THE GENERAL STATUTES OF NORTH CAROLINA

Replaced

1973 CUMULATIVE SUPPLEMENT

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

UNDER THE DIRECTION OF

W. M. WILLSON, J. H. VAUGHAN AND SYLVIA FAULKNER

Volume 2A

Place in Pocket of Corresponding 1966 Replacement Volume of Main Set and Discard Previous Supplement

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Preface

This Cumulative Supplement to Replacement Volume 2A contains the general laws of a permanent nature enacted at the 1966, 1967, 1969, 1971 and 1973 Sessions 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 Replacement Volumes 4B, 4C and 4D and the 1973 Supplements thereto.

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.

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

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 Department of Justice of the State of North Carolina, or to The Michie Company, Law Publishers, Charlottesville, Virginia.

Scope of Volume

Statutes:

Permanent portions of the general laws enacted at the 1967, 1969, 1971 and 1973 Sessions 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)-283 (p. 588).
North Carolina Court of Appeals Reports volumes 1-18 (p. 351).
Federal Reporter 2nd Series volumes 347 (p. 321)-476 (p. 656).
Federal Supplement volumes 242 (p. 513)-356.
United States Reports volumes 381 (p. 532)-411 (p. 525).
Supreme Court Reporter volumes 86-93 (p. 2788).
North Carolina Law Review volumes 43 (p. 667)-49 (p. 1006).
Wake Forest Intramural Law Review volumes 2-6 (p. 568).
Opinions of the Attorney General.

The General Statutes of North Carolina
1973 Cumulative Supplement

VOLUME 2A

Chapter 28.
Administration.

Article 1.

Probate Jurisdiction.

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

Character of Powers and Jurisdiction.—The authority to probate a will is vested in the clerk of the superior court; and in the exercise of his probate jurisdiction, the clerk is an independent tribunal of original jurisdiction. In re Will of Spinks, 7 N.C. App. 417, 173 S.E.2d 1 (1970).

Jurisdiction Exclusive.—

Where the clerk of a county had authority, upon proper application and proof, to admit a document to probate as a will, through the exercise of such authority by the admission of the documents to probate, his jurisdiction over the estate becomes exclusive. The subsequent discovery and presentation for probate of another document, executed later, as the last will of the decedent, would not deprive that clerk of the exclusive jurisdiction previously so acquired. In re Davis, 277 N.C. 134, 176 S.E.2d 825 (1970).

Jurisdiction of Superior Court Is Derivative.—Upon appeal from action taken by the clerk of the superior court, in the exercise of his probate jurisdiction, the jurisdiction of the superior court is derivative, and the provisions of § 1-276 are not applicable. In re Will of Spinks, 7 N.C. App. 417, 173 S.E.2d 1 (1970).

Lack of Jurisdictional Requirements.—When jurisdictional requirements for probate are shown to be lacking, the clerk may revoke his order admitting the document to probate. In re Davis, 277 N.C. 134, 176 S.E.2d 825 (1970).

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).

The clerk of the superior court has the power to set aside a probate of a will in common form in a proper case. This power can be exercised by the clerk where it is clearly made to appear that the adjudication and orders have been improvidently granted or that the court was imposed upon or misled as to the essential and true conditions existent in a given case. However, this power of the clerk does not extend to the setting aside of the probate of a will in common form upon grounds which should be raised by caveat. In re Will of Spinks, 7 N.C. App. 417, 173 S.E.2d 1 (1970).

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).

The burden of proof on a motion to vacate a probate is on the movants to establish sufficient grounds to set aside the probate. In re Will of Spinks, 7 N.C. App. 417, 173 S.E.2d 1 (1970).

Amendment to Substitute Proper Party Relates Back.—Under § 1A-1, Rule 15(a) and (c) and Rule 17(a), a lack of letters of administration may be cured, and an objection to want of capacity to sue may be avoided by amendment or by substitution of the proper party at any time before hearing. Later appointments of this nature will relate back and validate the proceedings from the beginning regardless of the statute of limitations. McNamara v. Kerr-McGee Chem. Corp., 328 F. Supp. 1058 (E.D.N.C. 1971).

Where a complaint to recover damages under a state wrongful death act was timely filed by an ancillary administrator appointed by a state court without jurisdiction to do so, the complaint could be amended under § 1A-1, Rule 17(a) at a time when a new suit would be barred so as to allege the subsequent effective appointment of the same person as ancillary administrator by a state court having jurisdiction. McNamara v. Kerr-McGee Chem. Corp., 328 F. Supp. 1058 (E.D.N.C. 1971).

(1)

Domicile or Residence at Death in County of Clerk Who Undertakes Probate Is Essential to Jurisdiction. — Where a testatrix was domiciled in and resided in this State at the time of her death, her domicile or residence, at the time of her death, in the county of the clerk who undertakes to admit a document to probate as her will and to issue letters testamentary, is essential to the jurisdiction of that clerk so to do. In re Davis, 277 N.C. 134, 176 S.E.2d 825 (1970).

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

(2)

Domicile and Residence in Separate Counties at Death.—If testatrix, at death, was domiciled in one county and also had a place of residence in another county, her will could lawfully be probated in either of those counties, nothing else appearing. In re Davis, 277 N.C. 134, 176 S.E.2d 825 (1970).

(3)

The term "assets," as used in this subdivision, includes intangibles. In re Edmundson, 273 N.C. 92, 159 S.E.2d 509 (1968).

(4)

Citizenship of Beneficiaries Controls in Diversity Action. — In determining the presence of diversity of citizenship when state law requires that an action be prosecuted in the name of a resident administrator, the citizenship of the beneficiaries, rather than that of the administrator, is relevant. Miller v. Perry, 456 F.2d 63 (4th Cir. 1972).

The term "assets," as used in this sub-

division, includes intangibles. In re Edmundson, 273 N.C. 92, 159 S.E.2d 509 (1968).

A policy of automobile liability insurance issued in the name of the deceased by an insurer qualified to do business in this State or otherwise subject to service of process is an asset within the purview of subdivision (4) so as to support the appointment of an ancillary administrator. In re Edmundson, 273 N.C. 92, 159 S.E.2d 509 (1968).

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

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

Jurisdiction obtained under this section continues until vacated by a direct attack thereon. In re Davis, 277 N.C. 134, 176 S.E.2d 825 (1970).

Lack of Jurisdictional Requirements.—When jurisdictional requirements for probate are shown to be lacking, the clerk may revoke his order admitting the document to probate. In re Davis, 277 N.C. 134, 176 S.E.2d 825 (1970).

Domicile or Residence at Death in County of Clerk Undertaking Probate Is Essential to Jurisdiction.—Where a testatrix was domiciled in and resided in this State at the time of her death, it is well settled that her domicile or residence, at the time of her death, in the county of the clerk who undertakes to admit a document to probate as her will, and to issue letters testamentary, is essential to the jurisdiction of that clerk so to do. In re Davis, 277 N.C. 134, 176 S.E.2d 825 (1970).

Jurisdiction Exclusive.—Where the clerk of a county had authority, upon proper application and proof, to admit a document to probate as a will, through the exercise of such authority by the admission of the documents to probate, his jurisdiction over the estate becomes exclusive. In re Davis, 277 N.C. 134, 176 S.E.2d 825 (1970).

The subsequent discovery and presentation for probate of another document, executed later, as the last will of decedent, would not deprive that clerk of the exclusive jurisdiction previously so acquired. In re Davis, 277 N.C. 134, 176 S.E.2d 825 (1970).

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

ARTICLE 2.

Necessity for Letters and Their Form.

§ 28-4. Executor de son tort.

Constructive Trustee May Become Executor de Son Tort.—The law recognizes the fact that a period of time must elapse between death and the qualification of the personal representative. During that interval one who takes possession of property belonging to and a part of the estate is a constructive trustee for the benefit of the administrator and must account to him. If he does not account to the administrator, he becomes executor de son tort. State v. Jessup, 279 N.C. 108, 181 S.E.2d 594 (1971).

The administrator's duty is set forth in this section. State v. Jessup, 279 N.C. 108, 181 S.E.2d 594 (1971).

ARTICLE 3.

Right to Administer.

§ 28-6. Order in which persons entitled; nomination by person renouncing right to administer.

Cited in Mecklenburg County v. Lee, 18 N.C. App. 239, 196 S.E.2d 814 (1973).

(1)

Cited in In re Estate of Lowther, 271 N.C. 345, 156 S.E.2d 693 (1967).

§ 28-8. Disqualifications enumerated.

Opinions of Attorney General.—Honorable Edgar W. Tanner, Rutherford County Clerk of Superior Court, 40 N.C.A.G. 26 (1969).

(2)

Nonresident Disqualified as Administrator.—A nonresident cannot qualify as the administrator of the assets of a decedent located in North Carolina. A North Carolina resident is the only one who can meet the requirements of § 28-173. The action under § 28-173 can only be instituted by a personal representative duly qualified in North Carolina. Miller v. Perry, 307 F. Supp. 633 (E.D.N.C. 1969).

Citizenship of Beneficiaries Controls in Diversity Action. — In determining the presence of diversity of citizenship when state law requires that an action be prosecuted in the name of a resident administrator, the citizenship of the beneficiaries, rather than that of the administrator, is relevant. Miller v. Perry, 456 F.2d 63 (4th Cir. 1972).

Noncitizen Entitled to Federal Forum.—Diversity jurisdiction exists for the protection of the noncitizen who is obliged to sue or to be sued in the state of his adversary. It is for that reason that state statutes or decisions that require a noncitizen to appoint an in-state representative should not have the effect of depriving the noncitizen of the federal forum that Congress has provided him. Miller v. Perry, 456 F.2d 63 (4th Cir. 1972).

§ 28-15. Failure to apply as renunciation.

Applied in In re Alston, 10 N.C. App. 46, 177 S.E.2d 745 (1970).

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 7.

Appointment and Revocation.

§ 28-32. Letters revoked on application of surviving husband or widow or next of kin, or for disqualification or default.

Clerk Has Primary, etc.—

The clerk of superior court, as probate judge, has exclusive original jurisdiction to hear and decide a motion to remove an administrator for cause. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

Manner in Which Facts to Be Ascertained.—In authorizing the clerk to remove executors and administrators for cause, this section does not specifically direct the manner in which the facts shall be ascertained, but it plainly implies that he shall act promptly and summarily, and, pending any litigation in that respect, he has power to make all necessary and interlocutory orders for the protection of the estate. In re Estate of Lowther, 271 N.C. 345, 156 S.E.2d 693 (1967).

A proceeding to remove an executor or administrator is neither a civil action nor a special proceeding. Therefore, § 1-276, which provides that "whenever a civil action or special proceeding begun before the clerk of a superior court is for any ground whatever sent to the superior court before the judge, the judge has jurisdiction" has no application to probate matters. In re Estate of Lowther, 271 N.C. 345, 156 S.E.2d 693 (1967).

Superior Court May Review Findings of Fact Challenged by Specific Exceptions.—To say that the superior court has jurisdic-

tion to hear a probate matter only upon an appeal from a final judgment entered below does not mean that the judge can review the record only to ascertain whether there have been errors of law. He also reviews any findings of fact which the appellant has properly challenged by specific exceptions. In re Estate of Lowther, 271 N.C. 345, 156 S.E.2d 693 (1967).

Jurisdiction of Superior Court Is Derivative.—It is sometimes said that, upon an appeal from an order of the clerk made in the performance of his duties as judge of probate, the jurisdiction of the judge of the superior court is derivative. Such derivative jurisdiction is construed to mean, inter alia (1) that the clerk of the superior court has the sole power in the first instance to determine whether a decedent died testate or intestate, and, if he died testate, whether the paper writing offered for probate is his will; (2) that proceedings to repeal letters of administration must be commenced before the clerk who issued them in the first instance; and (3) that the judge of the superior court has no jurisdiction to appoint or remove an administrator or a guardian. In other words, jurisdiction in probate matters cannot be exercised by the judge of the superior court except upon appeal. In re Estate of Lowther, 271 N.C. 345, 156 S.E.2d 693 (1967).

Hearing De Novo.—Where the clerk removes an administratrix upon his finding that she was not the widow of the deceased and therefore was not entitled to appointment as a matter of right, and an appeal is taken to the superior court from such order, the superior court, even though its jurisdiction is derivative, hears the matter de novo, and may review the finding of the clerk provided the appellant has properly challenged the finding by specific exception, and may hear evidence and even submit the controverted fact to the jury; but where there is no exception to the finding, the superior court may determine only whether the finding is supported by competent evidence, and if the order is so supported the superior court is without authority to vacate the clerk's judgment and order a jury trial upon the issue. In re Estate of Lowther, 271 N.C. 345, 156 S.E.2d 693 (1967).

Res Judicata.—An adjudication by the clerk that the administratrix theretofore appointed by him was not the widow of decedent is not res judicata in any other proceeding between the parties which respondent may be entitled to pursue. In re Estate of Lowther, 271 N.C. 345, 156 S.E.2d 693 (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 pre-

scribed 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 continue 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.

Opinions of Attorney General.—Honorable Robert Miller, Clerk, Superior Court, Stokes County, 40 N.C.A.G. 36 (1969).

Husband and Wife Constitute One Surety.—See opinion of Attorney General to Honorable Robert G. Jarrett, 42 N.C.A.G. 259 (1973).

§ 28-39.1. Conveyances by foreign executors validated.—If any nonresident executor, or administrator, c.t.a., acting under a power of sale contained in the last will and testament of a citizen and resident of another state or foreign country, executed according to the laws of this State and duly proven and recorded in the state or foreign country wherein the testator and his family and said executor, or administrator c.t.a., resided, and now or hereafter recorded in this State, shall have sold and conveyed real estate situated in this State prior to May 1, 1969, then said sale and conveyance so had and made shall be as valid and sufficient in law as though such executor, or administrator c.t.a., had given bond or obtained letters of administration in this State prior to the execution of such deed. (1945, c. 652; 1957, c. 320; 1969, c. 1067, ss. 1, 2.)

Editor's Note. — The 1969 amendment inserted "or administrator c.t.a." in three places in the section and changed the date near the middle of the section from Jan. 1, 1957, to May 1, 1969. Session Laws 1969, c. 1067, s. 3, provides: "This act does not apply to or affect pending litigation."

§ 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.)

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 continue 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.

ARTICLE 9.

Notice to Creditors.

§ 28-47. Advertisement for claims.

Applied in Mecklenburg County v. Lee, 18 N.C. App. 239, 196 S.E.2d 814 (1973).

ARTICLE 10.

Inventory.

§ 28-53. Trustees in wills to qualify and file inventories and accounts.

Opinions of Attorney General.—Honorable Glenn L. Hammer, Clerk of Superior Court, Davie County, 40 N.C.A.G. 29 (1969).

The trustee's Legal existence is derived from the instrument creating the trust, not from adminicular proceedings relating to qualification, posting bond, etc. The trustee takes his position by virtue of the donative acts of the grantor and not from the authority of the court. Lentz v. Lentz, 5 N.C. App. 309, 168 S.E.2d 437 (1969).

Valid Conveyance Is Not Made Void by Failure of Trustee to Qualify.—An otherwise valid conveyance by a testamentary trustee is not made void by reason of his failure to first qualify as now required by this section. Lentz v. Lentz, 5 N.C. App. 309, 168 S.E.2d 437 (1969).

There is no requirement that a life tenant must account to the court or to a remainderman. Godfrey v. Patrick, 8 N.C. App. 510, 174 S.E.2d 674 (1970).

Effect Must Be Given a Provision in a Will Which Exempts the Testamentary Trustee from Regular Accountings.—See opinion of Attorney General to Honorable C.G. Smith, 41 N.C.A.G. 757 (1952).

Cited in Fulk & Needham, Inc. v. United States, 288 F. Supp. 39 (M.D.N.C. 1968).

ARTICLE 11.

Assets.

§ 28-56.3. State income tax refunds.

Editor's Note. — Session Laws 1973, c. 476, s. 193, effective July 1, 1973, amends this section by substituting "Secretary of Revenue" for "Commissioner of Revenue."

§ 28-67. Compelling contribution among heirs, etc.—The remedy to compel contribution shall be by petition or action in the superior court or before the judge during a session of court against the personal representatives, devisees, legatees, and heirs also of the decedent if any part of the real estate be undevised, within two years after probate of the will, and setting forth the facts which entitle the party to relief; and the costs shall be within the discretion of the court. (1868-9, c. 113, s. 106; Code, s. 1534; Rev., s. 58; C. S., s. 65; 1971, c. 528, s. 14.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "during a session of court" for "in term time" near the middle of the section.

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

(1) If no administrator has been appointed, and

(2) If the amount owed by such person does not exceed two thousand dollars ($2,000), and

(3) If the sum tendered to the clerk would not make the aggregate sum which has come into the clerk's hands belonging to the intestate exceed two thousand dollars ($2,000).

(b) Such payments may not be made to the clerk if the total amount paid or

tendered with respect to any one intestate would exceed two thousand dollars ($2,000), even though disbursements have been made so that the aggregate amount in the clerk's hands at any one time would not exceed two thousand dollars ($2,000).

(c) If a sum tendered pursuant to this Article would make the aggregate sum coming into the clerk's hands with respect to any one intestate exceed two thousand dollars ($2,000), the clerk shall appoint an administrator.

(d) If it appears to the clerk after making a preliminary survey that disbursements pursuant to subsection (a) of G.S. 28-68.2 would not exhaust funds received pursuant to G.S. 28-68, he may, in his discretion, appoint an administrator in such case. (1921, c. 93; Ex. Sess. 1921, c. 65; C. S., s. 65(a); Ex. Sess. 1924, cc. 15, 58; 1927, c. 7; 1929, cc. 63, 71, 121; 1931, c. 21; 1933, cc. 16, 94; 1935, cc. 69, 96, 367; 1937, cc. 13, 31, 55, 121, 336, 377; 1939, cc. 383, 384; 1941, c. 176; 1943, cc. 24, 114, 138, 560; 1945, cc. 152, 178, 555; 1947, cc. 203, 237; 1949, cc. 17, 81, 691, 762; 1951, c. 380, s. 1; 1959, c. 795, ss. 1-4; 1973, c. 23.)

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

Editor's Note.—
The 1973 amendment substituted "two thousand dollars ($2,000)" for "one thousand dollars ($1,000)" throughout the section.

§ 28-68.2. Disbursement by clerk.

Clerk's Authority to Distribute Assets under This Section Limited to Estates with No Creditors. — See opinion of Attorney General to Mr. Martin C. Pannell, 41 N.C.A.G. 383 (1971).

ARTICLE 12.

Discovery of Assets.

§ 28-69. Examination of persons or corporations believed to have possession of property of decedent.

This section provides a quick and immediate remedy by which a personal representative may examine any party if he has reasonable grounds to believe a person, firm or corporation has possession of any property belonging to the estate. State v. Jessup, 279 N.C. 108, 181 S.E.2d 594 (1971).

One who takes and refuses to account to the personal representative becomes a trustee for the benefit of the estate and subject to the penalties provided for breach of trust. State v. Jessup, 279 N.C. 108, 181 S.E.2d 594 (1971).

The clerk may force delivery or attach for contempt for failure to deliver. State v. Jessup, 279 N.C. 108, 181 S.E.2d 594 (1971).

Such remedy is in addition to other remedies. State v. Jessup, 279 N.C. 108, 181 S.E.2d 594 (1971).

And it is for the purpose of discovery and recovery without waiting for the slower process of a suit in the superior court. State v. Jessup, 279 N.C. 108, 181 S.E.2d 594 (1971).

§ 28-70. Right of appeal. — Any person aggrieved by the order of the clerk of the superior court may, within five days, appeal to the judge holding the next session of the superior court of the county after said order is made or to the resident judge of the district, but as a condition precedent to his appeal he shall give a justified bond in a sum at least double the value of the property in question, conditioned upon the safe delivery of the property and the payment of damages for its detention, to the executor or administrator in the event that the order of the clerk should be finally sustained. When said bond is executed and delivered to the court no attachment shall be served upon the appealing party, or, if he has already been committed, he shall be released pending the final determination of the appeal. If the appellant fails to have his appeal heard at the next session of the superior court held in his county, or by the resident judge of the district, within 30 days after giving notice of appeal, the clerk of the court may

recommit the appellant to jail until he shall deliver the property to the executor or administrator as aforesaid. (1937, c. 209, s. 2; 1971, c. 528, s. 15.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term" in the first and last sentences.

ARTICLE 14.

Sales of Real Property.

§ 28-81. Sales of realty ordered, if personalty insufficient for debts; petition for partition.

Essential Fact Is Insufficiency of Personal Property to Pay Debts.—

In accord with original. See East v. Smith, 11 N.C. App. 604, 182 S.E.2d 266 (1971).

This section provides for the sale of realty without first exhausting the personal property of decedent only when it is alleged and shown that the personalty will be insufficient to pay the debts of his estate. Park v. Carroll, 18 N.C. App. 53, 196 S.E.2d 40 (1973).

Denial Raised Issue of Insufficiency of Personal Property.—Where it was alleged that there were debts of an estate and that there was no personal property owned by the estate, and both of these allegations were denied, the issues were raised, and the court was required to find the essential fact of insufficiency of personal property to pay the debts of the decedent prior to entering an order of sale. East v. Smith, 11 N.C. App. 604, 182 S.E.2d 266 (1971).

§ 28-83. Conveyance of lands by heirs within two years voidable; conditions for valid conveyance; judicial sale for partition.

Editor's Note.—

For note on the problem of after-discovered wills, see 47 N.C.L. Rev. 723 (1969).

Cited in In re Estate of Nixon, 2 N.C. App. 422, 163 S.E.2d 274 (1968).

§ 28-100. Sales of realty devised upon contingent remainder, executory devise or other limitation validated.

Cited in McRorie v. Shinn, 11 N.C. App. 475, 181 S.E.2d 773 (1971).

§ 28-101. Presumption; burden of proof.

Cited in McRorie v. Shinn, 11 N.C. App. 475, 181 S.E.2d 773 (1971).

§ 28-102. Application of §§ 28-100 and 28-101.

Cited in McRorie v. Shinn, 11 N.C. App. 475, 181 S.E.2d 773 (1971).

§ 28-103. Validation of certain bona fide sales of real estate to pay debts made without order of court.

Cited in McRorie v. Shinn, 11 N.C. App. 475, 181 S.E.2d 773 (1971).

ARTICLE 15.

Proof and Payment of Debts of Decedent.

§ 28-105. Order of payment of debts.

Execution against Personal Representative.—Section 28-142 is unambiguous in its mandate that execution against a personal representative may issue only for the amount fixed in the judgment which the personal representative has applicable to the claim ascertained by the judgment. This provision is necessary and must be followed to preserve and adhere to the order of payment of debts prescribed by this section. Brown v. Green, 9 N.C. App. 12, 175 S.E.2d 379 (1970).

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.

Opinions of Attorney General.—Mr. Rom B. Parker, Halifax County Attorney, 40 N.C.A.G. 686 (1969).

Priority of Portion of Funeral Bill Not a Limitation on Amount.—See opinion of Attorney General to Mrs. Martha O. Comer, CSC, 40 N.C.A.G. 30 (1970).

Sixth class.

Termination of Old Age Assistance.—When old age assistance is terminated by death of the recipient, the county's claim against the recipient's estate under § 108-30.1 must be satisfied out of the personal property in the estate to the extent it is sufficient to pay claims of the sixth class before resorting to the real property for satisfaction of the debt. Brunswick County v. Vitou, 6 N.C. App. 54, 169 S.E.2d 234 (1969).

§ 28-107.1. Funeral expenses of decedent.—Funeral expenses of a decedent shall be considered as a debt of the estate of the decedent and the decedent's estate shall be primarily liable therefor. The provisions of this section shall not affect the application of G.S. 28-105. (1969, c. 610, s. 1.)

Editor's Note.—Session Laws 1969, c. 610, s. 2, provides that "this act shall not change the application of previous laws or clauses of laws as to the estate of persons dying before ratification of this act." The act was ratified May 27, 1969, and made effective on ratification.

§ 28-112. Disputed debt not referred, barred in three months.

Applied in Mecklenburg County v. Lee, 18 N.C. App. 239, 196 S.E.2d 814 (1973).

ARTICLE 16.

Accounts and Accounting.

§ 28-117. Annual accounts.

There is no requirement that a life tenant must account to the court or to a remainderman. Godfrey v. Patrick, 8 N.C. App. 510, 174 S.E.2d 674 (1970).

§ 28-132. Issues joined; cause sent to superior court.—If the issues joined be of law, the clerk shall send the papers to the judge of the superior court for trial, as is provided for by the Chapter on Civil Procedure in like cases. If the issue shall be of fact, the clerk shall send so much of the record as may be necessary to the next session of the superior court for trial. (1871-2, c. 213, s. 11; Code, s. 1458; Rev., s. 114; C. S., s. 120; 1971, c. 528, s. 16.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term" in the second sentence.

§ 28-137. Appeal from judgment; security for costs.—Any party may appeal from a final judgment of the clerk to the judge of the superior court during a session of court, on giving an undertaking with surety, or making a deposit, to pay all costs which shall be recovered against him. If any creditor appeals and gives such security, his appeal shall be deemed an appeal by all who are damaged by the

judgment, and no other creditor shall be required to give any undertaking. (1871-2, c. 213, s. 17; Code, s. 1464; Rev., s. 119; C. S., s. 125; 1971, c. 528, s. 17.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "during a session of court" for "in term time" in the first sentence.

§ 28-138. Papers on appeal filed and cause docketed.—On an appeal the clerk shall file his report and judgment and all the papers in his office as clerk of the superior court, and enter the case on his trial docket for the next session. (1871-2, c. 213, s. 18; Code, s. 1465; Rev., s. 120; C. S., s. 126; 1971, c. 528, s. 18.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term" at the end of the section.

§ 28-142. Contents of judgment; execution.

Execution May Issue Only for Amount Which Representative Has Applicable to Claim Ascertained by Judgment.—This section is unambiguous in its mandate that execution may issue only for the amount fixed in the judgment which the personal representative has applicable to the claim ascertained by the judgment. This provision is necessary and must be followed to preserve and adhere to the order of payment of debts prescribed by § 28-105. Brown v. Green, 9 N.C. App. 12, 175 S.E.2d 379 (1970).

And If Judgment Fixes No Amount, Execution Cannot Issue. — Where judgment against an administratrix fixed no amount of assets which the administratrix had applicable to the plaintiff's claim, execution could not issue in any amount. Brown v. Green, 9 N.C. App. 12, 175 S.E.2d 379 (1970).

§ 28-147. Suits for accounting during session of court.—In addition to the remedy by special proceeding, actions against executors, administrators, collectors and guardians may be brought originally to the superior court during a session of court; and in all such cases it is competent for the court in which said actions are pending to order an account to be taken by such person or persons as said court may designate, and to adjudge the application or distribution of the fund ascertained, or to grant other relief, as the nature of the case may require. (1876-7, c. 241, s. 6; Code, ss. 215, 1511; Rev., s. 129; C. S., s. 135; 1971, c. 528, s. 19.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "during a session of court" for "at term time" near the middle of the section.

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

§ 28-148. Proceedings against land, if personal assets fail.

Real Estate Normally Not Administered by Executor.—Real estate normally is not considered a part of an estate to be administered by an executor, unless the personal estate is insufficient to discharge debts. Moore v. Bryson, 11 N.C. App. 260, 181 S.E.2d 113 (1971).

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 jurisdic-

tion 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.

§ 28-158.1. Distribution of assets in kind in satisfaction of bequests and transfers in trust for surviving spouse.

Editor's Note.—

For article on "Statutory Reaction to Revenue Procedure 64-19," see 46 N.C.L. Rev. 531 (1968).

ARTICLE 18.

Settlement.

§ 28-162. Representative must settle after two years.

Stated in Ervin v. Clayton, 278 N.C. 219, 179 S.E.2d 353 (1971).

§ 28-165. After final account representative may petition for settlement.—An executor, administrator or collector, who has filed his final account for settlement, may, at any time thereafter, file his petition against the parties interested in the due administration of the estate, in the superior court of the county in which he qualified, or before the judge during a session of court, setting forth the facts, and praying for an account and settlement of the estate committed to his charge. The petition shall be proceeded on in the manner prescribed by law, and, at the final hearing thereof, the judge or clerk may make such order or decree in the premises as shall seem to be just and right. (1868-9, c. 113, s. 96; Code, s. 1525; Rev., s. 150; C. S., s. 152; 1971, c. 528, s. 20.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "during a session of court" for "in term time" in the first sentence.

§ 28-170. Commissions allowed representatives; representatives guilty of misconduct or default.

Discretion of Clerk.—

Commissions of an administrator of the estate of a decedent are to be fixed in the discretion of the clerk of superior court subject to the maximum provided by statute. This requires exercise of judicial discretion and judgment by the clerk, who has original jurisdiction in the matter. In re Green, 9 N.C. App. 326, 176 S.E.2d 19 (1970).

A testator may stipulate, etc.—

Ordinarily, where the will expressly stipulates the compensation to be allowed an executor, the executor, by qualifying, is deemed to have accepted a bargain and is bound thereby even though the will stipulates compensation in a sum less than the five percent maximum allowed by statute. Wachovia Bank & Trust Co. v. Morgan, 279 N.C. 265, 182 S.E.2d 356 (1971).

Trustee May Purchase Special Skills.— Where special skills are required a trustee is entitled to purchase such skills at the expense of the trust estate in order to accomplish the trust purpose. Wachovia Bank & Trust Co. v. Morgan, 279 N.C. 265, 182 S.E.2d 356 (1971).

Where the trust income could best be applied to meet the charitable purposes through the advice of an advisory board assisted by a full-time director, and without such assistance the trust would be lacking in adequate direction the trial court correctly allowed the trustees to employ skilled assistance in the administration of the trust and to charge the reasonable cost for such assistance to trust income. Wachovia Bank & Trust Co. v. Morgan, 279 N.C. 265, 182 S.E.2d 356 (1971).

A reasonable fee for legal advice and assistance in the management of a trust estate is allowable as a necessary expense of the trust estate. Tripp v. Tripp. 17 N.C. App. 64, 193 S.E.2d 366 (1972).

ARTICLE 19.

Actions by and against Representative.

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

Editor's Note.—

For article on recent developments in North Carolina tort law, see 48 N.C.L. Rev. 791 (1970). For comment on new North Carolina wrongful death statute, see 48 N.C.L. Rev. 594 (1970).

Right to Retain Attorney.—Until a personal representative is appointed for an estate, no one has the right to retain an attorney to represent the estate. In re Alston, 10 N.C. App. 46, 177 S.E.2d 745 (1970).

The decedent's personal representative is the proper party plaintiff in a wrongful death action. Brendle v. General Tire & Rubber Co., 408 F.2d 116 (4th Cir. 1969).

Wrongful death damages are unlimited. Brendle v. General Tire & Rubber Co., 408 F.2d 116 (4th Cir. 1969).

There is a surviving cause of action for predeath expenses and pain and suffering. Brendle v. General Tire & Rubber Co., 408 F.2d 116 (4th Cir. 1969).

An injured person's common-law right of action to recover damages for hospital and medical expenses and for pain and suffering caused by the negligence of another survives to the injured party's personal representative. Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

Punitive Damages.—Upon sufficient allegations and evidence that injury to decedent was inflicted by the wilful or wanton conduct of the defendant, decedent's personal representative is entitled to have submitted an issue as to punitive damages. Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

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. — When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors or successors shall be liable to an action for damages, to be brought by the executor, administrator or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amounts in law to a felony. The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, and reasonable hospital and medical expenses not exceeding five hundred dollars ($500.00) incident to the injury resulting in death; provided that all claims filed for such services shall be approved by the clerk of the superior court and any party adversely affected by any decision of said clerk as to said claim may appeal to the superior court in term time, but shall be disposed of as provided in the Intestate Succession Act. (R. C., c. 46, ss. 8, 9; 1868-9, c. 113, ss. 70, 72, 115; Code, ss. 1498, 1500; Rev., s. 59; 1919, c. 29; C. S., s. 160; 1933, c. 113; 1951, c. 246, s. 1; 1959, c. 879, s. 9; c. 1136; 1973, c. 464, s. 2.)

I. IN GENERAL.

Cross Reference.—For present statute as to admissibility of dying declarations in civil and criminal proceedings, see § 8-51.1.

Editor's Note.—

The 1973 amendment, effective Oct. 1, 1973, deleted the former second paragraph, relating to the admissibility of dying declarations in actions brought under this section.

For article on recent developments in North Carolina tort law, see 48 N.C.L. Rev. 791 (1970). For comment on new North Carolina wrongful death statute, see 48 N.C.L. Rev. 594 (1970). For note on the North Carolina public assistance lien law and current constitutional doctrine, see 49 N.C.L. Rev. 519 (1971).

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

Stetson v. Easterling, 274 N.C. 152, cited in the note below, was commented on in 47 N.C.L. Rev. 280, 282 (1968).

History of Section.—See Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

Section Creates New Cause, etc.—

The wrongful death statute confers a

new right of action which did not exist before the statute and which at the death of an injured person accrued to the personal representative of the decedent for the benefit of a specific class of beneficiaries. Crawford v. Hudson, 3 N.C. App. 555, 165 S.E.2d 557 (1969).

The right of action for wrongful death, etc.—

In accord with 1st paragraph in original. See Young v. Marshburn, 10 N.C. App. 729, 180 S.E.2d 43 (1971).

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

Actions for wrongful death are creatures of the statute. Reeves v. Hill, 272 N.C. 352, 158 S.E.2d 529 (1968).

The right of action for wrongful death exists only by virtue of this section, which defines the right of action, and § 28-174, which defines the basis on which damages may be recovered. Stetson v. Easterling, 274 N.C. 152, 161 S.E.2d 531 (1968).

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).

At common law no right of action for wrongful death exists. It exists in North Carolina solely by statute. Miller v. Perry, 307 F. Supp. 633 (E.D.N.C. 1969).

A right of action for wrongful death did not exist at common law. Such right of action is conferred by statute and exists only by virtue of this section and § 28-174. Skinner v. Whitley, 281 N.C. 476, 189 S.E.2d 230 (1972).

Citizenship of Beneficiaries Is Controlling for Diversity Purposes. — When a resident ancillary administrator is required to represent the interests of noncitizen beneficiaries by virtue of the laws of the state in which the claim arose, and his duties are as limited as those imposed upon him by this section, the citizenship of the beneficiaries is controlling for diversity purposes. Miller v. Perry, 456 F.2d 63 (4th Cir. 1972).

The citizenship of the administrator does not defeat diversity jurisdiction in an action under this section brought by a North Carolina ancillary administrator against North Carolina defendants to recover for the death of a nonresident for the benefit of nonresident distributees. Miller v. Perry, 456 F.2d 63 (4th Cir. 1972).

Noncitizen Entitled to Federal Forum.— Diversity jurisdiction exists for the protection of the noncitizen who is obliged to sue or to be sued in the state of his adversary. It is for that reason that state statutes or decisions that require a noncitizen to appoint an in-state representative should not have the effect of depriving the noncitizen of the federal forum that Congress has provided him. Miller v. Perry, 456 F.2d 63 (4th Cir. 1972).

This section contemplates only one cause of action, and when the action is brought by the personal representative, the judgment is conclusive on other persons, and the right given by the statute is exhausted. Kendrick v. Cain, 272 N.C. 719, 159 S.E.2d 33 (1968).

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).

Wrongful death damages are unlimited. Brendle v. General Tire & Rubber Co., 408 F.2d 116 (4th Cir. 1969).

There is a surviving cause of action for predeath expenses and pain and suffering. Brendle v. General Tire & Rubber Co., 408 F.2d 116 (4th Cir. 1969).

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. Stetson v. Easterling, 274 N.C. 152, 161 S.E.2d 531 (1968).

This section controls over the provisions of the Workmen's Compensation Act, § 97-1 et seq. Byers v. North Carolina State Highway Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968).

The Workmen's Compensation Act does not create two causes of action, one for the employee's estate and the other for the employer and insurance carrier. The right to bring action for damages for wrongful death is conferred by this section. The compensation act merely governs the respective rights of the employee's estate, the employer and the insurance carrier to maintain an action for damages against third parties. Groce v. Rapidair, Inc., 305 F. Supp. 1238 (W.D.N.C. 1969).

No Conflict with § 97-10.2 (f) (1) (c).— There is no conflict in the language in this section which prohibits use of the wrongful death recovery to pay a debt of the decedent and the language in § 97-10.2 (f) (1) (c) which directs that a portion of the recovery be applied to the reimbursement of the employer for benefits paid under award of the Industrial Commission. Byers v. North Carolina State Highway Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968).

A covenant not to sue, procured by one tort-feasor, does not release the other from liability. Kendrick v. Cain, 272 N.C. 719, 159 S.E.2d 33 (1968).

But a release of one joint tort-feasor ordinarily releases them all. Kendrick v. Cain, 272 N.C. 719, 159 S.E.2d 33 (1968).

Recovery of Burial Expenses.—

There is no provision that the recovery must be applied to burial expenses. Crawford v. Hudson, 3 N.C. App. 555, 165 S.E.2d 557 (1969).

Funeral expenses do not constitute an element of damages to be taken into consideration in a wrongful death action. Crawford v. Hudson, 3 N.C. App. 555, 165 S.E.2d 557 (1969).

A cause of action does not exist for the recovery of burial expenses in an action for wrongful death separate and apart from the right to recover for the wrongful death. The statute provides for the payment of burial expenses out of the amount recovered in such action. Crawford v. Hudson, 3 N.C. App. 555, 165 S.E.2d 557 (1969).

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).

The burden of proving actionable negligence in an action for damages for wrongful death grounded in negligence is, of course, on the party seeking recovery. But if the evidence, that offered by both plaintiff and defendant, construed in the light most favorable to the party with the burden of proof, is sufficient to make out a prima facie case of actionable negligence, a motion for nonsuit should be denied and the case submitted to the jury. Maynor v. Townsend, 2 N.C. App. 19, 162 S.E.2d 677 (1968).

Directed Verdict. — In an action for wrongful death, a directed verdict for the defendant on the ground of contributory negligence should be granted when, and only when, the evidence, taken in the light most favorable to plaintiff, establishes the contributory negligence of plaintiff's intestate so clearly that no other reasonable inference or conclusion may be drawn therefrom. Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

Applied in Burton v. Groghan, 265 N.C. 392, 144 S.E.2d 147 (1965); Greene v. Nichols, 274 N.C. 18, 161 S.E.2d 521 (1968), commented on in 47 N.C.L. Rev. 281, 282 (1968).

Stated in Smith v. Mercer, 276 N.C. 329, 172 S.E.2d 489 (1970); Bowen v. Constructors Equip. Rental Co., 16 N.C. App. 70, 191 S.E.2d 419 (1972).

II. LIMITATION OF THE ACTION.

Action Is Now Subject, etc.—

The period prescribed for the commencement of an action for wrongful death under this section is two years. High v. Broadnax, 271 N.C. 313, 156 S.E.2d 282 (1967).

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 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).

Where a complaint to recover damages under a state wrongful death act was timely filed by an ancillary administrator appointed by a state court without jurisdiction to do so, the complaint could be amended under § 1A-1, Rule 17(a) at a time when a new suit would be barred so as to allege the subsequent effective appointment of the same person as ancillary administrator by a state court having jurisdiction. McNamara v. Kerr-McGee Chem. Corp., 328 F. Supp. 1058 (E.D.N.C. 1971).

Amendment to Substitute Proper Party Relates Back.—Amendment or substitution of the proper party under § 1A-1, Rule 15(a) and (c) and Rule 17(a), may be made at any time before hearing to cure a lack of letters of administration, and later appointments of this nature will relate back and validate the proceedings from the beginning regardless of the statute of limitations. McNamara v. Kerr-McGee Chem. Corp., 328 F. Supp. 1058 (E.D.N.C. 1971).

Action Commenced upon False Allegation of Appointment Cannot Be Validated Following Expiration of Statute of Limitations.—A party who has not been appointed as administratrix and has not offered herself for qualification may not, upon a false allegation that she has qualified as administratrix, commence an action for wrongful death and, following the expiration of the statute of limitations, validate that action by a subsequent appointment as administratrix, Reid v. Smith, 5 N.C. App. 646, 169 S.E.2d 14 (1969).

But Action Commenced under Mistaken Belief of Appointment May Be Validated by Subsequent Appointment. — Where a widow institutes an action as administratrix, for damages for the wrongful death of her husband, under the mistaken belief that she had been duly appointed and had qualified as such, thereafter discovers her error and amends her petition so as to show that she was appointed administratrix after the expiration of the statute of limitation applicable to such action, the amended petition will relate back to the date of the filing of the petition, and the action will be deemed commenced within the time limited by statute. Reid v. Smith, 5 N.C. App. 646, 169 S.E.2d 14 (1969).

III. PARTIES TO THE ACTION.

Suit Must Be Brought, etc.—

In accord with 4th paragraph in original. See Merchants Distrib., Inc. v. Hutchinson, 16 N.C. App. 655, 193 S.E.2d 436 (1972); Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

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 statutory action for wrongful death vests in the personal representative of the deceased. Stetson v. Easterling, 274 N.C. 152, 161 S.E.2d 531 (1968).

The right of action conferred by this section vests in the personal representative of the deceased. The only party who may maintain such action for wrongful death is "the executor, administrator or collector of the decedent." Miller v. Perry, 307 F. Supp. 633 (E.D.N.C. 1969), rev'd on other grounds, 456 F.2d 63 (4th Cir. 1972).

The right of action under this section is for the personal representative of the deceased only. The right of action for wrongful death, being conferred by statute at death, never belonged to the deceased. Miller v. Perry, 307 F. Supp. 633 (E.D.N.C. 1969), rev'd on other grounds, 456 F.2d 63 (4th Cir. 1972).

Nobody other than the executor, administrator, or collector of an estate can maintain an action for wrongful death. Young v. Marshburn, 10 N.C. App. 729, 180 S.E.2d 43 (1971).

Action by One Not Personal Representative, etc.—

In accord with original. See Merchants Distrib., Inc. v. Hutchinson, 16 N.C. App. 655, 193 S.E.2d 436 (1972).

If an action for wrongful death is instituted by one other than the personal representative of a decedent, duly appointed in this State, it should be dismissed. Young v. Marshburn, 10 N.C. App. 729, 180 S.E.2d 43 (1971).

The decedent's personal representative is the proper party plaintiff in a wrongful death action. Brendle v. General Tire & Rubber Co., 408 F.2d 116 (4th Cir. 1969).

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).

The personal representative of a decedent, as such, has no beneficial interest in a recovery and is therefore not the real party in interest. Long v. Coble, 11 N.C. App. 624, 182 S.E.2d 234 (1971).

False Allegation, etc.—

In accord with original. See Reid v. Smith, 5 N.C. App. 646, 169 S.E.2d 14 (1969). See also note under analysis line II.

Amendment to Substitute Proper Party Allowed.—Under § 1A-1, Rule 15(a) and (c), and Rule 17(a), a lack of letters of administration may be cured, and an objection to want of capacity to sue may be avoided by amendment or by substitution of the proper party at any time before hearing. McNamara v. Kerr-McGee Chem. Corp., 328 F. Supp. 1058 (E.D.N.C. 1971).

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); Miller v. Perry, 307 F. Supp. 633 (E.D.N.C.

1969), rev'd on other grounds, 456 F2d 63 (4th Cir. 1972).

Foreign Administrator Cannot Sue.— A nonresident cannot qualify as the administrator of the assets of a decedent located in North Carolina. A North Carolina resident is the only one who can meet the requirements of this section. The action under this section can only be instituted by a personal representative duly qualified in North Carolina. Miller v. Perry, 307 F. Supp. 633 (E.D.N.C. 1969), rev'd on other grounds, 456 F.2d 63 (4th Cir. 1972).

And Statute of Limitations Is Not Barred by His Commencement of Action. —The commencement of a wrongful death action by a foreign administrator in North Carolina will not operate to bar the running of the applicable two-year statute of limitations set forth in § 1-53, such action being a nullity and subject to dismissal. Merchants Distrib., Inc. v. Hutchinson, 16 N.C. App. 655, 193 S.E.2d 436 (1972).

But Ancillary Administrator May Be Appointed. — An administrator appointed by the court of another state may not maintain an action for wrongful death occurring in North Carolina; however, the clerk of the superior court in the county in which personal service may be had upon the alleged tort-feasor has authority to appoint an ancillary administrator to sue for wrongful death, notwithstanding that deceased was a nonresident. Merchants Distrib., Inc. v. Hutchinson, 16 N.C. App. 655, 193 SE.2d 436 (1972).

Executor May Not Be Joined as Defendant.—In a wrongful death action, a motion by the plaintiff, who was the adopted daughter of the decedent, that the executor of the estate of the decedent be joined as a defendant was denied because the executor is not a proper party to be joined as a defendant in an action which he alone by statute is authorized to commence. Young v. Marshburn, 10 N.C. App. 729, 180 S.E.2d 43 (1971).

Action by Child Born Alive.—Since the child must carry the burden of infirmity that results from another's tortious act, it is only natural justice that it, if born alive, be allowed to maintain an action on the ground of actionable negligence. Stetson v. Easterling, 274 N.C. 152, 161 S.E.2d 531 (1968).

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); Stetson v. Easterling, 274 N.C. 152, 161 S.E.2d 531 (1968).

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).

The administrator of an unemancipated minor child may not bring an action against the administrator of its father for damages for the wrongful death of such child caused by the ordinary negligence of the deceased father. Skinner v. Whitley, 281 N.C. 476, 189 S.E.2d 230 (1972).

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).

Since § 52-5 provides that an injured wife has a cause of action against her husband for damages for personal injury, under the provisions of this section the administrator of her estate may maintain an action for wrongful death when she does not survive. Cummings v. Locklear, 12 N.C. App. 572, 183 S.E.2d 832 (1971).

IV. DISTRIBUTION OF RECOVERY.

Section Governs Nature and Distribution of Recovery.—The nature and distri-

bution of whatever recovery is obtained is governed by the provisions of this section. Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

When Distribution in Accordance with Section Not Appropriate.—Distribution of the recovery in accordance with this section, although appropriate when the recovery is computed on the basis of the loss to the estate, is not appropriate when the recovery is based largely on losses suffered by particular beneficiaries. Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

Recovery Held in Trust.—

In receiving funds paid in settlement of a wrongful death claim a personal representative of a decedent's estate is not acting for the estate but as the trustee for the beneficiaries under the law. In re Below, 12 N.C. App. 657, 184 S.E.2d 378 (1971).

A personal representative does not derive any right, title, or authority from his intestate, but he sustains more the relation of a trustee in respect to the fund he may recover for the benefit of those entitled eventually to receive it, and he will hold it when recovered actually in that capacity, though in his name as executor or administrator. In re Below, 12 N.C. App. 657, 184 S.E.2d 378 (1971).

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); Miller v. Perry, 307 F. Supp. 633 (E.D.N.C. 1969).

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).

The right to sue granted by this statute is not conditioned upon who may be the ultimate beneficiary or beneficiaries of a recovery. Cummings v. Locklear, 12 N.C. App. 572, 183 S.E.2d 832 (1971).

The fortuitous circumstance that those entitled to the recovery under the Intestate Succession Act happened to be the children rather than collateral kin of the decedent is not germane to the administrator's right of action. Cummings v. Locklear, 12 N.C. App. 572, 183 S.E.2d 832 (1971).

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).

The Supreme Court recognizes two different causes of action stemming from the same wrongful act. Crawford v. Hudson, 3 N.C. App. 555, 165 S.E.2d 557 (1969).

Where a person is injured and later dies as a result of the negligence of another, his administrator has two causes of action, namely, (1) a cause of action to recover, as general assets of the estate, damages on account of the decedent's pain and suffering and on account of his hospital and medical expenses, and (2) a cause of action to recover, for the benefit of his next of kin, damages on account of the pecuniary loss resulting from his death. Stetson v. Easterling, 274 N.C. 152, 161 S.E.2d 531 (1968).

The right of an injured person to sue for personal injuries of any kind is entirely separate and distinct from the right of the personal representative to sue under authority of the wrongful death statute. Any damage sustained by such person during his lifetime is personal to that person and, if proximately caused by the wrongful act of another, could be recovered by him. If this right of action survived his death, the recovery would be an asset of his estate to be administered as any other personal property owned and possessed by decedent at the time of his death. Crawford v. Hudson, 3 N.C. App. 555, 165 S.E.2d 557 (1969).

While both the right of action for the recovery of consequential damages sustained between date of injury and date of death, and the right of action to recover damages resulting from such death, have as basis the same wrongful act, there is no overlapping of amounts recoverable. But such consequential damages as flow from the wrongful act would be recoverable by the personal representative; those sustained by the injured party during his lifetime, for benefit of his estate, and those resulting from his death, for benefit of his next of kin, determinable upon separate issues.

Crawford v. Hudson, 3 N.C. App. 555, 165 S.E.2d 557 (1969).

And Two Separate Recovery Funds.— The Supreme Court specifically recognizes two separate causes of action growing out of the same wrongful act of the tort-feasor and two separate recovery funds. Crawford v. Hudson, 3 N.C. App. 555, 165 S.E.2d 557 (1969).

"The wrongful death fund" results from the wrongful death cause of action. Crawford v. Hudson, 3 N.C. App. 555, 165 S.E.2d 557 (1969).

And "the general estate fund" results from the personal injury cause of action. Crawford v. Hudson, 3 N.C. App. 555, 165 S.E.2d 557 (1969).

Recovery Not Assets, etc.—

Proceeds recovered under the wrongful death statute are not a part of a decedent's estate, and in dealing with these funds neither the clerk nor the estate's personal representative is administering the estate of a decedent. In re Below, 12 N.C. App. 657, 184 S.E.2d 378 (1971).

The amount recovered is not a general asset of the estate, but the personal representative shall dispose of it as provided in this section and the Intestate Succession Act. Long v. Coble, 11 N.C. App. 624, 182 S.E.2d 234 (1971).

The recovery in an action for wrongful death created by and based on this section is not a general asset of the decedent's estate. It is not subject to the payment of his debt, nor could the decedent by will or otherwise have diverted any portion of such recovery from the persons who would be entitled thereto under the Intestate Succession Act. Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

But Treated as Assets for Certain Expenses. — A cause of action for wrongful death, being conferred by statute at death, could never have belonged to the deceased. A recovery resulting from such cause of action is therefore not an asset of the deceased's estate, although by virtue of the specific provisions of this section it is treated as an asset with respect to burial expenses and certain hospital and medical costs. In re Estate of Below, 12 N.C. App. 657, 184 S.E.2d 378 (1971).

Payment to Doctors and Hospital in Excess of $500.—The treatment for injuries during the interval between injury and death over and beyond the $500 provided for in this section, is to be paid to the doctors and hospital from the general estate fund. Crawford v. Hudson, 3 N.C. App. 555, 165 S.E.2d 557 (1969).

The Supreme Court recognizes the right of creditors (the doctors and hospital) to recover more than the wrongful death statute authorized (i.e., more than the $500) by recovering from the funds of the other cause of action. Crawford v. Hudson, 3 N.C. App. 555, 165 S.E.2d 557 (1969).

Burial Expenses for Minor Child.—In a case of an unemancipated minor child the father, who is primarily liable for the burial expenses of such child, would not be able to recover such expenses from the wrongful death funds. Crawford v. Hudson, 3 N.C. App. 555, 165 S.E.2d 557 (1969).

The father of an unemancipated minor child whose death results from the negligent act of a third party has a cause of action against the third party for the reasonable and necessary funeral expenses and loss of services during the minority of the deceased child which is separate and apart from the cause of action by the personal representative for the wrongful death of the child. Crawford v. Hudson, 3 N.C. App. 555, 165 S.E.2d 557 (1969).

Statutory Beneficiary, etc.—

The court will look beyond the parties to the suit and prevent a beneficiary from obtaining any sum by way of recovery in a death by wrongful act where his own wrong had brought about the death. Miller v. Perry, 307 F. Supp. 633 (E.D.N.C. 1969), rev'd on other grounds, 456 F.2d 63 (4th Cir. 1972).

Where it is a husband's wrongful act which caused the death of his wife intestate, he may not share in a recovery. Should the jury return a verdict in favor of the administrator of her estate, the court will enter judgment for only two thirds of the amount of the verdict. Cummings v. Locklear, 12 N.C. App. 572, 183 S.E.2d 832 (1971).

In an action by an administrator under the Wrongful Death Act, where a husband caused the death of his wife, the award must be reduced by the statutory share of the wrongdoer. St. Paul Fire & Marine Ins. Co. v. Lack, 476 F.2d 583 (4th Cir. 1973).

This result is not precluded by the "slayer statute," § 31A-4, which excludes the wrongdoer from taking by declaring him to have constructively died prior to the deceased, since the slayer's exclusion by § 31A-4 appears to apply only to inheritance from the decedent's "estate," while wrongful death awards have consistently been deemed not to pass through the personal estate of the deceased, but

rather to arise out of a right of action belonging peculiarly to the personal representative for the benefit of the intestate successors. St. Paul Fire & Marine Ins. Co. v. Lack, 476 F.2d 583 (4th Cir. 1973).

§ 28-174. Damages recoverable for death by wrongful act; evidence of damages.—(a) Damages recoverable for death by wrongful act include:

(1) Expenses for care, treatment and hospitalization incident to the injury resulting in death;

(2) Compensation for pain and suffering of the decedent;

(3) The reasonable funeral expenses of the decedent;

(4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected:

a. Net income of the decedent,

b. Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered,

c. Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered;

(5) Such punitive damages as the decedent could have recovered had he survived, and punitive damages for wrongfully causing the death of the decedent through maliciousness, wilful or wanton injury, or gross negligence;

(6) Nominal damages when the jury so finds.

(b) All evidence which reasonably tends to establish any of the elements of damages included in subsection (a), or otherwise reasonably tends to establish the present monetary value of the decedent to the persons entitled to receive the damages recovered, is admissible in an action for damages for death by wrongful act. (R. C., c. 1, s. 10; 1868-9, c. 113, s. 71; Code, s. 1499; Rev., s. 60; C. S., s. 161; 1969, c. 215, s. 1.)

Editor's Note.—

The 1969 amendment rewrote this section. Section 3 of the amendatory act provides that the act shall not apply to litigation pending on its effective date, April 14, 1969.

The cases cited in the note below were decided prior to the 1969 amendment.

For article on recent developments in North Carolina tort law, see 48 N.C.L. Rev. 791 (1970). For article on the 1969 amendments to the North Carolina wrongful death statute, see 6 Wake Forest Intra. L. Rev. 211 (1970). For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970). For note on the wife's right to husband's consortium, see 47 N.C.L. Rev. 1006 (1969). For comment on new North Carolina wrongful death statute, see 48 N.C.L. Rev. 594 (1970). 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).

Stetson v. Easterling, 274 N.C. 152, cited in the note below, was commented on in 47 N.C.L. Rev. 280 (1968).

Greene v. Nichols, 274 N.C. 18, cited in the note below, was commented on in 47 N.C.L. Rev. 281 (1968).

Constitutionality.—Subsection (a)(4) of this section are not unconstitutionally vague and therefore violative of N.C. Const., Art. I, § 19. Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

History of Section. — See Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

Legislative Intent as to Recovery under Subsection (a)(1), (2) and (5).—It seems improbable that the General Assembly intended that recovery for items of damage within subsection (a)(1), (2), and (5) should be exempt from liability for the payment of the debts and legacies of the decedent. Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

A right of action for wrongful death did not exist at common law. Such right of action is conferred by statute and exists only by virtue of § 28-173 and this section.

Skinner v. Whitley, 281 N.C. 476, 189 S.E.2d 230 (1972).

The 1969 amendment created a new cause of action for wrongful death in subsection (a)(4). Smith v. Mercer, 276 N.C. 329, 172 S.E.2d 489 (1970).

Injured Person's Right of Action to Recover Damages Survives. — Unless modified by implication by some provision of the 1969 amendment, an injured person's common-law right of action in respect of damages he sustained during the interval between injury and death now survives to his personal representative. Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

The 1969 amendment relates solely to the elements of damages recoverable in a wrongful death action. Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

It does not refer to or purport to modify § 28-173. Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

This section, as rewritten by the 1969 amendment, does not purport to identify the persons who are to be the beneficiaries of the recovery. Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

As heretofore, the nature and distribution of whatever recovery is obtained is governed by the provisions of § 28-173. Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

Provisions of 1969 Amendment Not Retroactive.—The 1969 amendment has no application to an action for wrongful death where the death occurred prior to April 14, 1969, the date it became effective. Smith v. Mercer, 276 N.C. 329, 172 S.E.2d 489 (1970); Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

Measure of Damages Recoverable under Former Provisions of Section.—Prior to the 1969 amendment rewriting this section, the measure of damages recoverable under this section for the loss of a human life was the present value of the net pecuniary worth of the deceased based upon his life expectancy. Smith v. Mercer, 276 N.C. 329, 172 S.E.2d 489 (1970); Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

Determination of Damages Recoverable under Section.—Damages recoverable under this section are not determined by ascertaining the net pecuniary loss suffered by the estate, but are determined by ascertaining the present monetary loss suffered by those persons entitled to receive the damages. Bowen v. Constructors Equip. Rental Co., 16 N.C. App. 70, 191 S.E.2d 419 (1972).

Where the measure of damages in death cases is "loss to beneficiaries," rather than the "loss to estate," a beneficiary's right to recover the value of expected benefits is limited to his life expectancy. Bowen v. Constructors Equip. Rental Co., 16 N.C. App. 70, 191 S.E.2d 419 (1972).

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); Stetson v. Easterling, 274 N.C. 152, 161 S.E.2d 531 (1968).

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).

Damages determinable in accordance with subsection (a)(4) are quite different from damages determinable on the basis of the pecuniary injury suffered by the decedent's estate as the result of his death. Smith v. Mercer, 276 N.C. 329, 172 S.E.2d 489 (1970); Bowen v. Constructors Equip. Rental Co., 16 N.C. App. 70, 191 S.E.2d 419 (1972).

No rule is prescribed for the measurement or ascertainment of the damages recoverable under subsection (a)(4). It would be difficult, if not impossible, to formulate a rule of general application for the measurement of such damages. Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

Since the persons entitled to the damages recovered may have suffered substantial losses on account of the items of damage under subsection (a)(4), it cannot be said that there can be no recovery for these items of damages because no yardstick for ascertaining the amount thereof has been provided. Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

Negligence Alone Does Not Create Cause of Action.—Negligence alone, without pecuniary injury resulting from such death, does not create a cause of action. Stetson v. Easterling, 274 N.C. 152, 161 S.E.2d 531 (1968); Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

Subsection (a)(6) supplies a statutory basis which was lacking when previous cases were decided. Nominal damages and

costs may now be recovered if the jury finds that the decedent's death was caused by the defendant's wrongful act but fails to find that such death caused pecuniary loss. Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

Recovery to Be One Compensation in Lump Sum. — This section contemplates that if plaintiff be entitled to recover at all, he is entitled to recover as damages one compensation in a lump sum. He is not entitled to recover the whole sum from each of the joint tort-feasors. Kendrick v. Cain, 272 N.C. 719, 159 S.E.2d 33 (1968).

The burden of proof, etc.—

The burden is on plaintiff to prove that the estate of his intestate suffered a net pecuniary loss as a result of her death. Greene v. Nichols, 274 N.C. 18, 161 S.E.2d 521 (1968); Maynor v. Townsend, 2 N.C. App. 19, 162 S.E.2d 677 (1968).

Direct evidence of earnings is not essential, it being sufficient to present evidence of "health, age, industry, means and business." Maynor v. Townsend, 2 N.C. App. 19, 162 S.E.2d 677 (1968).

It is not essential that direct evidence of the earnings of a deceased adult be offered in order for there to be recovery of damages. Evidence of his health, age, industry, means and business are competent to show pecuniary loss. Reeves v. Hill, 272 N.C. 352, 158 S.E.2d 529 (1968).

Although it is not essential that direct, specific evidence be offered with reference to decedent's earning capacity, it is required that plaintiff offer some evidence tending to show that intestate was potentially capable of earning money in excess of that which would be required for her support. Greene v. Nichols, 274 N.C. 18, 161 S.E.2d 521 (1968).

It is required that plaintiff offer some evidence tending to show that intestate was potentially capable of earning money in excess of that which would be required for her support. Maynor v. Townsend, 2 N.C. App. 19, 162 S.E.2d 677 (1968).

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).

Viable Child Born Dead.—There can be no evidence from which to infer pecuniary injury resulting from the wrongful prenatal death of a viable child en ventre sa mere; it is all sheer speculation. Stetson v. Easterling, 274 N.C. 152, 161 S.E.2d 531 (1968).

Instructions as to Life Expectancy of Persons Entitled to Recover. — Where there is evidence tending to show that persons entitled to receive the damages recovered have a shorter life expectancy than that of deceased, it is error for the court to fail to instruct the jury to consider the life expectancy of such persons in determining the amount of damages recoverable. Bowen v. Constructors Equip. Rental Co., 16 N.C. App. 70, 191 S.E.2d 419 (1972).

Cited in Davis v. Peacock, 10 N.C. App. 256, 178 S.E.2d 133 (1970); In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

§ 28-175. Actions which do not survive.

Editor's Note.—

For article on recent developments in North Carolina tort law, see 48 N.C.L. Rev. 791 (1970).

An injured person's common-law right of action to recover damages for hospital and medical expenses and for pain and suffering caused by the negligence of another survives to the injured party's personal representative. Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

Punitive Damages.—Upon sufficient allegations and evidence that the injury was inflicted by the wilful or wanton conduct of the defendant, the plaintiff is entitled to have submitted an issue as to punitive damages. Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

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).

ARTICLE 20.

Representative's Powers, Duties and Liabilities.

§ 28-184.1. Exercise of powers of joint personal representatives by one or more than one.

Opinions of Attorney General.—Honorable George M. Harris, Caswell County Clerk of Superior Court, 40 N.C.A.G. 28 (1969).

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).

§ 28A-2. Action for receiver; contents of complaint; parties.—(a) Action for Receiver to Be Instituted in the Superior Court.—If any person having an interest in any property in this State disappears and is absent from his place of residence and after diligent inquiry his whereabouts remains unknown to those persons most likely to know the same, for a period of 30 days or more, anyone who would be entitled to administer the estate of such absentee if he were deceased, or any interested person, may commence a civil action and file a duly verified complaint in the superior court of either the county of such absentee's domicile, or the county where any of his property is situated.

(1973, c. 522, s. 11.)

Cross Reference. — As to estates of prisoners of war and persons declared missing in action, see Chapter 28B.

Editor's Note. — The 1973 amendment deleted "or is a person in the military service of the United States who has been officially reported as missing in action" following "30 days or more" near the middle of subsection (a).

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

For note on requirement of notice for appointment of guardians ad litem and next friends, see 48 N.C.L. Rev. 92 (1969).

§ 28A-20. Provisions applicable to person held incommunicado in foreign country.—As to a person who is known to be held incommunicado in a foreign country, G.S. 28A-1 through G.S. 28A-8 and G.S. 28A-10 may be applied as though such person were an absentee within the meaning of this Chapter, and if his whereabouts becomes unknown, the other provisions of this Chapter may be applied by such amendments to the pending proceeding as may be required. This section shall not apply to personnel serving in or with the armed forces, the merchant marine, or the Red Cross during a period of hostilities between the United States and some other power who are listed by the appropriate federal agency as prisoners of war or as missing in action. (1965, c. 815, s. 1; 1973, c. 522, s. 12.)

Cross Reference. — As to estates of prisoners of war and persons declared missing in action, see Chapter 28B.

Editor's Note. — The 1973 amendment added the second sentence.

Chapter 28B.

Estates of Absentees in Military Service.

§ 28B-1. Absentee in military service; definition.—Any person serving in or with the armed forces of the United States, in or with the Red Cross, in or with the merchant marines, during any time when a state of hostilities exists between the United States and any other power, who has been reported or listed by the appropriate federal agency as missing in action or as a prisoner of war for a period of one year, shall be an "absentee in military service" within the meaning of this Chapter. (1973, c. 522, s. 1.)

§ 28B-2. Action for receiver; jurisdiction; contents of complaint.—(a) Whenever any absentee in military action as defined in this Chapter has an interest in any form of property in this State and has not provided an adequate power of attorney authorizing another to act in his behalf in regard to such property or interest, any person who would have an interest in the property or estate of the absentee in military service were such absentee in military service deceased, or any person who is dependent on such absentee in military service for his maintenance or support, may commence an action for the appointment of a receiver to care for the estate of the absentee in military service by filing a verified complaint in the superior court in the county of domicile of the absentee in military service or in any county where his property is situated.

(b) The complaint shall show the following:

(1) The name, age, address, relationship of the person filing the complaint to the alleged absentee, and the interest of that person in the property of the absentee in military service or his dependency upon the absentee in military service for his maintenance and support.

(2) The name, age, and address of all persons who would have an interest in the estate of the absentee in military service were he deceased and the name, age, and address of all persons dependent upon him for their maintenance and support.

(3) The name, age, and last known address of the absentee in military service.

(4) The date on which the absentee in military service was first reported as missing or captured by the appropriate federal agency, and, as far as is known, the circumstances surrounding his absence.

(5) The necessity for and the reasons why a receiver should be appointed.

(6) Whether or not the person alleged to be an absentee in military service has a will and the whereabouts of said will;

(7) So far as known, a schedule of all his property within this State, including property in which he is co-owner with or without the right of survivorship. (1973, c. 522, s. 2.)

§ 28B-3. Notice; hearing; guardian ad litem. — (a) Notice of the hearing on the complaint to appoint a receiver shall be given to all persons named in the petition by registered mail or certified mail with return receipt requested.

(b) The judge shall hear evidence on the questions of whether the person alleged to be missing or captured is an absentee in military service as defined by G.S. 28B-1, on the question of the necessity for the appointment of a receiver, and on the question of who is entitled to appointment as the receiver.

(c) The court may in its discretion appoint a guardian ad litem to represent the alleged absentee in military service at the hearing. (1973, c. 522, s. 3.)

§ 28B-4. Order of appointment.—(a) If after the hearing, the court is satisfied that said person is, in fact, an absentee in military service as defined in G.S. 28B-1 and that it is necessary that a receiver be appointed, he shall appoint a receiver of the estate and property of said absentee in military service under the supervision and subject to the further orders of the court.

(b) In the appointment of a receiver, the court shall give due consideration to the appointment of the spouse or one of the next of kin of the absentee in military service if such spouse or next of kin is a fit and proper person and is qualified to act. (1973, c. 522, s. 4.)

§ 28B-5. Bond; inventory; accounting.—(a) Before receiving any property the judge shall require the receiver to qualify by giving bond in an amount and with surety approved by him.

(b) Within 30 days after the date of his appointment, the receiver shall file an inventory of all of the property of the absentee in military service taken in charge. Every year thereafter, within 30 days of the anniversary date of his appointment the receiver shall file a full and complete inventory and accounting with the clerk of superior court under oath, of the amount of property received by him, or invested by him, and the manner and nature of such investment, and his receipts and disbursements for the past year in the form of debit and credit. The clerk shall inspect and audit the inventory and accounting and if he approves the same he shall endorse his approval thereon, which shall be deemed prima facie evidence of correctness. If the clerk finds evidence of misconduct or default on the part of the receiver he shall report the same to the court. In such event, the procedures found in G.S. 28B-7(b) shall be followed. (1973, c. 522, s. 5.)

§ 28B-6. Powers and duties of receiver.—(a) Under the direction of a judge, the receiver shall administer the property of the absentee in military service as an equity receivership with the following powers:

(1) To take custody and control of all property of the absentee in military service wherever situated.
(2) To collect all debts due to the absentee in military service and pay all debts owed by him.
(3) To bring and defend suits.
(4) To pay insurance premiums.
(5) With the approval of the judge in each instance, to continue to operate and manage any business enterprise, farm or farming operations, and to make necessary contracts with reference thereto.
(6) With the approval of the judge in each instance, to renew notes and other obligations, obtain loans on life insurance policies, and pledge or mortgage property for loans necessary in carrying on or liquidating the affairs of such absentee in military service.
(7) With the approval of the judge in each instance, to institute proceedings to partition property owned by the absentee and another as joint tenants or tenants in common, with or without the right of survivorship; provided, in the case of property owned by the absentee in military service and spouse as tenants by the entirety, such proceedings may be instituted only if the spouse of the absentee in military service consents in writing to the partitioning, and, in the event of partitioning, one half of the property or proceeds shall belong to the spouse and one half shall belong to the receiver as property of the absentee in military service.

(8) With the approval of the judge in each instance, to sell, lease, invest, and reinvest any or all property, its income, or its proceeds.

(9) To pay over or apply the proceeds of mortgage and sales of such portion, or all of the property or the income thereof, as may be necessary for the maintenance and support of the dependents of the absentee in military service. If the income from the property of the absentee in military service is not sufficient to pay all of his debts and to provide for the maintenance and support of his dependents, the receiver may apply to the judge for an order to sell or mortgage so much of the real or personal property as may be necessary therefor. Such sale or mortgage shall be reported to the judge, and if approved and confirmed by the judge, the receiver shall execute the required conveyances or mortgages of such property to the purchaser or lender upon his complying with the terms of sale or mortgage.

(b) The judge may, in his discretion, by written order, modify, add to, or subtract from the statutory powers granted in this section. (1973, c. 522, s. 6.)

§ 28B-7. Resignation and removal.—(a) A receiver appointed under authority of this Chapter may resign and his successor be appointed by complying with the provisions set forth in G.S. 36-9 through 36-18.2.

(b) If, after a receiver has been appointed, it is made to appear to the court upon the filing of a complaint or upon information received that the person appointed as receiver of the estate and property of the absentee in military service is legally incompetent, or that such person has been guilty of default or misconduct in due execution of his office, or that his appointment was obtained by false representation, or that such person has removed himself from this State, the court shall issue an order requiring such person to show cause why his appointment as a receiver should not be revoked. Upon the removal of a receiver of the estate or property of an absentee in military service, the court shall immediately appoint his successor. Pending any suit or proceeding between parties respecting such revocation, the clerk of superior court is authorized to make such interlocutory orders as may tend to better secure the estate and property of the absentee in military service. (1973, c. 522, s. 7.)

§ 28B-8. Termination of receivership. — (a) At any time upon petition signed by the absentee in military service, or on petition of an attorney-in-fact acting under an adequate power of attorney granted by the absentee in military service, the court shall direct the termination of the receivership and the transfer of all property held thereunder to the absentee in military service or to the designated attorney-in-fact.

(b) If at any time subsequent to the appointment of a receiver it shall appear that the absentee in military service has died and an executor or administrator has been appointed for his estate, the court shall terminate the receivership, certify all proceedings under the receivership to the clerk of superior court, and transfer all property of the deceased absentee in military service held thereunder to such executor or administrator.

(c) When the need for a receivership terminates, the receiver shall promptly file a final inventory and accounting and his application for discharge with the court. If it appears to the court that the inventory and accounting are correct and that the receiver has made full and complete transfer of the assets of the absentee in military service as directed, the court may approve the inventory and accounting and discharge the receiver. If objections to the final inventory and accounting are filed, the court shall conduct a hearing under the same conditions for a hearing on objections to the annual accounting and inventory.

(d) Such discharge shall operate as a release from the duties of the receivership and as a bar to any suit against said receiver or his surety, unless such suit is commenced within one year from the date of discharge. (1973, c. 522, s. 8.)

§ 28B-9. Specific property valued at less than $5,000; summary procedure.—(a) If the spouse of any person defined as an absentee in military service by this Chapter, or his next of kin, if said absentee in military service has no spouse, shall wish to sell or transfer any property of the absentee in military service which has a gross value of less than five thousand dollars ($5,000), or shall require the consent of the absentee in military service in any matter regarding the children of the absentee in military service, or in any other matter in which the gross value of the subject matter is less than five thousand dollars ($5,000), such spouse may apply to the superior court for an order authorizing said sale, transfer, or consent without opening a full receivership proceeding as provided by this Chapter. Said application shall be made by petition on the following form, which form shall be made available to the applicant by the clerk of the superior court:

STATE OF NORTH CAROLINA
..... COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

In re: *(absentee)*, PETITION FOR SUMMARY APPOINTMENT OF RECEIVER NOW COMES, *(name of petitioner)*, petitioner in this action, pursuant to G.S. ....., and requests the Court that he be appointed a receiver to sell/transfer *(describe property)* of the value of *(value)* because *(give reasons)*. Petitioner is ..... years of age, resides at *(address)* in ..... County, North Carolina, and is the *(relation)* of *(name of absentee)* who has been *(pow or mia)* since *(date of notification)*. The terms of the sale/transfer are *(terms)*. Petitioner requires the consent of the absentee for the purpose of *(give reasons)*.

(Signature) .....

The above named, ..., being by me duly sworn, says the foregoing petition is true and correct to the best of his knowledge.

.....

Notary Public

My commission expires .....

(b) The court shall, without hearing or notice, enter an order on said petition if it deems the relief requested in said petition necessary to protect the best interest of the absentee in military service or his dependents.

(c) Such order shall be prima facie evidence of the validity of the proceedings and the authority of the petitioner to make a conveyance or transfer property or to give the consent of the absentee in military service in any matter prescribed by subsection (a). (1973, c. 522, s. 9.)

§ 28B-10. Specific property valued at more than $5,000; summary procedure.—(a) If the spouse, or the next of kin if there is no spouse, of any person defined as an absentee in military service under this Chapter shall wish to sell, lease, or mortgage specific property having a gross value of five thousand dollars ($5,000) or more owned by the absentee in military service or in which the absentee has an interest, or take specific action with respect to any interest of the absentee in military service having a gross value of five thousand dollars ($5,000) or more, such spouse may file a complaint with the superior court for an order authorizing the action with respect to such property or interest.

(b) The complaint shall contain all of the information called for by G.S. 28B-2(b) and, in addition, shall contain a description of the specific property or interest and the disposition to be made of it.

(c) The court shall hear evidence on the question of whether the person alleged to be missing or captured is an absentee in military service as defined by G.S. 28B-1 and on the question of whether the action in question should be authorized. Any person interested in such proceedings may intervene with leave of the court.

(d) The court may in its discretion appoint a guardian ad litem to represent the alleged absentee in military service at the hearing.

(e) If, after hearing, the court is satisfied that the person alleged to be an absentee in military service is, in fact, an absentee in military service as defined in G.S. 28B-1, and that the action is in the best interest of the absentee in military service and his dependents, the court shall enter an order appointing the petitioner as receiver for the purposes of the specific action which is the subject of the complaint and authorizing the receiver to take the specific action requested in the complaint. The court shall require the receiver to account for the proceeds of the specific sale, the specific lease, or other specific action. The court may retain jurisdiction of the proceeding to make such further orders as it deems proper.

(f) Such order shall be prima facie evidence of the validity of the proceedings and the authority of the petitioner to take the specific action requested.

(g) Other property of the absentee in military service not the specific subject of the complaint is not affected in any manner by the filing of such complaint as provided for in this section. (1973, c. 522, s. 10.)

Chapter 29.

Intestate Succession.

ARTICLE 1.

General Provisions.

§ 29-1. Short title.

Editor's Note.—

For note entitled "Does North Carolina Law Adequately Protect Surviving Spouses?" see 48 N.C.L. Rev. 361 (1970).

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).

Cited in Byers v. North Carolina State Highway Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968); Baxter v. Jones, 14 N.C. App. 296, 188 S.E.2d 622 (1972).

§ 29-2. Definitions.

Whether a gift is an advancement depends on the intention of the parent at the time the gift is made. Parrish v. Adams, 10 N.C. App. 700, 179 S.E.2d 880 (1971).

Knowledge That Conveyance Represents an Advancement Estops Claim to Any Other Lands.—Where a child accepts a deed with knowledge that the lands conveyed therein represent an advancement of his full share of the parents' realty, he is estopped to claim any other lands owned by the parents at the time of their deaths. Parrish v. Adams, 10 N.C. App. 700, 179 S.E.2d 880 (1971).

§ 29-3. Certain distinctions as to intestate succession abolished.

Applied in In re Johnston, 16 N.C. App. 38, 190 S.E.2d 879 (1972).

§ 29-5. Computation of next of kin.

Applied in In re Will of Cobb, 271 N.C. 307, 156 S.E.2d 285 (1967).

§ 29-10. Renunciation.

Cited in Brown v. Green, 3 N.C. App. 506, 165 S.E.2d 534 (1969).

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).

Quoted in Long v. Coble, 11 N.C. App. 624, 182 S.E.2d 234 (1971).

Cited in In re Estate of Connor, 5 N.C. App. 228, 168 S.E.2d 245 (1969).

§ 29-14. Share of surviving spouse.

Editor's Note.—For article "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971). For note entitled "Does North Carolina Law Adequately Protect Surviving Spouses?" see 48 N.C.L. Rev. 361 (1970).

This section defines, etc.—

In accord with original. See Peoples Oil Co. v. Richardson, 271 N.C. 696, 157 S.E.2d 369 (1967).

The intestate share does not include the value of property passing by survivorship (which includes property owned as tenants by the entirety), joint accounts with right of survivorship, and insurance payable to the surviving spouse. In re Estate of Connor, 5 N.C. App. 228, 168 S.E.2d 245 (1969).

Estate Does Not Include Property Conveyed Away Prior to Death.—For purposes of this section a wife's husband's estate would not include property which he had conveyed away prior to his death, even though she had not joined in the conveyance. Heller v. Heller, 7 N.C. App. 120, 171 S.E.2d 335 (1969).

A deed by plaintiff's husband, which was executed while he and plaintiff were living together and which conveyed his separate real property to his children by a prior marriage, was effective to convey title to the children free from any claims of plaintiff. Heller v. Heller, 7 N.C. App. 120, 171 S.E.2d 335 (1969).

Insofar as concerns any rights which the spouse of a married person might acquire by virtue of the provisions of this section, the General Assembly has prescribed no regulation or limitations relating to the conveyance during lifetime by such married person of his or her separate real or personal property. Heller v. Heller, 7 N.C. App. 120, 171 S.E.2d 335 (1969).

Present Right of Possession Not Conferred.—A wife is not a real party in interest so as to interpose as a defense or counterclaim, in an action in ejectment instituted by her husband's grantee, that her husband had fraudulently conveyed the lands without her joinder in order to deprive her of the possession thereof, since this section, defining the share of the surviving spouse of an intestate, and § 29-30, providing for a life estate at the election of the surviving spouse, do not give her a present right of possession. Peoples Oil Co. v. Richardson, 271 N.C. 696, 157 S.E.2d 369 (1967).

Share of Second or Successive Spouse.—Section 30-3 (b), which provides that a second or successive spouse who dissents from the will of his deceased spouse shall take only one half the amount provided by the Intestate Succession Act for the surviving spouse if the testator has surviving him lineal descendants by a former marriage but there are no surviving lineal descendants by the second or successive marriage, is not arbitrarily discriminatory and capricious so as to be violative of the due process provisions of the federal and State Constitutions. Vinson v. Chappell, 275 N.C. 234, 166 S.E.2d 686 (1969).

Wrongful Act Bars Husband from Share of Wrongful Death Recovery.—Where it is a husband's wrongful act which caused the death of his wife intestate, he may not share in a recovery from an action for wrongful death. Should the jury return a verdict in favor of the administrator of her estate, the court will enter judgment for only two thirds of the amount of the verdict. Cummings v. Locklear, 12 N.C. App. 572, 183 S.E.2d 832 (1971).

In an action by an administrator under the Wrongful Death Act where a husband caused the death of his wife, the award must be reduced by the statutory share of the wrongdoer. St. Paul Fire & Marine Ins. Co. v. Lack, 476 F.2d 583 (4th Cir. 1973).

This result is not precluded by the "slayer statute," § 31A-4, which excludes the wrongdoer from taking by declaring him to have constructively died prior to the deceased, since the slayer's exclusion by § 31A-4 appears to apply only to inheritance from the decedent's "estate," while wrongful death awards have consistently been deemed not to pass through

the personal estate of the deceased, but rather to arise out of a right of action belonging peculiarly to the personal representative for the benefit of the intestate successors. St. Paul Fire & Marine Ins. Co. v. Lack, 476 F.2d 583 (4th Cir. 1973).

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); In re Will of Farr, 277 N.C. 86, 175 S.E.2d 578 (1970).

§ 29-15. Shares of others than surviving spouse.

Editor's Note.—For note entitled "Does North Carolina Law Adequately Protect Surviving Spouses?" see 48 N.C.L. Rev. 361 (1970).

Applied in Smith v. Allied Exterminators, Inc., 279 N.C. 583, 184 S.E.2d 296 (1971); Cummings v. Locklear, 12 N.C. App. 572, 183 S.E.2d 832 (1971); Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

Stated in Smith v. Allied Exterminators, Inc., 11 N.C. App. 76, 180 S.E.2d 390 (1971).

ARTICLE 3.

Distribution Among Classes.

§ 29-16. Distribution among classes.

Applied in Cummings v. Locklear, 12 N.C. App. 572, 183 S.E.2d 832 (1971).

ARTICLE 6.

Illegitimate Children.

§ 29-19. Succession by illegitimate children.

Editor's Note.—For note on illegitimacy in North Carolina, see 46 N.C.L. Rev. 813 (1968).

§ 29-21. Share of surviving spouse.

Editor's Note. — For article "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

Cited in Heller v. Heller, 7 N.C. App. 120, 171 S.E.2d 335 (1969).

ARTICLE 7.

Advancements.

§ 29-24. Presumption of gift.

Applied in Lassiter v. Lassiter, 15 N.C. App. 588, 190 S.E.2d 283 (1972).

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.

Editor's Note.—

For article "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

Section Preserves, etc.—

In accord with original. See Heller v. Heller, 7 N.C. App. 120, 171 S.E.2d 335 (1969).

This section has the practical effect of providing the benefits of dower to the surviving spouse, at her election. Peoples Oil Co. v. Richardson, 271 N.C. 696, 157 S.E.2d 369 (1967).

To protect the rights of dower or curtesy, the General Assembly has prescribed regulations and limitations on the right of a married person to convey his or her real property free from the elective life estate provided for his or her spouse by this section. Heller v. Heller, 7 N.C. App. 120, 171 S.E.2d 335 (1969).

Present Right of Possession Not Conferred.—A wife is not a real party in interest so as to interpose as a defense or counterclaim in an action in ejectment instituted by her husband's grantee that her husband had fraudulently conveyed the lands without her joinder in order to deprive her of the possession thereof, since § 29-14, defining the share of the surviving spouse of an intestate, and this section, providing for a life estate at the election of the surviving spouse, do not give her a present right of possession. Peoples Oil Co. v. Richardson, 271 N.C. 696, 157 S.E.2d 369 (1967).

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 interest 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).

"Pending" Litigation.—An action by the widow, commenced after time for election had expired, to declare void a deed executed by her husband which conveyed the husband's separate realty to his children of a prior marriage, does not constitute "pending" litigation within the meaning of subsection (c)(4) of this section. Heller v. Heller, 7 N.C. App. 120, 171 S.E.2d 335 (1969).

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.

Editor's Note.—For article "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971). For note entitled "Contracts to Devise—Effect of Excluded Forced Heirs," see 47 N.C.L. Rev. 905 (1969). For note entitled "Does North Carolina Law Adequately Protect Surviving Spouses?" see 48 N.C.L. Rev. 361 (1970).

"Intestate share" means the amount of real and personal property that the surviving spouse would receive under the provisions of Chapter 29 of the General Statutes of North Carolina, known as the Intestate Succession Act, if her husband had died intestate. In re Estate of Connor, 5 N.C. App. 228, 168 S.E.2d 245 (1969).

The year's allowance for the surviving spouse under the provisions of § 30-15 is not a part of the "intestate share" passing to a surviving spouse under the provisions of Chapter 29 of the General Statutes, known as the Intestate Succession Act. In re Estate of Connor, 5 N.C. App. 228, 168 S.E.2d 245 (1969).

"Intestate share" does not include any property received by the surviving spouse as a tenant by entirety, or from insurance contracts, or from joint accounts with right of survivorship. In re Estate of Connor, 5 N.C. App. 228, 168 S.E.2d 245 (1969).

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 former 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 former 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).

Right of Dissent Conferred by Statute. —The right of a husband or wife to dissent from the will of his spouse is conferred by statute and may be exercised at the time and in the manner fixed by statute. Vinson v. Chappell, 275 N.C. 234, 166 S.E.2d 686 (1969).

Right to Dissent Is Mathematically Determined by Value of Property.—This section provides that when the values are determined as set out therein, such are final for determining the right of dissent and shall be used exclusively for this purpose.

No doubt when this legislation was enacted it was contemplated that the right to dissent would be thus mathematically established. In re Estate of Connor, 5 N.C. App. 228, 168 S.E.2d 245 (1969).

And Right Cannot Be Established Until Property Is Determined and Valued.— In the absence of a determination and valuation of the property passing to the surviving spouse under the will and outside the will as of the date of the death of the deceased spouse as provided by the statute, there can be no proper determination of whether the right to dissent has been established. When the property involved is determined and valued as provided by statute, then the right of dissent can be determined mathematically. In re Estate of Connor, 5 N.C. App. 228, 168 S.E.2d 245 (1969).

Property Determined and Valued as of Date of Testator's Death. — This section, which permits dissent in certain instances, also requires that the property involved shall be determined and valued as of the date of death of the testator. The procedure is mandatory. In re Estate of Connor, 5 N.C. App. 228, 168 S.E.2d 245 (1969).

Testator Presumed, etc.—

In accord with original. See Vinson v. Chappell, 275 N.C. 234, 166 S.E.2d 686 (1969).

Cited in O'Neil v. O'Neil, 271 N.C. 106, 155 S.E.2d 495 (1967); Calloway v. Ford Motor Co., 281 N.C. 496, 189 S.E.2d 484 (1972).

§ 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).

Cited in Vinson v. Chappell, 275 N.C. 234, 166 S.E.2d 686 (1969); Vinson v. Chappell, 3 N.C. App. 348, 164 S.E.2d 631 (1968).

§ 30-3. Effect of dissent.—(a) Upon dissent as provided for in G.S. 30-2, the surviving spouse, except as provided in subsection (b) of this section, shall take the same share of the deceased spouse's real and personal property as if the deceased had died intestate; provided, that if the deceased spouse is not survived by a child, children, or any lineal descendants of a deceased child or children, or by a parent, the surviving spouse shall receive only one half of the deceased spouse's net estate as defined in G.S. 29-2(5), which one half shall be estimated and determined before any federal estate tax is deducted or paid and shall be free and clear of such tax.

(1971, c. 19.)

Editor's Note.—

The 1971 amendment substituted "G.S. 29-2(5)" for "G.S. 29-2(3)" near the end of subsection (a).

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

Constitutionality.—Subsection (b) of this section does not create a classification or distinction that is arbitrary and unjustifiable so as to be offensive to our federal or State Constitutions. Vinson v. Chappell, 3 N.C. App. 348, 164 S.E.2d 631 (1968).

Subsection (b) of this section, which provides that a second or successive spouse who dissents from the will of his deceased spouse shall take only one half the amount provided by the Intestate Succession Act for the surviving spouse if the testator has surviving him lineal descendants by a former marriage but there are no surviving lineal descendants by the second or successive marriage, is not arbitrarily discriminatory and capricious so as to be violative of the due process provisions of the federal and State Constitutions. Vinson v. Chappell, 275 N.C. 234, 166 S.E.2d 686 (1969).

Legislative Intent. — The intent of the legislature in enacting subsection (b) of this section was to enable a person who has a child or lineal descendant by a former marriage to make greater provision for such child or lineal descendant. Vinson v. Chappell, 275 N.C, 234, 166 S.E.2d 686 (1969).

This section has no application in cases of intestacy. Vinson v. Chappell, 3 N.C. App. 348, 164 S.E.2d 631 (1968).

It is only when a spouse dies testate that this section may become applicable. Vinson v. Chappell, 3 N.C. App. 348, 164 S.E.2d 631 (1968).

What Section Provides in Substance.— This section provides in substance that whenever a second or successive spouse dissents from the will of his or her deceased spouse, he or she shall take one half of the amount provided by the Intestate Succession Act for the surviving spouse if the testator has surviving him a lineal descendant by a former marriage but there is no surviving lineal descendant by the second or successive marriage. Vinson v. Chappell, 3 N.C. App. 348, 164 S.E.2d 631 (1968).

The real effect of this section is to allow a spouse, who leaves a child or other lineal descendant by a previous marriage but none by the spouse who survives him, more testamentary freedom than he would have otherwise. It is not for the Court of Appeals to "second guess" the General Assembly on the wisdom of this distinction, but the court believes the statute was enacted in good faith and it creates a classification based upon real distinctions which are not unreasonable. Vinson v. Chappell, 3 N.C. App. 348, 164 S.E.2d 631 (1968).

Subsection (b) applies to limit the share of a surviving spouse to one half the intestate share only when (1) a married person dies testate survived by his spouse, (2) the surviving spouse, being entitled under § 30-1 to do so, dissents, (3) the surviving spouse is a "second or successive spouse," (4) no lineal descendants by the second or successive marriage survive the testator, and (5) the testator is survived by lineal descendants by his former marriage. Vinson v. Chappell, 275 N.C. 234, 166 S.E.2d 686 (1969).

Cited in In re Estate of Connor, 5 N.C. App. 228, 168 S.E.2d 245 (1969).

ARTICLE 4.

Year's Allowance.

Part 1. Nature of Allowance.

§ 30-15. When spouse entitled to allowance.—Every surviving spouse of an intestate or of a testator, whether or not he has dissented from the will, shall, unless he has forfeited his right thereto as provided by law, be entitled, out of the personal property of the deceased spouse, to an allowance of the value of two thousand dollars ($2,000.00) for his support for one year after the death of the deceased spouse. Such allowance shall be exempt from any lien, by judgment or execution, acquired against the property of the deceased spouse, and shall, in cases of testacy, be charged against the share of the surviving spouse. (1868-9, c. 93, s. 81; 1871-2, c. 193, s. 44; 1880, c. 42; Code, s. 2116; 1889, c. 499, s 2; Rev., s. 3091; C. S., s. 4108; 1953, c. 913, s. 1; 1961, c. 316, s. 1; c. 749, s. 1; 1969, c. 14.)

Editor's Note.—

The 1969 amendment, effective July 1, 1969, increased the amount of the allowance from $1,000 to $2,000. The amendatory act is applicable only to estates of persons dying on or after July 1, 1969.

Opinions of Attorney General.—Honorable Fred Proffitt, Clerk of Superior Court, Yancey County, 40 N.C.A.G. 35 (1969).

Allowance Is Not "Intestate Share".—The year's allowance for the surviving spouse under the provisions of this section is not a part of the "intestate share" passing to a surviving spouse under the provisions of Chapter 29 of the General Statutes, known as the Intestate Succession Act. In re Estate of Connor, 5 N.C. App. 228, 168 S.E.2d 245 (1969).

§ 30-16. Duty of personal representative or magistrate to assign allowance.—It shall be the duty of every administrator, collector, or executor of a will, on application in writing, signed by the surviving spouse, at any time within one year after the death of the deceased spouse, to assign to the surviving spouse the year's allowance as provided in this Article.

If there shall be no administration, or if the personal representative shall fail or refuse to apply to a magistrate, as provided in G.S. 30-20, for 10 days after the surviving spouse has filed the aforesaid application, or if the surviving spouse is the personal representative, the surviving spouse may make application to the magistrate, and it shall be the duty of the magistrate to proceed in the same manner as though the application had been made by the personal representative.

Where any personal property of the deceased spouse shall be located outside the township or county where the deceased spouse resided at the time of his death, the personal representative or the surviving spouse may apply to any magistrate be the duty of such magistrate to assign the year's allowance as if the deceased of any township or county where such personal property is located, and it shall spouse had resided and died in that township. (1868-9, c. 93, s. 12; 1870-1, c. 263;

Code, ss. 2120, 2122; 1889, cc. 496, 531; 1891, c. 13; Rev., ss. 3096, 3098; C. S., ss. 4113, 4115; 1961, c. 749, s. 2; 1971, c. 528, s. 21.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "magistrate" for "justice of the peace" in the second and third paragraphs and for "justice" in two places in the second paragraph and again in the third paragraph.

§ 30-17. When children entitled to an allowance. — Whenever any parent dies leaving any child under the age of 18 years, including an adopted child, or a child with whom the widow may be pregnant at the death of her husband, or any other person under the age of 18 years residing with the deceased parent at the time of the death to whom the deceased parent or the surviving parent stood in loco parentis, every such child shall be entitled, besides its share of the estate of such deceased parent, to an allowance of six hundred dollars ($600.00) for its support for the year next ensuing the death of such parent, less, however, the value of any articles consumed by said child since the death of said parent. Such allowance shall be exempt from any lien, by judgment or execution against the property of such parent. The personal representative of the deceased parent, within one year after the parent's death, shall assign to every such child the allowance herein provided for; but if there is no personal representative or if he fails or refuses to act within 10 days after written request by a guardian or next friend on behalf of such child, the allowance may be assigned by a magistrate, upon application of said guardian or next friend.

If the child resides with the widow of the deceased parent at the time such allowance is paid, the allowance shall be paid to said widow for the benefit of said child. If the child resides with its surviving parent who is other than the widow of the deceased parent, such allowance shall be paid to said surviving parent for the use and benefit of such child. Provided, however, the allowance shall not be available to an illegitimate child of a deceased father, unless such deceased father shall have recognized the paternity of such illegitimate child by deed, will or other paper-writing. If the child does not reside with a parent when the allowance is paid, it shall be paid to its general guardian, if any, and if none, to the clerk of the superior court who shall receive and disburse same for the benefit of such child. (1889, c. 496; Rev., s. 3094; C. S., s. 4111; 1939, c. 396; 1953, c. 913, s. 2; 1961, c. 316, s. 2; c. 749, s. 3; 1969, c. 269; 1971, c. 528, s. 22.)

Editor's Note.—

The 1969 amendment substituted "six hundred dollars ($600.00)" for "three hundred dollars ($300.00)" near the end of the first sentence. The amendatory act provides that it shall be applicable only with respect to estates of persons dying on or after April 22, 1969.

The 1971 amendment, effective Oct. 1, 1971, substituted "magistrate" for "justice of the peace" in the last sentence of the first paragraph.

Part 2. Assigned by Magistrate.

§ 30-19. Value of property ascertained. — The value of the personal property assigned to the surviving spouse and children shall be ascertained by a magistrate and two persons qualified to act as jurors of the county in which administration was granted or the will probated. (1868-9, c. 93, s. 13; Code, s. 2121; Rev., s. 3097; C. S., s. 4114; 1961, c. 749, s. 5; 1971, c. 528, s. 22.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "magistrate" for "justice of the peace."

§ 30-20. Procedure for assignment.—Upon the application of the surviving spouse, or whenever it shall appear that a child is entitled to an allowance as provided by G.S. 30-17, the personal representative of the deceased shall apply to the clerk of superior court of the county in which the deceased resided to assign the inquiry to a magistrate of the county. The magistrate shall summon two persons qualified to act as jurors, who, having been sworn by the magistrate to act impartially as commissioners shall, with him, ascertain the person or persons

entitled to an allowance according to the provisions of this Article, and determine the money or other personal property of the estate, and pay over to or assign to the surviving spouse and to the children, if any, so much thereof as they shall be entitled to as provided in this Article. Any deficiencies shall be made up from any of the personal property of the deceased, and if the personal property of the estate shall be insufficient to satisfy such allowance, the clerk of the superior court shall enter judgment against the personal representative for the amount of such deficiency, to be paid when a sufficiency of such assets shall come into his hands. (1870-1, c. 263; Code, s. 2122; 1891, c. 13; 1899, c. 531; Rev., s. 3098; C. S., s. 4115; 1961, c. 749, s. 6; 1971, c. 528, s. 23.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, rewrote the former first sentence as the present first and second sentences. The amendment substituted "the clerk of superior court of the county in which the deceased resided to assign the inquiry to a magistrate of the county" for "a justice of the peace of the township in which the deceased resided, or some other township," at the end of the present first sentence, added "The magistrate shall" at the beginning of the present second sentence and substituted "magistrate" the second time the word appears in the present second sentence for "justice."

§ 30-21. Report of commissioners.—The commissioners shall make and sign three lists of the money or other personal property assigned to each person, stating their quantity and value, and the deficiency to be paid by the personal representative. Where the allowance is to the surviving spouse, one of these lists shall be delivered to him. Where the allowance is to a child, one of these lists shall be delivered to the surviving parent with whom the child is living; or to the child's guardian or next friend if the child is not living with said surviving parent; or to the child if said child is not living with the surviving parent and has no guardian or next friend. One list shall be delivered to the personal representative. One list shall be returned by the magistrate, within 20 days after the assignment, to the superior court of the county in which administration was granted or the will probated, and the clerk shall file and record the same, together with any judgment entered pursuant to G.S. 30-20. (1868-9, c. 93, s. 15; Code, s. 2123; Rev., s. 3099; C. S., s. 4116; 1961, c. 749, s. 7; 1971, c. 528, s. 24.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "magistrate" for "justice" in the last sentence.

§ 30-22: Repealed by Session Laws 1971, c. 528, s. 25, effective October 1, 1971.

§ 30-23. Right of appeal.

Applied in In re Godwin, 17 N.C. App. 365, 194 S.E.2d 204 (1973).

Part 3. Assigned in Superior Court.

§ 30-30. Judgment and order for commissioners.—If the material allegations of the complaint be found true, the judgment shall be that plaintiff is entitled to the relief sought; and the court shall thereupon issue an order to the sheriff or other proper officer of the county, commanding him to summon a magistrate and two persons qualified to act as jurors, who shall determine the money or other personal property of the estate and assign to the plaintiff a sufficiency thereof for plaintiff's support for one year from the decedent's death. Any deficiency shall be made up from any of the personal property of the deceased, and if the personal property of the estate shall be insufficient for such support, the clerk of the superior court shall enter judgment against the personal representative for the amount of such deficiency, to be paid when a sufficiency of such assets

shall come into his hands. (1868-9, c. 93, s. 23; Code, s. 2131; Rev., s. 3107; C. S., s. 4124; 1961, c. 749, s. 13; 1971, c. 528, s. 26.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "magistrate" for "justice of the peace" near the middle of the first sentence.

§ 30-31. Duty of commissioners; amount of allowance. — The said commissioners shall be sworn by the magistrate and shall proceed as prescribed in this Chapter, except that they may assign to the plaintiff a value sufficient for the support of plaintiff according to the estate and condition of the decedent and without regard to the limitations set forth in this Chapter; but the value allowed shall be fixed with due consideration for other persons entitled to allowances for year's support from the decedent's estate; and the total value of all allowances shall not in any case exceed the one half of the average annual net income of the deceased for three years next preceding his death. This report shall be returned by the magistrate to the court. (1868-9, c. 93, s. 24; Code, s. 2132; Rev., s. 3108; C. S., s. 4125; 1971, c. 528, s. 27.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "magistrate" for "justice" near the beginning of the first sentence and in the second sentence.

Chapter 31.

Wills.

Article 2.

Revocation of Will.

ARTICLE 1.

Execution of Will.

§ 31-1. Who may make will.—Any person of sound mind, and 18 years of age or over, may make a will. (1811, c. 280; R. C., c. 119, s. 2; Code, s. 2137; Rev., s. 3111; C. S., s. 4128; 1953, c. 1098, s. 1; 1965, c. 303; 1969, c. 39.)

Editor's Note.—

The 1969 amendment, effective July 1, 1969, deleted "and 21 years of age or over, or married and of sound mind" preceding "and 18 years."

Mere ignorance of a technical statute relating to wills does not evidence a lack of testamentary capacity. In re Will of Farr, 277 N.C. 86, 175 S.E.2d 578 (1970).

§ 31-3.1. Will invalid unless statutory requirements complied with.

Instrument Executed without Proper Formalities Is Void. — An instrument which is testamentary in effect but does not follow the prescribed formalities for the proper execution of a will is void. Baxter v. Jones, 14 N.C. App. 296, 188 S.E.2d 622 (1972).

§ 31-3.3. Attested written will.

Editor's Note.—

For comment on the necessity for proof of due execution of a will, see 3 Wake Forest Intra. L. Rev. 12 (1967).

Question for Jury.—

Where the testator signified by a nod of his head that the paper writing read to him was his will, and although the testator was severely physically incapacitated, he was mentally alert and able to make known any objection he might have had to the minister signing his name to the will, and this he failed to do; indeed, he placed his hand upon the pen while the minister made his mark, this evidence gives rise to an inference to be resolved by the jury as to whether the will was duly executed according to law. In re Will of Knowles, 11 N.C. App. 155, 180 S.E.2d 394 (1971).

Cited in In re Will of Cobb, 271 N.C. 307, 156 S.E.2d 285 (1967); In re Will of Hodgin, 10 N.C. App. 492, 179 S.E.2d 126 (1971).

§ 31-3.4. Holographic will.

Editor's Note.—

For note on the problem of after-discovered wills, see 47 N.C.L. Rev. 723 (1969).

Opinions of Attorney General.—Honorable Robert Miller, Clerk, Superior Court, Stokes County, 40 N.C.A.G. 36 (1969).

Deposit among Unopened Mail.—A bona fide controversy existed as to whether a holographic document was found among the valuable papers and effects of the testatrix, where the document was discovered among some unopened mail on a sofa at the testatrix's home, in a small room which was used as an office. Lenoir Rhyne College v. Thorne, 13 N.C. App. 27, 185 S.E.2d 303 (1971).

Cited in In re Will of Spinks, 7 N.C. App. 417, 173 S.E.2d 1 (1970).

ARTICLE 2.

Revocation of Will.

§ 31-5.1. Revocation of written will.

Defacing, Cancellation or Obliteration Alone Insufficient to Show Revocation.—A paper writing duly executed as a last will and testament was not revoked, in whole

or in part, by defacing, cancellation, or obliteration, unless the testatrix defaced or obliterated the paper writing, or some portion or portions thereof with the intent thereby to revoke it in whole or in part. Defacement or obliteration, even though shown to be made by testatrix, is not, alone, sufficient to show revocation. In re Will of Hodgin, 10 N.C. App. 492, 179 S.E.2d 126 (1971).

Issue of Revocation Is for Jury.—Probate is an in rem action and the issue of revocation raised by caveat is for determination by the jury, and the court may not grant a motion for directed verdict. In re Will of Hodgin, 10 N.C. App. 492, 179 S.E.2d 126 (1971).

But the trial judge does have authority to set aside the verdict in his discretion when the verdict is against the greater weight of the evidence. In re Will of Hodgin, 10 N.C. App. 492, 179 S.E.2d 126 (1971).

Applied in Mansour v. Rabil, 277 N.C. 364, 177 S.E.2d 849 (1970).

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).

§ 31-5.8. Revival of revoked will.

Applied in In re Will of Farr, 7 N.C. App. 250, 172 S.E.2d 78 (1970); In re Will of Farr, 277 N.C. 86, 175 S.E.2d 578 (1970).

ARTICLE 4.

Depository for Wills.

§ 31-11. Depositories in offices of clerks of superior court where living persons may file wills.—The clerk of the superior court in each county of North Carolina shall be required to keep a receptacle or depository in which any person who desires to do so may file his or her will for safekeeping; and the clerk shall, upon written request of the testator, or the duly authorized agent or attorney for the testator, permit said will or testament to be withdrawn from said depository or receptacle at any time prior to the death of the testator: Provided, that the contents of said will shall not be made public or open to the inspection of anyone other than the testator or his duly authorized agent until such time as the said will shall be offered for probate. (1937, c. 435, s. 1; 1971, c. 528, s. 28.)

Editor's Note.—

The 1971 amendment, effective Oct. 1, 1971, deleted, near the middle of the section, a provision requiring the clerk to make a charge of fifty cents for the filing of a will.

ARTICLE 5.

Probate of Will.

§ 31-12. Executor may apply for probate; jurisdiction when clerk interested party.

Editor's Note.—

For note on the problem of after-discovered wills, see 47 N.C.L. Rev. 723 (1969).

Stated in In re Davis, 277 N.C. 134, 176 S.E.2d 825 (1970).

§ 31-13. Executor failing, beneficiary may apply.

"Persons Interested in the Estate". — It is obvious from this section that the classification of a "person interested in the estate" includes persons who are neither devisees nor legatees. It is broad enough to include even a person whose interest in the estate is in opposition to the will. In re Davis, 277 N.C. 134, 176 S.E.2d 825 (1970).

The designation of a person who exhibited a document for probate as "one of the executors therein named," though inaccurate, is not an affirmative showing that he was not a "person interested in the estate" and, therefore, does not show affirmatively that the document was presented for probate by a person not authorized by this section to do so. In re Davis, 277 N.C. 134, 176 S.E.2d 825 (1970).

Death of Only Executor Named in Will before Testator.—Where the only executor named in the will has died before the testator, this section does not require another person "interested in the estate" to wait sixty days before applying to the clerk for the probate of the will. In re Davis, 277 N.C. 134, 176 S.E.2d 825 (1970).

§ 31-15. Clerk may compel production of will.

Editor's Note.—For note on the problem of after-discovered wills, see 47 N.C.L. Rev. 723 (1969).

§ 31-17. Proof and examination in writing.

Editor's Note. — For comment on the necessity for proof of due execution of a will, see 3 Wake Forest Intra. L. Rev. 12 (1967).

§ 31-18.1. Manner of probate of attested written will.

Editor's Note.—

For comment on the necessity for proof of due execution of a will, see 3 Wake Forest Intra. L. Rev. 12 (1969).

Cited in Jones v. Warren, 274 N.C. 166, 161 S.E.2d 467 (1968).

§ 31-18.2. Manner of probate of holographic will.

Cited in Jones v. Warren, 274 N.C. 166, 161 S.E.2d 467 (1968); In re Will of Spinks, 7 N.C. App. 417, 173 S.E.2d 1 (1970).

§ 31-18.3. Manner of probate of nuncupative will.

Editor's Note.—

For note on the problem of after-discovered wills, see 47 N.C.L. Rev. 723 (1969).

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

This section is restricted, etc.—

In accord with original. See Jones v. Warren, 274 N.C. 166, 161 S.E.2d 467 (1968).

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).

Where the clerk of the superior court probates a will in common form and records it properly, the record and probate are conclusive as to the validity of the will until vacated on appeal or declared void by a competent tribunal. In re Will of Spinks, 7 N.C. App. 417, 173 S.E.2d 1 (1970).

Cannot Be Attacked Collaterally.—

Under this section, a will probated and recorded in accordance with the applicable statute may not be collaterally attacked. Jones v. Warren, 274 N.C. 166, 161 S.E.2d 467 (1968).

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).

Same—Muniment of Title.—

Under this section a will probated and recorded in accordance with the applicable statute constitutes a muniment of title. Jones v. Warren, 274 N.C. 176, 161 S.E.2d 467 (1968).

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).

The burden of proof on a motion to vacate a probate is on the movants to establish sufficient grounds to set aside the probate. In re Will of Spinks, 7 N.C. App. 417, 173 S.E.2d 1 (1970).

§ 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.

§ 31-31.1. Validation of probates of wills when witnesses examined before notary public; acts of deputy clerks validated.—Whenever any last will and testament has been probated, based upon the examination of the subscribing witness or the subscribing witnesses, taken before a notary public in the county in which the will is probated, or taken before a notary public of any other county, it is hereby in all respects validated and shall be sufficient to pass the title to all real and personal property purported to be transferred thereby.

All acts heretofore performed by deputy clerks of the superior court in taking acknowledgments, examining witnesses and probate of any wills, deeds and other instruments required or permitted by law to be recorded, are hereby validated. Nothing herein contained shall affect pending litigation. (1945, c. 822; 1973, c. 445.)

Editor's Note.—Session Laws 1973, c. 445, reenacted this section without change.

ARTICLE 6.

Caveat to Will.

§ 31-32. When and by whom caveat filed.—At the time of application for probate of any will, and the probate thereof in common form, or at any time within three years thereafter, any person entitled under such will, or interested in the estate, may appear in person or by attorney before the clerk of the superior court and enter a caveat to the probate of such will: Provided, that if any person entitled to file a caveat be within the age of 18 years, or insane, or imprisoned, then such person may file a caveat within three years after the removal of such disability.

Notwithstanding the provisions of the first paragraph of this section, as to persons not under disability, a caveat to the probate of a will probated in common form prior to May 1, 1951, must be filed within seven years of the date of probate or within three years from May 1, 1951, whichever period of time is shorter. (C. C. P., s. 446; Code, s. 2158; Rev., s. 3135; 1907, c. 862; C. S., s. 4158; 1925, c. 81; 1951, c. 496, ss. 1, 2; 1971, c. 1231, s. 1.)

Editor's Note.—

The 1971 amendment substituted "18" for "twenty-one" in the first paragraph.

For note on the problem of after-discovered wills, see 47 N.C.L. Rev. 723 (1969).

The purpose of a caveat is to determine whether the paper-writing purporting to be a will is in fact the last will and testament of the person for whom it is propounded. In re Will of Spinks, 7 N.C. App. 417, 173 S.E.2d 1 (1970).

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).

When Proceeding, etc.—

It is only by a caveat or proceeding in that nature that the validity of a properly probated will, and one without inherent or fatal defect appearing on its face, may be brought in question. In re Will of Spinks, 7 N.C. App. 417, 173 S.E.2d 1 (1970).

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).

A proceeding to contest a will is begun, etc.—

The filing of a caveat is the customary and statutory procedure for an attack upon the testamentary value of a paper-writing which has been admitted by the clerk of superior court to probate in common form. In re Will of Spinks, 7 N.C. App. 417, 173 S.E.2d 1 (1970).

Beneficiaries under Alleged, etc.—

Beneficiaries under a prior paper writing are persons interested within the purview of this section and are entitled to file a caveat to a subsequent instrument probated in common form, notwithstanding they are not heirs of the deceased and are not named as beneficiaries in the writing they seek to nullify. Sigmund Sternberger Foundation v. Tannenbaum, 273 N.C. 658, 161 S.E.2d 116 (1968).

§ 31-33. Bond given and cause transferred to trial docket.—When a caveator shall have given bond with surety approved by the clerk, in the sum of two hundred dollars ($200.00), payable to the propounder of the will, conditioned

upon the payment of all costs which shall be adjudged against such caveator in the superior court or when a caveator shall have deposited money or given a mortgage in lieu of such bond, or shall have filed affidavits and satisfied the clerk of his inability to give such bond or otherwise secure such costs, the clerk shall transfer the cause to the superior court for trial. Such caveator shall cause notice of the caveat proceeding to be given to all devisees, legatees, or other persons in interest in the manner provided for service of process by G.S. 1A-1, Rule 4(j) and (k). The notice shall advise such devisees, legatees, or other persons in interest, of the session of superior court to which the proceeding has been transferred and shall call upon them to appear and make themselves proper parties to the proceeding if they so choose. At the session of court to which such proceeding is transferred, or as soon thereafter as motion to that effect shall be made by the propounder, and before trial, the judge shall require any of the devisees, legatees or other persons in interest so cited, either those who make themselves parties with the caveators or whose interests appear to him antagonistic to that of the propounders of the will, to align themselves and to file bond within such time as he shall direct and before trial. Upon the failure of any party to file such bond, the judge shall dismiss that party from the proceeding but that party shall be bound by the proceeding. (C. C. P., s. 447; Code, s. 2159; 1899, c. 13; 1901, c. 748; Rev., s. 3136; 1909, c. 74; C. S., s. 4159; 1947, c. 781; 1971, c. 528, s. 29; 1973, c. 458.)

Editor's Note.—

The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term" in two places.

The 1973 amendment, effective Oct. 1, 1973, rewrote this section.

ARTICLE 7.

Construction of Will.

§ 31-38. Devise presumed to be in fee.

It Applies to Real and Personal Property.—

In accord with original. See YWCA v. Morgan, 281 N.C. 485, 189 S.E.2d 169 (1972).

Quoted in Olive v. Biggs, 276 N.C. 445, 173 S.E.2d 301 (1970).

§ 31-39. Probate necessary to pass title; recordation in county where land lies; rights of innocent purchasers.

Editor's Note.—For note on the problem of after-discovered wills, see 47 N.C.L. Rev. 723 (1969).

Devised property vests in devisee at time will is probated, subject to liens of deeds of trust. Cable v. Hardin Oil Co., 10 N.C. App. 569, 179 S.E.2d 829 (1971).

Hence, devisee owns equity of redemption in the property. Cable v. Hardin Oil Co., 10 N.C. App. 569, 179 S.E.2d 829 (1971).

Where, subsequent to the execution of the will, the property is subjected to the liens of various deeds of trust, these added encumbrances do not prevent the equity of redemption, which was retained by the testatrix, from passing under the will. Cable v. Hardin Oil Co., 10 N.C. App. 569, 179 S.E.2d 829 (1971).

Applied in Jones v. Warren, 274 N.C. 166, 161 S.E.2d 467 (1968).

§ 31-41. Will relates to death of testator.

Specific Bequest of Stock Did Not Include Accretion from Stock Split.—A specific bequest of common stock took effect as if the bequest were made immediately before the testator's death, and consequently the bequest did not include accretions resulting from a stock split occurring subsequent to the execution of the will and prior to testator's death. North Carolina Nat'l Bank v. Carpenter, 12 N.C. App. 19, 182 S.E.2d 3 (1971), aff'd, 280 N.C. 705, 187 S.E.2d 5 (1972).

Or Accretion from Recapitalization. — Where testator owned 900 shares of the stock of a corporation at the time he executed a will bequeathing 10 shares of the

stock to his employee, and, as a result of a recapitalization, the 900 shares were retired and 250,000 shares of new stock were issued to testator in lieu thereof prior to testator's death, the employee was entitled to receive under the will only 10 shares of the stock as it existed at testator's death without accretions resulting from the recapitalization. North Carolina Nat'l Bank v. Carpenter, 280 N.C. 705, 187 S.E.2d 5 (1972).

§ 31-42. Failure of devises and legacies by lapse or otherwise.

Legislative Intent. — The legislature did not intend that the issue of a devisee or legatee meeting the conditions of subsection (a) could be substituted for that devisee or legatee as to a specific devise or bequest and not allowed to be similarly substituted if the same devisee or legatee were named as one of the residuary devisees or legatees. Bear v. Bear, 3 N.C. App. 498, 165 S.E.2d 518 (1969).

Construction.—Subsection (a) of this section is designed and intended to prevent the lapse of a devise or bequest, whether it be specific or residuary, in a situation where the devisee or legatee, who would have taken had he survived the testator, predeceases testator survived by issue who survive the testator and who would have been heirs of testator had there been no will. If this situation does not exist, then the devise or legacy lapses and passes under the provisions of subsection (c) (1) under the residuary or by intestacy, if there be no residuary. If lapse of a residuary devise or legacy cannot be prevented by application of subsection (a), then under subsection (c) (2) it continues a part of the residue and passes to the other residuary legatees or devisees, if any. If none, it passes as if testator had died intestate with respect thereto. That this construction manifests the intent of the legislature is further evidenced by the clear language of the statute itself. Subsection (c) (2) is applicable, with respect to residuary devises or legacies, only where subsecton (a) is not applicable. It would follow, that if the legislature had intended to exclude residuary devises and legacies from the operation of subsection (a), it would have specifically limited the section to specific legacies and devises, omitted subdivision (2) from the provisions of subsection (c), and treated residuary devises and legacies in a separate provision of the statute unrelated to any other section. Bear v. Bear, 3 N.C. App. 498, 165 S.E.2d 518 (1969).

This section is applicable to wills of persons dying on or after 1 July 1965. Bear v. Bear, 3 N.C. App. 498, 165 S.E.2d 518 (1969).

Prior to the 1965 amendment, in a situation where testator gave the residue of his estate to A, B, and C and A predeceased testator leaving no issue entitled to the property under the anti-lapse statute, A's share would pass to the heirs of testator as intestate property. After the 1965 amendment the application thereof would result in A's share continuing as a part of the residue for division among the other residuary legatees and devisees. Bear v. Bear, 3 N.C. App. 498, 165 S.E.2d 518 (1969).

Subsection (a) applies to residuary devises or bequests. Bear v. Bear, 3 N.C. App. 498, 165 S.E.2d 518 (1969).

No particular mode of expression is necessary to constitute a residuary clause. The words "rest," "residue," or "remainder" are commonly used in the residuary clause, whose natural position is at the end of the disposing portion of the will; but all that is necessary is an adequate designation of what has not otherwise been disposed of, and the fact that a provision so operating is not called the residuary clause is immaterial. Barnacascel v. Spivey, 11 N.C. App. 269, 181 S.E.2d 151 (1971).

"Residuary Devisee".—Residuary devisee is defined as the person named in a will, who is to take all the real property remaining over and above the other devises. Bear v. Bear, 3 N.C. App. 498, 165 S.E.2d 518 (1969).

"Residuary Legatee".—Residuary legatee is defined as the person to whom a testator bequeaths the residue of his personal estate, after the payment of such other legacies as are specifically mentioned in the will. Bear v. Bear, 3 N.C. App. 498, 165 S.E.2d 518 (1969).

"The Other Residuary Devisees or Legatees, If Any".—This section, by use of the words "the other residuary devisees or legatees, if any," refers to those residuary devisees or legatees named in the will and not to "such issue of the devisee or legatee as survive testator" who may have been substituted under subsection (a) of this section. Bear v. Bear, 3 N.C. App. 498, 165 S.E.2d 518 (1969).

Applicability of Subsection (c) (2).—Subsection (c) (2) of this section is applicable only where there are other residuary devisees or legatees named in the will who survive the testator. Bear v. Bear, 3 N.C. App. 498, 165 S.E.2d 518 1969).

§ 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).

Divorce Does Not Annul or Revoke Designation of Insurance Beneficiary.—Neither § 50-11 which provides that "all rights arising out of the marriage shall cease and determine," nor this section which bars rights to "any rights or interests in the property of the other spouse" discloses a legislative intent that divorce should annul or revoke the beneficiary designation in a garden-variety insurance certificate. DeVane v. Travelers Ins. Co., 8 N.C. App. 247, 174 S.E.2d 146 (1970).

Cited in Imperial Tobacco Group Ltd. v. Peoples Bank & Trust Co., 7 N.C. App. 202, 171 S.E.2d 807 (1970).

ARTICLE 2.

Parents.

§ 31A-2. Acts barring rights of parents.

Parent Not Barred from Workman's Compensation Death Benefits.—This section, under certain conditions, bars a parent who has abandoned his child from all right to intestate succession in any part of the child's estate, but in the absence of a similar provision with reference to workmen's compensation death benefits, the Court of Appeals cannot judicially impose a forfeiture, no matter how unworthy the beneficiary. Smith v. Allied Exterminators, Inc., 11 N.C. App. 76, 180 S.E.2d 390 (1971).

Parent Does Not Share Death Benefits.—Where the father wilfully abandoned the care and maintenance of the deceased during the latter's minority, this section provides that the father loses all right to intestate succession in the distribution of the personal estate of his intestate deceased child and consequently, he does not share in the death benefits for which the employer or its carrier is liable under § 97-38. Smith v. Allied Exterminators, Inc., 279 N.C. 583, 184 S.E.2d 296 (1971).

ARTICLE 3.

Wilful and Unlawful Killing of Decedent.

§ 31A-3. Definitions.

Applied in Tew v. Durham Life Ins. Co., 1 N.C. App. 94, 160 S.E.2d 117 (1968).

§ 31A-4. Slayer barred from testate or intestate succession and other rights.

Estate of Decedent Determined at Date of Her Actual Death.—This section makes no attempt artificially to alter the date of the death of the decedent but provides instead that the actual date of death of the slayer is to be disregarded. Therefore, if the language of the statute is followed, the estate of the decedent is determined at the date of her actual death, and the law calls the roll of the class immediately as of that time; those who can then answer, take. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

This section provides in part that, for purposes of distributing the estate of the decedent, "the slayer shall be deemed to have died immediately prior to the death of the decedent." In view of this express statutory presumption, it is clear that the words "the estate of the wife" as the same are used in § 31A-5 (2) mean the estate of the murdered wife as the same comes

into existence at the instant of her death, and the title to the entireties property at that moment passes to those persons who would be entitled to succeed to her interest in such property as of the moment of her death if she had in fact survived her husband, subject only to his recognized right to "hold" the property during his lifetime. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

Wrongful Act Bars Husband from Share of Wrongful Death Recovery.—In an action by an administrator under the Wrongful Death Act where a husband caused the death of his wife, the award must be reduced by the statutory share of the wrongdoer. St. Paul Fire & Marine Ins. Co. v. Lack, 476 F.2d 583 (4th Cir. 1973).

This result is not precluded by this section, which excludes the wrongdoer from taking by declaring him to have constructively died prior to the deceased, since the slayer's exclusion by this section appears to apply only to inheritance from the decedent's "estate," while wrongful death awards have consistently been deemed not to pass through the personal estate of the deceased, but rather to arise out of a right of action belonging peculiarly to the personal representative for the benefit of the intestate successors. St. Paul Fire & Marine Ins. Co. v. Lack, 476 F.2d 583 (4th Cir. 1973).

§ 31A-5. Entirety property.

"Estate".—The word "estate" as used in this section means those persons, other than the slayer, who succeed to the rights of the decedent either by testate or intestate succession as the case may be. To accomplish the purpose of this section and consistent with the clear language of § 31A-4, the slayer cannot be included in this class. In cases in which the decedent has made testamentary disposition of the real property involved, this interpretation gives effect to the decedent's will. If there is no will, or if the decedent left a will but made no disposition therein of the real property involved, the decedent's "estate" consists of those persons who become entitled to succeed to the decedent's property under the intestate succession laws. In either event under § 31A-4 the slayer is not included. Porth v. Porth, 3 N. C. App. 485, 165 S.E.2d 508 (1969).

The correctness of the interpretation of the words "estate of the wife" in subdivision (2) as meaning the estate as it came into existence at the moment of her actual death, is strengthened by an examination of subdivision (1) of this section, which deals with the situation when the wife is the slayer. In such case the statute provides that "one half of the property shall pass upon the death of the husband to his estate, and the other one half shall be held by the wife, subject to pass upon her death to the estate of the husband." It is not reasonable to suppose that the legislature in subdivision (1) intended the word "estate" to have one meaning as to one half of the property and another meaning as to the other one half. Rather, it is more reasonable to suppose that the word "estate" as twice used in the same sentence was intended to have the same meaning, and that it refers to the estate of the deceased as such estate comes into existence at the moment of actual death. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

The language "he shall hold all of the property during his life" was employed by the legislature, not for the purpose of barring any alienation of the property until after the slayer-husband's death, but in order to recognize and preserve the husband's lifetime rights in the property. The legislature clearly intended that even the slayer-husband should not forfeit what was always recognized as his—the right to possession and income from the property for his lifetime. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

The words "shall hold," as used in this section were not intended to effect a complete restraint on alienation during the husband's lifetime. On the contrary, the word "hold," as used in the statute, is used in the same sense as when used in the habendum clause of a deed, Certainly the word "hold" as used in the habendum clause of a deed is never construed to place a restraint on alienation, and the very words used in this statute, "hold all of the property during his life subject to pass upon his death to the estate of the wife," if used in a deed, would not prevent the husband from selling his life interest in the property. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

The words "pass upon his death" refer exclusively to possession and enjoyment of the property and not to vesting in interest. In effect, the slayer-husband holds a life estate in the property with a vested remainder in the estate of his deceased wife, and the persons entitled to succeed to her estate are to be determined as of the actual date of her death, not as of the

subsequent date when the husband's life estate terminates upon his death. This interpretation is further supported by the express language of this chapter as well as by reference to the purposes to be achieved by the statute. Porth v, Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

"The Estate of the Wife."—Section 31A-4 provides in part that, for purposes of distributing the estate of the decedent, "the slayer shall be deemed to have died immediately prior to the death of the decedent." In view of this express statutory presumption, it is clear that the words "the estate of the wife" as the same are used in subdivision (2) mean the estate of the murdered wife as the same comes into existence at the instant of her death, and the title to the entireties property at that moment passes to those persons who would be entitled to succeed to her interest in such property as of the moment of her death if she had in fact survived her husband, subject only to his recognized right to "hold" the property during his lifetime. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

Section recognizes distinction in rights held by husband as compared with rights held by wife in entirety property by providing that the slayer-husband shall hold all of the property during his life subject to pass upon his death to the estate of the wife, whereas the slayer-wife is to hold only one half of the property during her lifetime subject to pass upon her death to the estate of the husband, while the other one half of the property in such case shall pass upon the death of the husband to his estate. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

The slayer-husband holds the interest of his deceased wife in the property as a trustee for her heirs at law. He should be perpetually enjoined from conveying the property in fee; the plaintiffs should be adjudged the sole owners, upon the decedent's death, of the entire property as the heirs of their deceased mother. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

Slayer-Husband Has Right to Lifetime Possession, Income and Usufruct. — In preserving the slayer-husband's right to hold all of the property during his life, subdivision (2) of this section recognizes his right to the lifetime possession, income, and usufruct, of the property, and thereby avoids the possibility that the statute might be considered unconstitutional as working a forfeiture of a vested property right for crime. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

Where husband and wife own real property as tenants by the entirety, the husband is solely entitled, to the exclusion of the wife, to the possession, income, and usufruct of such property during their joint lives. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

Estate of Decedent Determined at Date of Her Actual Death. — Section 31A-4 makes no attempt artificially to alter the date of the death of the decedent, but provides instead that the actual date of death of the slayer is to be disregarded. Therefore, if the language of the statute is followed, the estate of the decedent is determined at the date of her actual death, and the law calls the roll of the class immediately as of that time; those who can then answer, take. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

This section does not bar the alienation of the entire title to the property by joint conveyance of the slayer-husband and the heirs of the decedent. To so interpret the statute would run contrary to the established policy of North Carolina law, which is to prevent undue restraint upon or suspension of the right of alienation. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

The slayer-husband cannot convey more than his own interest in the entirety property and certainly no conveyance of his can work a detriment to the rights of the estate of his deceased wife. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

Where there is a bequest to one for life, and after his decease to the testator's next of kin, the next of kin who are to take are the persons who answer that description at the death of the testator, and not those who answer that description at the death of the first taker. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

§ 31A-6. Survivorship Property.

The slayer-husband should have only the income during his lifetime from his one-half share of a joint bank account, subject to the rights of his creditors, and at his death the principal should pass to the estate of his deceased wife. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

ARTICLE 4.

General Provisions.

§ 31A-13. Record determining slayer admissible in evidence.

Cited in Tew v. Durham Life Ins. Co., 1 N.C. App. 94, 160 S.E.2d 117 (1968).

Chapter 32.

Fiduciaries.

Article 3.

Powers of 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).

"Fiduciary Relationship". — A fiduciary relationship exists where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and in due regard to the one reposing confidence. Moore v. Bryson, 11 N.C. App. 260, 181 S.E.2d 113 (1971).

It is not necessary that there be a technical or legal relationship for a fiduciary relationship to exist. Moore v. Bryson, 11 N.C. App. 260, 181 S.E.2d 113 (1971).

If as an executor, as a cotenant or simply as an individual, a person undertook to manage and generally control a tract of land for the benefit of his coowners, causing them to repose special faith, confidence and trust in him to represent their best interest with respect to the property, he occupied a fiduciary relationship to them. Moore v. Bryson, 11 N.C. App. 260, 181 S.E.2d 113 (1971).

While a fiduciary relationship ordinarily does not arise between tenants in common from the simple fact of their cotenancy, such a relationship may be created by their conduct, as where one cotenant assumes to act for the benefit of his cotenants. Moore v. Bryson, 11 N.C. App. 260, 181 S.E.2d 113 (1971).

Fiduciaries must act in good faith. They can never paramount their personal interest over the interest of those for whom they have assumed to act. Moore v. Bryson, 11 N.C. App. 260, 181 S.E.2d 113 (1971).

Interests May Not Conflict.—A person occupying a place of trust and confidence may not place himself in a position where his own interest may conflict with the interest of those for whom he acts. Moore v. Bryson, 11 N.C. App. 260, 181 S.E.2d 113 (1971).

A fiduciary who acquires an outstanding title adverse to his cestuis que trustent is considered in equity as having acquired it for their benefit. Moore v. Bryson, 11 N.C. App. 260, 181 S.E.2d 113 (1971).

An executor acts in a fiduciary capacity. Moore v. Bryson, 11 N.C. App. 260, 181 S.E.2d 113 (1971).

ARTICLE 2.

Security Transfers.

§ 32-17. Evidence of appointment or incumbency. — A corporation or transfer agent making a transfer pursuant to an assignment by a fiduciary who is not the registered owner shall obtain the following evidence of appointment or incumbency:

(1) In the case of a fiduciary appointed or qualified by a court, a certificate issued by or under the direction or supervision of that court or an officer thereof and dated within 60 days before the transfer; or

(2) In any other case, a copy of a document showing the appointment or certificate issued by or on behalf of a person reasonably believed by the corporation or transfer agent to be responsible or, in the absence of such a document or certificate, other evidence reasonably deemed by the corporation or transfer agent to be appropriate. Corporations and transfer agents may adopt standards with respect to evidence of appointment or incumbency under this subdivision (2) provided

such standards are not manifestly unreasonable. Neither the corporation nor transfer agent is charged with notice of the contents of any document obtained pursuant to this subdivision (2) except to the extent that the contents relate directly to the appointment or incumbency. (1959, c. 1246, s. 4; 1971, c. 528, s. 30.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, corrected the spelling of the word "document" near the beginning of subdivision (2).

ARTICLE 3.

Powers of Fiduciaries.

§ 32-25. Definitions.

Editor's Note.—For note on "The North Carolina Fiduciary Powers Act and the Duty of Loyalty," see 45 N.C.L. Rev. 1141 (1967).

§ 32-27. Powers which may be incorporated by reference in trust instrument.—The following powers may be incorporated by reference as provided in G.S. 32-26:

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

(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.

(31) The foregoing powers shall be limited as follows for any trust which shall be classified as a "private foundation" as that term is defined by section 509 of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent federal tax laws (including each nonexempt charitable trust described in section 4947(a)(1) of the code which is treated as a private foundation) or nonexempt split-interest trust described in section 4947(a)(2) of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent federal tax laws (but only to the extent that section 508(e) of the code is applicable to such nonexempt split-interest trust under section 4947(a)(2)):

a. The fiduciary shall make distributions of such amounts, for each taxable year, at such time and in such manner as not to become subject to the tax imposed by section 4942 of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws.

b. No fiduciary shall engage in any act of self-dealing as defined in section 4941(d) of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws.

c. No fiduciary shall retain any excess business holdings as defined in section 4943(c) of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws.

d. No fiduciary shall make any investments in such manner as to subject the trust to tax under section 4944 of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws.

e. No fiduciary shall make any taxable expenditures as defined in section 4945(d) of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws. (1965, c. 628, s. 1; 1967, c. 24, s. 15; c. 956; 1971, c. 1136, s. 3.)

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).

Session Laws 1971, c. 1136, s. 3, added subdivision (31).

As the rest of the section was not changed by the amendments, only the opening paragraph and subdivisions (5), (29) and (31) are set out.

§ 32-28. Appointment of ancillary trustee. — In the event that any property in which a legal or beneficial interest is or may become a part of the assets of a trust whether by purchase, foreclosure, testamentary disposition, transfer inter vivos or in any other manner, in a state or states other than the State of North Carolina or in the District of Columbia or any possession of the United States, the North Carolina trustee is empowered to name an individual or corporate trustee qualified to act in any such other jurisdiction in connection with the property situated therein as ancillary trustee of such property and require such security as may be designated by the North Carolina trustee. The ancillary trustee so appointed shall have all rights, powers, discretions, responsibilities and duties as are delegated to it by the North Carolina trustee, within the limits of the authority possessed by the North Carolina trustee, but shall exercise and discharge the same subject to such limitations or directions of the North Carolina trustee as shall be specified in

the instrument evidencing the appointment. The ancillary trustee shall be answerable to the North Carolina trustee for all moneys, assets or other property entrusted to it or received by it in connection with the administration of the trust. The North Carolina trustee may remove such ancillary trustee and may or may not appoint a successor at any time or from time to time as to any or all of the assets. Provided, however, that if the ancillary trustee is to be appointed in any jurisdiction that requires any kind of procedure or judicial order for the appointment of such an ancillary trustee or to authorize it to act, the North Carolina trustee and the ancillary trustee must conform to all such requirements. (1973, c. 186.)

Chapter 33.

Guardian and Ward.

Article 8.

Estates without Guardian.

Article 12.

Gifts of Securities and Money to Minors.

ARTICLE 1.

Creation and Termination of Guardianship.

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

"Infant" As One under Age 18.—See opinion of Attorney General to Mr. Fred P. Parker, Jr., 41 N.C.A.G. 450 (1971).

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).

Quoted in In re Michal, 273 N.C. 504, 160 S.E.2d 495 (1968).

§ 33-2. Appointment by parents; effect; powers and duties of guardian.—Any father, though he be a minor, may, by his last will and testament in writing, if the mother be dead, dispose of the custody and tuition of any of his infant children, being unmarried, and whether born at his death or in ventre sa mere for such time as the children may remain under 18 years of age, or for any less time. Or in case the father is dead and has not exercised his said right of appointment, or has wilfully abandoned his wife, then the mother, whether of full age or minor, may do so. Every such appointment shall be good and effectual against any person claiming the custody and tuition of such child or children. Every guardian by will shall have the same powers and rights and be subject to the same liabilities and regulations as other guardians: Provided, however, that in the event it is so specifically directed in said will such guardian so appointed shall be permitted to qualify and serve without giving bond, unless the clerk of the superior court having jurisdiction of said guardianship shall find as a fact and adjudge that the interest of such minor or incompetent would be best served by requiring such guardian to give bond. (1762, c. 69; R. C., c. 54; 1868-9, c. 201; 1881, c. 64; Code, ss. 1562, 1563, 1564; Rev., ss. 1762, 1763, 1764; 1911, c. 120; C. S., s. 2151; Ex. Sess. 1920, c. 21; 1941, c. 26; 1945, c. 73, s. 20; 1947, c. 413, ss. 1, 2; 1971, c. 1231, s. 1.)

Editor's Note.—

The 1971 amendment substituted "18" for "twenty-one" in the first sentence.

§ 33-5. Appointment when father living.

Not Authority for Appointment of Guardian of Child for Purposes of School Assignment if Parents Living.—See opinion of Attorney General to Honorable Ben G. Floyd, Jr., Clerk of Superior Court, Robeson County, 41 N.C.A.G. 14 (1970).

§ 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).

Stated in In re Michal, 273 N.C. 504, 160 S.E.2d 495 (1968).

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).

§ 33-25. Guardians and other fiduciaries authorized to buy real estate foreclosed under mortgages executed to them.—On application of

the guardian or other fiduciary of any idiot, inebriate, lunatic, non compos mentis or any person incompetent from want of understanding to manage his own affairs for any cause or reason, or any minor or infant, or any other person for whom such guardian or fiduciary has been appointed, by petition, verified upon oath, to the superior court, showing that the purchase of real estate is necessary to avoid a loss to the said ward's estate by reason of the inadequacy of the amount bid at foreclosure sale under a mortgage or deed of trust securing the repayment of funds previously loaned the mortgagor by said guardian or other fiduciary, and that the interest of the ward would be materially promoted by said purchase, the proceeding shall be conducted as in other cases of special proceedings; and the truth of the matter alleged in the petition being ascertained by satisfactory proof, or by affidavit of three disinterested freeholders over 18 years of age who reside in the county in which said land lies, a decree may thereupon be made that said real estate be purchased by such person; but no purchase of real estate shall be made until approved by a judge of the superior court, nor shall the same be valid, nor any conveyance of the title made, unless confirmed and directed by a judge, and then only in compliance with the terms and conditions set out in said order and judgment. (1935, c. 156; 1971, c. 1231, s. 1.)

Editor's Note. — The 1971 amendment substituted "18" for "twenty-one" near the middle of the section.

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, or by guardian ad litem, next friend or commissioner of the court acting pursuant to this Article, 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, 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 June 1, 1973, no sales of property belonging to minors or incompetents prior to that date 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; 1973, c. 741.)

Editor's Note.—

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

The 1973 amendment, effective June 1, 1973, inserted, near the beginning of the first sentence, "or by guardian ad litem, next friend or commissioner of the court acting pursuant to this Article" and substituted, near the end of the first sentence, "June 1, 1973" for "January 1, 1968" and "that date" for "July 3, 1967."

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).

Order of Sale, etc.—

The power of a guardian to make disposition of his ward's estate is very carefully regulated, and the sale is not allowed except by order of court, which order must have the supervision, approval and confirmation of the resident judge of the district or the judge regularly holding the courts of the district. Pike v. Wachovia Bank & Trust Co., 274 N.C. 1, 161 S.E.2d 453 (1968).

No Liability on Implied Warranty of Authority.—A guardian who contracts to convey the property of his ward is not liable on an implied warranty of authority. Pike v. Wachovia Bank & Trust Co., 274 N.C. 1, 161 S.E.2d 453 (1968).

§ 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), commented on in 46 N.C.L. Rev. 687 (1968).

ARTICLE 5.

Returns and Accounting.

§ 33-39. Annual accounts.

Opinions of Attorney General.—Honorable Lanie M. Hayes, Clerk of Superior Court, Warren County, 40 N.C.A.G. 32 (1969).

§ 33-41. Final account.

Opinions of Attorney General.—Honorable Lanie M. Hayes, Clerk of Superior Court, Warren County, 40 N.C.A.G. 32 (1969).

Coming of Age Occurs at Age 18.—See opinion of Attorney General to Mr. Fred P. Parker, Jr., 41 N.C.A.G. 450 (1971).

§ 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).

§ 33-42.1. Guardian to exhibit investments and bank statements.— At the time the accounts required by this Article and other provisions of law are filed, the clerk of the superior court shall require the guardian to exhibit to the court all investments and bank statements showing cash balance, and the clerk of the superior court shall certify on the original account that an examination was made of all investments and the cash balance, and that the same are correctly stated in the account: Provided, such examination may be made by the clerk of the superior court of the county in which such guardian resides or the county in

which such securities are located and, when the guardian is a duly authorized bank or trust company, such examination may be made by the clerk of the superior court of the county in which such bank or trust company has its principal office or in which such securities are located; the certificate of the clerk of the superior court of such county shall be accepted by the clerk of the superior court of any county in which such guardian is required to file an account; provided that banks, organized under the laws of North Carolina or the Acts of Congress, engaged in doing a trust and fiduciary business in this State, when acting as guardian, or in other fiduciary capacity, shall be exempt from the requirements of this section, when a certificate executed by a trust examiner employed by a governmental unit, by a bank's internal auditors who are responsible only to the bank's board of directors or by an independent certified public accountant who is responsibile only to the bank's board of directors is exhibited to the clerk of the superior court and when said certificate shows that the securities are held by the fiduciary or by a clearing corporation for the fiduciary and when said certificate shows that the securities held by or for the fiduciary have been examined within one year. (1947, c. 596; 1961, cc. 292, 1066; 1973, c. 497, s. 5.)

Editor's Note. — The 1973 amendment inserted, near the end of the section, "by a bank's internal auditors who are responsible only to the bank's board of directors or by an independent certified public accountant who is responsible only to the bank's board of directors" and "that the securities are held by the fiduciary or by a clearing corporation for the fiduciary and when said certificate shows." The amendment also inserted "or for" preceding "the fiduciary," the last time the phrase appears in the section.

ARTICLE 8.

Estates without Guardian.

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

ARTICLE 12.

Gifts of Securities and Money to Minors.

§ 33-68. Definitions.—In this Article, unless the context otherwise requires:

(1) An "adult" is a person who has attained the age of 18 years.

(2) A "bank" is a bank, savings and loan association, building and loan association, federal savings and loan association, trust company, national banking association, savings bank, industrial bank, and State and federally chartered credit unions whose deposits are insured by either Federal Share Insurance or the North Carolina Savings Guaranty Corporation.

(12) A "minor" is a person who has not attained the age of 18 years.

(1971, c. 1231, s. 1; 1973, c. 145.)

Editor's Note.—

The 1971 amendment substituted "18" for "twenty-one" in subdivisions (1) and (12).

The 1973 amendment added to subdivision (2) the language beginning "and State and federally chartered credit unions."

As the rest of the section was not changed by the amendments, only the introductory language and subdivisions (1), (2) and (12) are set out.

§ 33-69.1. Gifts by will. — (a) Subject to the provisions of this section, any person authorized by G.S. 31-1 to make a will may make a gift by will of a security, money, or life insurance to a person who is a minor at the time the will takes effect.

(b) The will must contain an expressed intention of the donor to make a gift to a minor named therein pursuant to the North Carolina Uniform Gifts to Mi-

nors Act and must, by appropriate reference, incorporate in said will all of the provisions of the North Carolina Uniform Gifts to Minors Act as they exist at the time of the signing of the will by donor.

(c) The custodian must be designated in donor's will and must be an adult member of the minor's family, a guardian of the minor, an attorney-at-law, or a trust company. An alternate custodian may be named in the will to serve in the event the custodian first named predeceases the testator or refuses to accept the appointment as custodian. If the donor designates an ineligible person as custodian, or if the person designated renounces, resigns, becomes incapacitated, dies, or for any other reason fails to act or ceases to serve as custodian before the minor attains the age of 21 years, the guardian of the minor shall be successor custodian. If the minor has no guardian, the successor custodian shall be appointed by the court upon its own motion or upon petition as provided in G.S. 33-74. A successor custodian shall have all the rights, powers, duties and immunities of a custodian designated in a manner prescribed in this Article.

(d) The custodian shall give bond to secure the amount by which the fair market value of any gift made by one donor exceeds ten thousand dollars ($10.-000.00) per donee. Gifts other than money shall be valued in accordance with the values as finally determined for federal estate tax purposes for the estate of donor or, if no federal estate tax return is filed for donor's estate, in accordance with the values as finally determined for North Carolina inheritance tax purposes for the estate of donor, or if no such determination is made, the fair market value at the date of the donor's death. The valuation so made shall be conclusive for purposes of this subsection.

(e) If the donor by will attempts to make a gift pursuant to this section to a donee who is not a minor at the time the gift takes effect, the gift shall not be void but shall take effect as to the full amount of the gift. The personal representative of the donor's estate shall cause the subject of the gift to be delivered to the donee as in the case of other legacies or bequests.

(f) (1) If the subject of the gift is a security in registered form, the personal representative of donor's estate shall cause the security to be registered in the name of the custodian designated in donor's will or in the name of a successor custodian, followed, in substance, by the words: "as custodian for ..... under the North Caro-
(name of minor)
lina Uniform Gifts to Minors Act."

(2) If the subject of the gift is a security not in registered form, the personal representative of donor's estate shall cause the subject of the gift to be delivered to the person designated as custodian in donor's will or to a successor custodian, accompanied by a statement of gift in the following form, in substance, signed by the personal representative of donor's estate and the person designated as custodian or who is serving as successor custodian:

GIFT UNDER THE NORTH CAROLINA UNIFORM GIFTS TO MINORS ACT

I, ..., personal representative of the estate of
(name of personal representative)
....., deceased, hereby deliver to ..... as
(name of custodian)
custodian for ....., under the North Carolina Uni-
(name of minor)
form Gifts to Minors Act, the following security(ies):

(Insert an appropriate description of the security or securities delivered sufficient to identify it or them).

Dated this ..... day of ....., 19.....

.....

(signature of personal representative of donor's estate)

..... hereby acknowledges receipt of the above

(name of custodian)

described security(ies) as custodian for the above minor under the North Carolina Uniform Gifts to Minors Act.

Dated this ..... day of ....., 19.....

.....

(signature of custodian or successor custodian)

(3) If the subject of the gift is money, the personal representative of donor's estate shall pay or deliver it to the custodian designated in donor's will or to a successor custodian accompanied by a statement of gift, in the following form, signed by the personal representative of donor's estate and the person designated as custodian or who is serving as successor custodian:

GIFT UNDER THE NORTH CAROLINA UNIFORM GIFTS TO MINORS ACT

I, ..., personal representative of the

(name of personal representative)

estate of ....., deceased, hereby deliver to .....

(name of custodian)

..... as custodian for ....., under the

(name of minor)

North Carolina Uniform Gifts to Minors Act, the sum of $.....

Dated this ..... day of ....., 19.....

.....

(signature of personal representative of donor's estate)

..... hereby acknowledges receipt of the sum of

(name of custodian)

$..... as custodian for the above minor under the North Carolina Uniform Gifts to Minors Act.

Dated this ..... day of ....., 19.....

.....

(signature of custodian or successor custodian)

(4) If the subject of the gift is life insurance, the personal representative of donor's estate shall cause the ownership of the policy to be registered in the name of the person designated in donor's will as custodian or in the name of the successor custodian, followed, in substance, by the words: "as custodian for ..... under the North

(name of minor)

Carolina Uniform Gifts to Minors Act," and such policy of life insurance shall be delivered to the person in whose name it is thus registered as custodian or successor custodian.

(g) The personal representative of donor's estate shall promptly do all things within his power to put the subject of the gift in the possession and control of

the custodian designated in donor's will, but neither the failure of said personal representative to comply with this subsection, nor the designation of an ineligible person as custodian nor renunciation by the person designated as custodian shall affect the consummation of the gift.

(h) The receipt of the custodian or successor custodian for the subject of the gift shall constitute a full acquittance of the donor's personal representative with respect to the property so delivered.

(i) A will may contain any number of gifts under the provisions of this section, but any one gift may be made to only one minor and only one person may be custodian of that gift. For the purposes of this section, all gifts to a single donee by a single donor shall be to the same custodian and shall be treated as a single gift.

(j) The custodian or successor custodian shall not be deemed to be a testamentary trustee, but shall hold, manage, administer, and dispose of the custodial property pursuant to the provisions of this Article. (1971, c. 247, s. 1; c. 844.)

Editor's Note.—Section 3, c. 247, Session Laws 1971, makes the act effective Oct. 1, 1971.

The 1971 amendment, effective Oct. 1, 1971, added the second sentence of subsection (c).

Under § 33-68 (1) and (12), the age of majority has been changed from 21 to 18.

§ 33-70. Effect of gift.

Statute Determines Terms of Transfer.—By appointing himself as custodian the donor is deemed to have adopted the provisions of the Uniform Gifts to Minors Act as the terms of his conveyance and transfer. Korschun v. Clayton, 13 N.C. App. 273, 185 S.E.2d 417 (1971).

Gift Is Transfer.—A gift made under the provisions of the Uniform Gifts to Minors Act is a "transfer" within the meaning of § 105-2. Korschun v. Clayton, 13 N.C. App. 273, 185 S.E.2d 417 (1971).

Custodianship Similar to Trusteeship.—Though the purpose of the enactment of the Uniform Gifts to Minors Act was to avoid the necessity of a complex trust agreement, the result is the same whether a donor transfers property to himself as custodian and retains powers by statute, or whether a settlor names himself as trustee of stocks and money for his minor children in an irrevocable trust in which the rights of the children are vested, but settlor reserves the right to terminate it and deliver the assets of the trust to the children. Korschun v. Clayton, 13 N.C. App. 273, 185 S.E.2d 417 (1971).

Self-Appointed Custodian of Minor Subject to Inheritance Tax. — The value of property which is the subject of a gift to the donor's unemancipated minor child under the Uniform Gifts to Minors Act is includable in the gross estate of the donor for State inheritance tax purposes where the donor appoints himself as custodian of the property and dies while serving in that capacity before the minor donee attains his majority. Korschun v. Clayton, 13 N.C. App. 273, 185 S.E.2d 417 (1971).

Whether or Not He Exercised Reserved Rights.—Where the donor makes the gift to himself as custodian under the Uniform Gifts to Minors Act and dies prior to the donee's reaching age 21, the determinative factors requiring inclusion of the value of a gift in decedent donor's taxable estate are the rights reserved to the donor. These rights existed at the time of the transfer, and continued to be possessed by donor until the time of his death. Whether the rights are ever exercised is of no consequence. Korschun v. Clayton, 13 N.C. App. 273, 185 S.E.2d 417 (1971).

Tax Avoided by Appointment of Third Person as Custodian.—If a parent donor wishes to avoid inheritance tax on a transfer under the Uniform Gifts to Minors Act he need only choose as custodian one of those persons or corporations allowed by the Act other than himself. Korschun v. Clayton, 13 N.C. App. 273, 185 S.E.2d 417 (1971).

§ 33-71. Duties and powers of custodian.

(b) The custodian shall pay over to the minor for expenditure by him, or expend for the minor's benefit, so much of or all the custodial property as the custodian deems advisable for the support, maintenance, education and benefit of the minor in the manner, at the time or times, and to the extent that the custodian in his discretion deems suitable and proper, with or without court order, with or without regard to the duty of himself or of any other person to

support the minor or his ability to do so, and with or without regard to any other income or property of the minor which may be applicable or available for any such purpose.

(d) To the extent that the custodial property is not so expended, the custodian shall deliver or pay it over to the minor on his attaining the age of 18 years or, if the minor dies before attaining the age of 18 years, he shall thereupon deliver or pay it over to the estate of the minor.

(1971, c. 1231, s. 1.)

Editor's Note.—

The 1971 amendment substituted "18" for "twenty-one" twice in subsection (d).

Subsection (b) is set out in this Supplement to correct a typographical error appearing in the replacement volume.

As the rest of the section was not changed by the amendment or subject to correction, only subsections (b) and (d) are set out.

Stated in Korschun v. Clayton, 13 N.C. App. 273, 185 S.E.2d 417 (1971).

§ 33-74. Resignation, death or removal of custodian; bond; appointment of successor custodian.

(d) If the person designated as custodian is not eligible, renounces or dies before the minor attains the age of 18 years, the guardian of the minor shall be successor custodian. If the minor has no guardian, a donor, his legal representative, the legal representative of the custodian, an adult member of the minor's family, or the minor, if he has attained the age of 14 years, may petition the court for the designation of a successor custodian.

(1971, c. 1231, s. 1.)

Editor's Note. — The 1971 amendment substituted "18" for "twenty-one" in the first sentence of subsection (d).

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

§ 33-75. Accounting by custodian.

Stated in Korschun v. Clayton, 13 N.C. App. 273, 185 S.E.2d 417 (1971).

§ 33-76. Construction.

(b) This Article provides an alternative method for making inter vivos or testamentary gifts to minors and shall not be construed as providing an exclusive method. (1959, c. 1166, s. 1 ; 1971, c. 247, s. 1.1.)

Editor's Note.—The 1971 amendment, effective Oct. 1, 1971, inserted "provides an alternative method for making inter vivos or testamentary gifts to minors and" in subsection (b).

As subsection (a) was not affected by the amendment, it is not set out.

Chapter 34.

Veterans' Guardianship Act.

§ 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 officer verifying the accounts, there shall be added a certificate of another officer of the bank certifying that all assets referred to in the account are held by the guardian or by a clearing corporation for 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 15 days nor more than 30 days from the date of filing such objections, and notice shall be given by the court to the aforesaid Bureau office and the Department of Military and Veterans Affairs by mail not less than 15 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; 1973, c. 497, s. 6; c. 620, s. 9.)

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.

The first 1973 amendment substituted, near the end of the first sentence of the second paragraph, "officer verifying the accounts" for "officers verifying the account" and "another officer" for "other officers" and added, at the end of that sentence, "or by a clearing corporation for the guardian."

The second 1973 amendment, effective July 1, 1973, substituted "Department of Military and Veterans Affairs" for "North Carolina Department of Veterans Affairs."

§ 34-12. Compensation at five percent; additional compensation; premiums on bonds.—Compensation payable to guardians shall not exceed five percent (5%) 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 Department of Military and Veterans Affairs in the manner provided in G.S. 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; 1973, c. 620, s. 9.)

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.

The 1973 amendment, effective July 1, 1973, substituted "Department of Military and Veterans Affairs" for "North Carolina Department of Veterans Affairs."

§ 34-13. Investment of funds.—Every guardian shall invest the funds of the estate in any of the following securities:

(1) United States government bonds.

(2) State of North Carolina bonds issued since the year 1872.

(3) By loaning the same upon real estate securities in which the guardian has no interest, such loans not to exceed fifty percent (50%) of the actual appraised or assessed value, whichever may be lower, and said loans when made to be evidenced by a note, or notes, or bond, or bonds, under seal of the borrower and secured by first mortgage or first deed of trust. Said guardian before making such investment on real estate mortgages shall secure a certificate of title from some reputable attorney certifying that the same is the first lien on real estate and also setting forth the tax valuation thereof for the current year: Provided, said guardian may purchase with said funds a home or farm for the sole use of said ward or his dependents upon petition and order of the clerk of superior court, said order to be approved by the resident or presiding judge of the superior court, and provided further that copy of said petition shall be forwarded to said Bureau before consideration thereof by said court. 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 Department of Military and Veterans Affairs by mail not less than 15 days prior to the date fixed for the hearing.

(4) By investing the funds of the estate in a savings account, or savings share account, or optional savings share account, or stock of any federal savings and loan association organized under the laws of the United States and located in the State of North Carolina or of any building or savings and loan association organized and licensed under the laws of this State, to the extent that such investment is insured by the Federal Savings and Loan Insurance Corporation.

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

It shall be the duty of guardians who shall have funds invested other than as provided for in this section to liquidate same within one year from the passage of this law: Provided, however, that upon the approval of the judge of the superior court, either residing in or presiding over the courts of the district, the clerk of the superior court may authorize the guardian to extend from time to time, the time for sale or collection of any such investments; that no extension shall be made to cover a period of more than one year from the time the extension is made.

The clerk of the superior court of any county in the State or any guardian who shall violate any of the provisions of this section shall be guilty of a misdemeanor, punishable by fine or imprisonment or both in the discretion of the court. (1929, c. 33, s. 13; 1933, c. 262, s. 2; 1957, c. 199; 1959, c. 1015, s. 1; 1967, c. 564, ss. 3, 4; 1973, c. 620, s. 9.)

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).

The 1973 amendment, effective July 1, 1973, substituted "Department of Military and Veterans Affairs" for "North Carolina Department of Veterans Affairs."

§ 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 Department of Military and Veterans Affairs in the manner provided in G.S. 34-10. (1929, c. 33, s. 14; 1945, c. 723, s. 2; 1961, c. 396, s. 3; 1967, c. 564, s. 5; 1973, c. 620, s. 9.)

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.

The 1973 amendment, effective July 1, 1973, substituted "Department of Military and Veterans Affairs" for "North Carolina Department of Veterans Affairs."

§ 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 Department of Military and 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 Department of Military and Veterans Affairs with a certified copy of such record. (1929, c. 33, s. 15; 1945, c. 723, s. 2; 1967, c. 564, s. 5; 1973, c. 620, s. 9.)

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.

The 1973 amendment, effective July 1, 1973, substituted "Department of Military and Veterans Affairs" for "North Carolina Department of Veterans Affairs."

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. — Any person, in behalf of one who is deemed a mental defective, inebriate, or mentally disordered, or incompetent from want of understanding to manage his own affairs by reason of the excessive use of intoxicating drinks, or other cause, may file a petition before the clerk of the superior court of the county where such supposed mental defective, inebriate or mentally disordered person resides, setting forth the facts, duly verified by the oath of the petitioner; whereupon such clerk shall issue an order, upon notice to the supposed mental defective, inebriate or mentally disordered person, to the sheriff of the county, commanding him to summon a jury of 12 men to inquire into the state of such supposed mental defective, inebriate or mentally disordered person. Upon the return of the sheriff summoning said jury, the clerk of the superior court shall swear and organize said jury and shall preside over said hearing, and the jury shall make return of their proceedings under their hand to the clerk, who shall file and record the same; and he shall proceed to appoint a guardian of any person so found to be a mental defective, inebriate, mentally disordered, or incompetent person by inquisition of a jury, as in cases of orphans.

Either the applicant or the supposed mental defective, inebriate, mentally disordered, or incompetent person may appeal from the finding of said jury to the next session of the superior court, when the matters at issue shall be regularly tried de novo before a jury, and pending such appeal, the clerk of the superior court shall not appoint a guardian for the said supposed mental defective, inebriate, mentally disordered, or incompetent person, but the resident judge of the district, or the judge presiding in the district, may in his discretion appoint a temporary receiver for the alleged incompetent pending the appeal. The trial of said appeal in the superior court shall have precedence over all other causes.

The jury shall make return of their proceedings under their hands to the clerk, who shall file and record the same; and he shall proceed to appoint a guardian of any person so found to be a mental defective, inebriate, mentally disordered or incompetent person by inquisition of a jury as in cases of orphans. If the person so adjudged incompetent shall be an inebriate within the definition of G.S. 35-1, the clerk shall proceed to commit said inebriate to the department for inebriates at the State Hospital at Raleigh for treatment and cure. He shall forward to the superintendent of said State Hospital a copy of the record required herein to be made, together with the commitment, and these shall constitute the authority to said superintendent to receive and care for such said inebriate. The expenses of

the care and cure of said inebriate shall constitute a charge against the estate in the care of his guardian. If, however, such estate is not large enough to pay such expenses the same shall be a valid charge against the county from which said inebriate is sent. Provided, where the person is found to be incompetent from want of understanding to manage his affairs, by reason of physical and mental weakness on account of old age and/or disease and/or other like infirmities, the clerk may appoint a trustee instead of guardian for said person. The trustee or guardian appointed shall be vested with all the powers of a guardian administering an estate for any person and shall be subject to all the laws governing the administration of estates of minors and incompetents. The clerks of the superior courts who have heretofore appointed guardians for persons described in this proviso are hereby authorized and empowered to change said appointment from guardian to trustee. The sheriffs of the several counties to whom a process is directed under the provisions of this section shall serve the same without demanding their fees in advance. And the juries of the several counties upon whom a process is served under the provisions of this section shall serve and make their returns without demanding their fees in advance. (C. C. P., s. 473; Code, s. 1670; Rev., s. 1890; 1919, c. 54; C. S., s. 2285; 1921, c. 156, s. 1; 1929, c. 203, s. 1; 1933, c. 192; 1945, c. 952, s. 3; 1951, c. 777; 1971, c. 528, s. 31.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term" in the first sentence of the second paragraph.

For note on requirement of notice for appointment of guardians ad litem and next friends, see 48 N.C.L. Rev. 92 (1969).

There is no completely satisfactory definition of the phrase "incompetent from want of understanding to manage his own affairs." Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

Incompetency to administer one's property obviously depends upon the general frame and habit of mind, and not upon specific actions, such as may be reflected by eccentricities, prejudices, or the holding of particular beliefs. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

The word "affairs" encompasses a person's entire property and business, not just one transaction or one piece of property to which he may have a unique attachment. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

Test.—Under this section, if a person's mental condition is such that he is incapable of transacting the ordinary business involved in taking care of his property, if he is incapable of exercising rational judgment and weighing the consequences of his acts upon himself, his family, his property and estate, he is incompetent to manage his affairs. On the other hand, if he understands what is necessarily required for the management of his ordinary business affairs and is able to perform those acts with reasonable continuity, if he comprehends the effect of what he does, and can exercise his own will, he is not lacking in understanding within the meaning of the law, and he cannot be deprived of the control of his litigation or property. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

Mere weakness of mind will not be sufficient to put a person among those who are incompetent to manage their own affairs. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

Eccentricity, like profligacy, may coexist with the ability to manage one's property. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

An adult plaintiff who is not an idiot or lunatic must be non compos mentis before the court has jurisdiction to appoint a next friend for him. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

No Substantial Difference between Next Friend and Guardian Ad Litem.—Although technically a next friend represents a plaintiff and a guardian ad litem represents a defendant, there is no substantial difference between the two. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

The class of persons for whom next friends and guardians ad litem may be appointed are the same. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

To authorize the appointment of next friend or guardian ad litem, it is not enough to show that another might manage a man's property more wisely or efficiently than he himself. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

An inquisition is not always a condition

precedent for the appointment of a next friend or a guardian ad litem. In an emergency, when it is necessary, pendente lite, to safeguard the property of a person non compos mentis whose incompetency has not been adjudicated, the protection of the court may be invoked in his behalf by one acting as next friend. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

Neither a next friend nor a guardian ad litem has authority to receive money or administer the litigant's property. His powers are coterminous with the beginning and end of the litigation in which he is appointed. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

Notice and Opportunity to Be Heard. —When a party's lack of mental capacity is asserted and denied, and he has not previously been adjudicated incompetent to manage his affairs, he is entitled to notice and an opportunity to be heard before the judge can appoint either a next friend or a guardian ad litem for him. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

A person for whom a next friend or guardian ad litem is proposed is entitled to notice as in case of an inquisition of lunacy under this section. This statute does not specify the time but, by analogy to former § 1-581, ten days' notice would be appropriate unless the court, for good cause, should prescribe a shorter period. If, at the time appointed for the hearing, the party does not deny the allegation that he is incompetent, and the judge is satisfied that the application is made in good faith and that the party is non compos mentis, the judge may proceed to appoint a next friend to act for him. If, however, he asserts his competency, he is entitled to have the issue determined as provided in this section. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

Right to Traverse Inquisition. — From the earliest times the common law and the course of the legislation in common-law states has guarded sedulously the right of persons accused of incompetency of any kind to traverse the inquisition or other proceeding in the nature of one de lunatico inquirendo. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

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).

Quoted in In re Michal, 273 N.C. 504, 160 S.E.2d 495 (1968).

§ 35-2.1. Guardian appointed when issues answered by jury in any case.

Stated in Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

§ 35-3. Guardian appointed on certificate from hospital for insane or training school.

Editor's Note.—

For note on requirement of notice for appointment of guardians ad litem and next friends, see 48 N.C.L. Rev. 92 (1969).

Quoted in Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

§ 35-3.1. Ancillary guardian for insane or incompetent nonresident having real property in State.

Editor's Note.—

For note on requirement of notice for appointment of guardians ad litem and next friends, see 48 N.C.L. Rev. 92 (1969).

§ 35-4. Restoration to sanity or sobriety; effect; how determined; appeal. — When any insane person or inebriate becomes of sound mind and memory, or becomes competent to manage his property, he is authorized to manage, sell and control all his property in as full and ample a manner as he could do before he became insane or inebriate, and a petition in behalf of such person may be filed before the clerk of the superior court of the county of his resi-

dence; provided, however, that in all cases where a guardian has been appointed the cause of action shall be tried in the county where the guardianship is pending, and said guardian shall be made a party to such action before final determination thereof, setting forth the facts, duly verified by the oath of the petitioner (the petition may be filed by the person formerly adjudged to be insane, lunatic, inebriate or incompetent; or by any friend or relative of said person; or by the guardian of said person), whereupon the clerk shall issue an order, upon notice to the person alleged to be no longer insane or inebriate, to the sheriff of the county, commanding him to summon a jury of six freeholders to inquire into the sanity of the alleged sane person, formerly a lunatic, or the sobriety of such alleged restored person, formerly an inebriate. The jury shall make return of their proceedings under their hands to the clerk, who shall file and record the same, and if the jury find that the person whose mental or physical condition inquired of is sane and of sound mind and memory, or is no longer an inebriate, as the case may be, the said person is authorized to manage his affairs, make contracts and sell his property, both real and personal, as if he had never been insane or inebriate. The petitioner may appeal from the finding of said jury to the next session of the superior court, when the matters at issue shall be regularly tried de novo before a jury. (1879, c. 324, s. 4; Code, s. 1672; 1901, c. 191; 1903, c. 80; Rev., s. 1893; C. S., s. 2287; 1937, c. 311; 1941, c. 145; 1949, c. 124; 1955, c. 691; 1971, c. 528, s. 31.)

Editor's Note.— The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term" in the last sentence.

§ 35-4.1. Discharge of guardian by clerk on testimony of one or more practicing physicians.—When any person for whom a guardian has been appointed by reason of his commitment to and confinement in a State hospital or private hospital for mental cases or State school for the feebleminded shall have been discharged from that commitment by the hospital or school, he may petition, or in his behalf his natural or legal guardian or any interested responsible person may petition, the clerk of superior court of the county of his residence or the clerk of superior court of the county in which the guardian was appointed for the discharge of such guardian. The guardian shall be notified thereupon and made a party to such action, which shall be held in, or transferred to, if requested by the guardian, the county in which the guardian was appointed.

The clerk shall hold a hearing, which at the option of the petitioner may be without jury, and shall appoint one or more licensed physicians to examine the person in question and to make an affidavit as to his mental state and competency to conduct his business, make contracts and sell property. If the hearing is before a jury and the jury determines that such person is competent, or if the hearing is without a jury and the clerk determines that such person is competent on the basis of evidence presented by the interested parties and the medical affidavits, the clerk shall discharge the guardian, and the person shall be able to conduct his affairs and business, make contracts, and transfer property as if he never had been committed or declared incompetent. When any such determination by the jury or the clerk, in the absence of a jury, is adverse to the person in whose behalf such petition has been presented, such petitioner may appeal from the finding of said jury or clerk to the next session of the superior court, when the matters at issue shall be regularly tried de novo before a jury. (1947, c. 537, s. 22; 1949, c. 124; 1971, c. 528, s. 31.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term" in the last sentence of the second paragraph.

ARTICLE 4.

Mortgage of Sale of Estates Held by the Entireties.

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

Editor's Note.—

For note on tenancy by the entirety in real property during marriage, see 47 N.C.L. Rev. 963 (1969).

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

ARTICLE 5.

Surplus Income and Advancements.

§ 35-20. Advancement of surplus income to certain relatives. — When any nonsane person, of full age, and not having made a valid will, has children or grandchildren (such grandchildren being the issue of a deceased child), and is possessed of an estate, real or personal, whose annual income is more than sufficient abundantly and amply to support himself, and to support, maintain and educate the members of his family, with all the necessaries and suitable comforts of life, it is lawful for the clerk of the superior court for the county in which such person has his residence to order from time to time, and so often as may be judged expedient, that fit and proper advancements be made, out of the surplus of such income, to any such child, or grandchild, not being a member of his family and entitled to be supported, educated and maintained out of the estate of such person. Whenever any nonsane person of full age, not being married and not having issue, be possessed, or his guardian be possessed for him, of any estate, real or personal, or of an income which is more than sufficient amply to provide for such person, it shall be lawful for the clerk of the superior court for the county in which such person resided prior to insanity to order from time to time, and so often as he may deem expedient, that fit and proper advancements be made, out of the surplus of such estate or income, to his or her parents, brothers and sisters, or grandparents to whose support, prior to his insanity, he contributed in whole or in part. (R. C., c. 57, s. 9; Code, s. 1677; Rev., s. 1900; C. S., s. 2296; Ex. Sess. 1924, c. 93; 1971, c. 528, s. 32.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, corrected the spelling of the word "superior" in the second sentence.

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 social services, 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 feebleminded or mentally defective inmate, patient or noninstitutional individual. (1933, c. 224, s. 3; 1961, c. 186; 1967, c. 138, s. 3; 1969, c. 982.)

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 G.S. 35-36, the executive head of such institution or his duly authorized agent shall act as prosecutor of the case. The county director of social services may act as prosecutor or petitioner in instituting sterilization proceedings in the case of any feebleminded 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 social services 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 Commission. If the person to be operated upon is not an inmate of any such public institution, then the director of social services 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 G.S. 35-55. (1933, c. 224, s. 4; 1935, c.

463, s. 1; 1937, c. 243; 1961, c. 186; 1967, c. 138, s. 4; 1969, c. 982; 1973, c. 476, s. 133.3.)

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

The 1973 amendment, effective July 1, 1973, substituted "Eugenics Commission" for "Eugenics Board" in the first paragraph.

§ 35-40: Repealed by Session Laws 1973, c. 476, s. 133.3, effective July 1, 1973.

Cross Reference. — For present provisions as to the Eugenics Commission, see §§ 143B-151, 143B-152.

§ 35-40.1. Eugenics Commission authorized to accept gifts.

Editor's Note.—Session Laws 1973, c. 476, s. 133.3, effective July 1, 1973, amends this section by substituting "Eugenics Commission" for "Eugenics Board of North Carolina" and "Commission" for "Board."

§§ 35-41, 35-42: Repealed by Session Laws 1973, c. 476, s. 133.3, effective July 1, 1973.

§ 35-43. Proceedings before Eugenics Commission.

Editor's Note.—Session Laws 1973, c. 476, s. 133.3, effective July 1, 1973, amends this section by substituting "Commission" for "Board."

§ 35-44. Copy of petition served on patient.—(a) A copy of said petition, duly certified by the Secretary of Human Resources to be correct, must be served upon the inmate, patient or individual resident, together with a notice in writing signed by the Secretary of Human Resources designating the time and place not less than 20 days before the presentation of such petition to said Eugenics Commission when and where said Commission will hear and pass upon such petition. It shall be sufficient service if the copy of said petition and notice in writing be delivered to said inmate, patient or individual resident, and it shall not be necessary to read the above-mentioned document to said patient, inmate or individual resident.

(b) A copy of said petition, duly certified to be correct, and the said notice must also be served upon the legal or natural guardian or next of kin of the inmate, patient or individual resident.

(c) If there is no next of kin, or if next of kin cannot after due and diligent search be found, or if there be no known legal or natural guardian of said inmate, patient or individual resident and the said inmate, patient or individual resident is of such mental condition as not to be competent reasonably to conduct his own affairs, then the said prosecutor shall petition the clerk of the superior court or the resident judge of the district or the judge presiding at a session of superior court of the county in which the inmate, patient or individual resident resides, who shall appoint some suitable person to act as guardian ad litem of the said inmate, patient or individual resident during and for the purpose of proceeding under this Article, to defend the rights and interests of the said inmate, patient or individual resident. Any such guardian ad litem should be served likewise with a copy of the aforesaid petition and notice, and shall under all circumstances be given at least 20 days' notice of said hearing. Such guardian ad litem may be removed or discharged at any time by the said court or the judge thereof either in during a session of court or in vacation and a new guardian ad litem appointed and substituted in his place.

(d) If the said inmate, patient or individual resident be under 18 years of age and has a living parent or parents whose names and addresses are known or can by reasonable investigation be learned by said prosecutor, they or either of them, as the case may be, shall be served likewise with a copy of said petition and notice and shall be entitled to at least 20 days' notice of the said hearing: Provided, that the procedure described in this section shall not be necessary in the

case of any operation for sterilization or asexualization provided for in this Article if the parent, legal or natural guardian, or spouse or next of kin of the inmate, patient or noninstitutional individual shall submit to the superintendent of the institution of which the subject is a patient or inmate, or to the director of social services of the county in which this subject is residing, regardless of whether the subject is a legal resident of such county, a duly witnessed petition requesting that sterilization or asexualization be performed upon said inmate, patient or noninstitutional individual, provided the other provisions of this Article are complied with. Any operation authorized in accordance with this proviso may be performed immediately upon receipt of the authorization from the Eugenics Commission. (1933, c. 224, s. 9; 1935, c. 463, ss. 3, 6; 1947, c. 93; 1961, c. 186; 1969, c. 982; 1971, c. 528, s. 33; c. 1231, s. 1; 1973, c. 476, s. 133.3.)

Editor's Note.—The first 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term" near the middle of the first sentence and "during a session of court" for "term" in the last sentence of subsection (c).

The second 1971 amendment substituted "18" for "twenty-one" near the beginning of the first sentence of subsection (d).

The 1973 amendment, effective July 1, 1973, substituted "Secretary of Human Resources" for "secretary of the said Board," "Eugenics Commission" and "Commission" for "Board."

§ 35-45. Consideration of matter by Eugenics Commission.

Editor's Note. — Session Laws 1973, c. 476, s. 133.3, effective July 1, 1973, amends this section by substituting "Eugenics Commission" and "Commission" for "Board."

§ 35-46. Eugenics Commission may deny or approve petition.

Editor's Note.—Session Laws 1973, c. 476, s. 133.3, effective July 1, 1973, amends this section by substituting "Eugenics Commission" and "Commission" for "Board."

§ 35-47. Orders may be sent parties by registered mail; consenting to operation.

Editor's Note.—Session Laws 1973, c. 476, s. 133.3, effective July 1, 1973, amends this section by substituting "Eugenics Commission" for "Board."

§ 35-48. Right of appeal to superior court.—If it appears to the inmate, patient or individual resident, or to his or her representative, guardian, parent or next of kin, or to the solicitor, that the proceedings taken are not in accordance with the law, or that the reasons given for asexualization or sterilization are not adequate or well founded, or for any other reason the order is not legal, or is not legal as applied to this inmate, patient or individual resident, he or she may within 15 days from the date of such order have an appeal of right to the superior court of the county in which said inmate or patient resided prior to admission to the institution, or the county in which the noninstitutional individual resides. This appeal may be taken by giving notice in writing to any member of the Eugenics Commission and to the other parties to the proceeding, including the doctor who is designated to perform the said operation. Upon the giving of this notice the petitioner within 15 days thereafter shall cause a copy of the petition, notice, evidence and orders of the said Commission certified by any member thereof to be sent to the clerk of the said court, who shall file the same and docket the appeal to be heard and determined by the said court as soon thereafter as may be practicable.

The preceding judge of said superior court may hear the appeal upon affidavit or oral evidence and in determining such an appeal may consider the record of the proceedings before the Eugenics Commission, including the evidence therein appearing together with such other legal evidence as may be offered to the said judge by any party to the appeal. In hearing such an appeal the general public may be excluded and only such persons admitted thereto as have direct interest in the case.

Upon such appeal the said superior court may affirm, revise, or reverse the orders of the said Commission appealed from and may enter such order as it deems just and right and which it shall certify to the said Commission.

The pendency of such appeal shall automatically, and without more, stay proceedings under the order of the said Commission until the appeal be completely determined. Should the decision of the superior court uphold the plaintiff's objection, such decision unless appealed from will annul the order of the Commission to proceed with the operation, and the matter may not be brought up again until one year has elapsed except by the consent of the plaintiff or his next of kin, or his legal representatives. Should the court affirm the order of the Commission, then, if no notice of appeal to the appellate division is filed within 10 days after such decision, said Commission's recommendation as affirmed shall be put into effect at a time fixed by the original prosecutor or his successor in office and the inmate, patient or individual shall be asexualized or sterilized as provided in this article.

In this appeal the person for whom an order of asexualization or sterilization has been issued shall be designated as the plaintiff, and the prosecutor presenting the original petition shall be designated as defendant. (1933, c. 224, s. 13; 1935, c. 463, s. 4; 1969, c. 44, s. 44; 1973, c. 476, s. 133.3.)

Editor's Note.—The 1969 amendment substituted "appellate division" for "Supreme Court" in the last sentence of the fourth paragraph.

The 1973 amendment, effective July 1, 1973, substituted "Eugenics Commission" and "Commission" for "Board" and "Commission's" for "Board's."

§ 35-50. Appeal to appellate division.—Any party to such appeal to the superior court may, within 10 days after the date of the final order therein, apply for an appeal to the appellate division, which shall have jurisdiction to hear and determine the same upon the record of the proceedings in the superior court and to enter such order as it may find the superior court should have entered.

The pendency of an appeal in the appellate division shall operate as a stay of proceedings under any orders of the said Eugenics Commission and the superior court until the appeal be determined by the appellate division. (1933, c. 224, s. 15; 1969, c. 44, s. 45; 1973, c. 476, s. 133.3.)

Editor's Note.—The 1969 amendment substituted "appellate division" for "Supreme Court" three times in the section and deleted "said" which formerly preceded "Supreme Court" at the end of the section.

The 1973 amendment, effective July 1, 1973, substituted "Eugenics Commission" for "Board."

§ 35-53. Permanent records of proceedings before Eugenics Commission.

Editor's Note.—Session Laws 1973, c. 476, s. 133.3, effective July 1, 1973, amends this section by substituting "Secretary of Human Resources" for "Secretary of the said Eugenics Board."

§ 35-55. Discharge of patient from institution.

Editor's Note.—Session Laws 1973, c. 476, s. 133.3, effective July 1, 1973, amends this section by substituting "Commission" for "Board."

§ 35-57. Temporary admission to State hospitals for sterilization.—Any feebleminded or mentally diseased person, for whom the Eugenics Commission has authorized sterilization, may be admitted to the appropriate State hospital for the performance of such operation. The order of the Eugenics Commission 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 Commission 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; 1973, c. 476, s. 133.3.)

Editor's Note. — The 1967 amendment deleted "epileptic" following "feeble-minded" near the beginning of the section. The 1973 amendment, effective July 1, 1973, substituted "Eugenics Commission" for "Eugenics Board of North Carolina" and for "Eugenics Board."

ARTICLE 11.

Medical Advisory Council to State Board of Mental Health.

§§ 35-70 to 35-72: Repealed by Session Laws 1973, c. 476, s. 133, effective July 1, 1973.

ARTICLE 12.

Council on Mental Retardation and Developmental Disabilities.

§§ 35-73 to 35-77: Repealed by Session Laws 1973, c. 476, s. 170, effective July 1, 1973.

Chapter 36.

Trusts and Trustees.

ARTICLE 1.

Investment and Deposit of Trust Funds.

§ 36-1. Certain investments deemed cash.—Guardians, executors, administrators, and others acting in a fiduciary capacity, having surplus funds of their wards, estates and cestuis que trustent to loan, may invest in United States bonds, or any securities for which the United States are responsible, farm loan bonds issued by federal land banks, bonds, debentures, consolidated bonds or other obligations of any federal home loan bank or banks, or any notes, bonds, debentures, or similar type obligations, consolidated or otherwise, issued by any farm credit institution pursuant to authorities contained in the Farm Credit Act of 1971 (Public Law 92-181), as amended, or in bonds of the State of North Carolina issued since the year 1872; or in drainage bonds duly issued under the provisions of Article 8 of Chapter entitled Drainage; and in settlements by guardians, executors, administrators, trustees, and others acting in a fiduciary capacity, such bonds or other securities of the United States, and such bonds of the State of North Carolina, and such drainage bonds, shall be deemed cash to the amount actually paid for same, including the premium, if any, paid for such bonds or other securities, and may be paid as such by the transfer thereof to the persons entitled.

Guardians, executors, administrators and others acting in a fiduciary capacity may invest surplus funds belonging to their wards in a savings account or accounts in any federally insured bank in North Carolina or in a certificate or certificates of deposit issued by any federally insured bank in North Carolina. (1870-1, c. 197; Code, s. 1594; 1885, c. 389; Rev., s. 1792; 1917, c. 6, s. 9; c. 67, s. 1; c. 152, s. 7; c. 191, s. 1; c. 269, s. 5; C. S., s. 4018; 1959, c. 364, s. 2; c. 1015, s. 2; 1973, c. 239, s. 1.)

Editor's Note. — The 1973 amendment inserted in the first paragraph the provisions relating to obligations issued by farm credit institutions pursuant to the Farm Credit Act of 1971.

§ 36-3. Investment in building and loan and federal savings and loan associations.—Guardians, executors, administrators, clerks of the superior court and others acting in a fiduciary capacity may invest funds in their hands as such fiduciaries in stock of any building and loan association organized and licensed under the laws of this State: Provided, that no such funds may be so invested unless and until authorized by the Administrator of the Savings and Loan Division. Provided further, that such funds may be invested in stock of any federal savings and loan association organized under the laws of the United States, upon approval of an officer of the Home Loan Bank at Winston-Salem, or such other governmental agency as may hereafter have supervision of such associations.

The authorization of the Administrator of the Savings and Loan Division or an officer of the Home Loan Bank at Winston-Salem or other government agency having supervision will not be required to the extent that such funds are insured by the Federal Savings and Loan Insurance Corporation or by any mutual deposit guaranty association authorized by the Administrator of the Savings and Loan Division of North Carolina to do business in North Carolina pursuant to Article 7A of Chapter 54 of the General Statutes. (1933, c. 549, s. 1; 1937, c. 14; 1953, c. 620; 1969, c. 861; 1971, c. 864, s. 17.)

Editor's Note. — The 1969 amendment added at the end of the section the provision as to insurance by a mutual deposit guaranty association authorized to do business in North Carolina.

The 1971 amendment substituted "Administrator of the Savings and Loan Division" for "Commissioner of Insurance" in three places in this section.

By virtue of Session Laws 1943, c. 170, "Commissioner of Insurance" has been substituted for "Insurance Commissioner" in the first sentence of the section.

§ 36-4.1. Investment in life, endowment or annuity contracts of legal reserve life insurance companies.—(a) Executors, administrators c.t.a., trustees and guardians legally holding funds or assets belonging to, or for the benefit of, minors or others may, upon petition filed with the clerk of the superior court of the county in which said fiduciary has qualified, be authorized by an order of such clerk of the superior court and approved by either the resident judge or a judge of the superior court during a session of court, to invest such funds or assets, or part thereof, in single premium life, endowment or annuity contracts; any such fiduciaries may be authorized by order of the clerk of the superior court, upon approval by the judge as above provided, to invest the earnings, or part thereof, of such trust funds or assets, without encroaching upon the principal, in any annual premium life, endowment or annuity contracts of legal reserve life insurance companies duly licensed and qualified to transact business within the State: Provided, that where any such annual premium contract has been purchased as herein authorized any such fiduciary may, upon authorization of the clerk of the superior court and approval of the judge as above specified, encroach upon and use the principal of such trust funds or assets in order to pay subsequent premiums and thereby prevent a lapsation or forfeiture of any such insurance contract purchased pursuant to the provisions of this section.

(1971, c. 528, s. 34.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "during a session of court" for "at term time" near the middle of subsection (a).

As subsections (b) and (c) were not changed by the amendment, only subsection (a) is set out.

This section requires specific court approval as a condition precedent to the purchase of a single premium annuity by a trustee even from income. Greer v. United States, 448 F.2d 937 (4th Cir. 1971).

ARTICLE 3.

Resignation of Trustee.

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

Stated in In re Michal, 273 N.C. 504, 160 S.E.2d 495 (1968).

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

§ 36-14. On appeal judge determines facts. — Upon an appeal taken from the clerk to the judge, the judge shall have the power to review the findings of fact made by the clerk and to find the facts or to take other evidence, but the facts found by the judge shall be final and conclusive upon any appeal to the appellate division. (1911, c. 39, s. 5; C. S., s. 4028; 1969, c. 44, s. 46.)

Editor's Note.—The 1969 amendment substituted "appellate division" for "Supreme Court" at the end of the section.

§ 36-18.1. Appointment of successors to deceased or incapacitated trustees.

Cited in Beam v. Almond, 271 N.C. 509, 157 S.E.2d 215 (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.

§ 36-19. Trustees to file accounts; exceptions.

Cited in Greer v. United States, 448 F.2d 937 (4th Cir. 1971).

§ 36-20. Action for account; court to enforce trust.

Stated in Greer v. United States, 448 F.2d 937 (4th Cir. 1971).

Cited in YWCA v. Morgan, 281 N.C. 485, 189 S.E.2d 169 (1972).

§ 36-21. Not void for indefiniteness; title in trustee; vacancies.

The rule, etc.—

In accord with 1st paragraph in original. See Wachovia Bank & Trust Co. v. John Thomasson Constr. Co., 275 N.C. 399, 168 S.E.2d 358 (1969).

Equity Courts May Modify Terms of Charitable Trust.—Courts in the exercise of their equitable jurisdiction may modify the terms of a charitable trust when it appears that some exigency, contingency, or emergency not anticipated by the trustor has arisen requiring a disregard of a specific provision of the trust in order to preserve the trust estate or protect the cestuis. Wachovia Bank & Trust Co. v. John Thomasson Constr. Co., 275 N.C. 399, 168 S.E.2d 358 (1969.)

And May Order Real Property Sold and Reinvested.—In order to accomplish the ultimate purpose or intent of the trustor, the court may order real property sold and reinvested in other property when a change in circumstances makes such sale necessary to accomplish the purposes of the trust, even though the trust forbids the trustees to mortgage or sell the property. Wachovia Bank & Trust Co. v. John Thomasson Constr. Co., 275 N.C. 399, 168 S.E.2d 358 (1969).

Courts of equity have long exercised the jurisdiction to sell property devised for charitable uses, where, on account of changed conditions, the charity would fail or its usefulness would be materially impaired without a sale. Wachovia Bank & Trust Co. v. John Thomasson Constr. Co., 275 N.C. 399, 168 S.E.2d 358 (1969).

Restraints on Alienation of Property Are Not Void. — North Carolina has tacitly recognized the right of a donor to restrain alienation of property in charitable trusts since it recognizes the right of the court, in its equitable jurisdiction, to order the sale of trust property under certain conditions, even when the trust forbids the trustee to mortgage or sell. Wachovia Bank & Trust Co. v. John Thomasson Constr. Co., 275 N.C. 399, 168 S.E.2d 358 (1969).

Charitable trusts are exceptions to the rule that a restraint on alienation is void. Wachovia Bank & Trust Co. v. John Thomasson Constr. Co., 275 N.C. 399, 168 S.E.2d 358 (1969).

§ 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 devise 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.

(c) The words "impracticable of fulfillment," as used in this section shall include, but shall not be limited to, the failure of any trust for charity, testamentary

or inter vivos, (including, without limitation, trusts described in section 509 of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent federal tax laws and charitable remainder trusts described in section 664 of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent federal tax laws) to include, if required to do so by section 508(e) or section 4947(a) of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent federal tax laws, the provisions relating to governing instruments set forth in section 508(e) of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent federal tax laws. (1967, c. 119; 1971, c. 1136, s. 2.)

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

The 1971 amendment added subsection (c).

For comment on this section, see 46 N.C.L. Rev. 1020 (1968).

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; Wachovia Bank & Trust Co. v. Morgan, 279 N.C. 265, 182 S.E.2d 356 (1971).

Legislative Intent. — This section represents an obvious intent on the part of the legislature to invest the superior courts of this State with the power of cy pres. Wachovia Bank & Trust Co. v. Morgan, 9 N.C. App. 460, 176 S.E.2d 860 (1970).

Prior Law.—Before the passage of this section, the Supreme Court often held that the doctrine of cy pres did not obtain in this State. Wachovia Bank & Trust Co. v. Morgan, 9 N.C. App. 460, 176 S.E.2d 860 (1970).

Before 1 October 1967 North Carolina rejected the cy pres doctrine as such, while upholding modification of charitable trust provisions under the court's general equitable power to supervise trust administration. Wachovia Bank & Trust Co. v. Morgan, 279 N.C. 265, 182 S.E.2d 356 (1971).

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.

This section expressly gives the courts the power to apply the cy pres doctrine to charitable trusts. YWCA v. Morgan, 281 N.C. 485, 189 S.E.2d 169 (1972).

"Cy pres".—Cy pres, meaning "as near as possible," is the doctrine that equity will, when a charity is originally or later becomes impossible, inexpedient, or impracticable of fulfillment, substitute another charitable object which is believed to approach the original purpose as closely as possible. Wachovia Bank & Trust Co. v. Morgan, 9 N.C. App. 460, 176 S.E.2d 860 (1970).

The cy pres doctrine is the rule which courts of equity use when a gift given for a particular charitable purpose cannot be applied according to the exact intention of the donor. In such cases, the court will direct that the gift be applied as nearly as possible in conformity with the original purpose and intent of the testator. Cy pres literally means "as near as possible." Wachovia Bank & Trust Co. v. Morgan, 279 N.C. 265, 182 S.E.2d 356 (1971).

"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.

A charity may be defined as a gift to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government. Wachovia Bank & Trust Co. v. Morgan, 9 N.C. App. 460, 176 S.E.2d 860 (1970).

"Charitable Trust".—A charitable trust has been defined as a fiduciary relationship with respect to property, arising as a result of a manifestation of an intent to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose. YWCA v. Morgan, 281 N.C. 485, 189 S.E.2d 169 (1972).

Generally, when a trust is created for any lawful purpose which promotes the well-being of mankind and does not contravene public policy, it is charitable in its purpose. YWCA v. Morgan, 281 N.C. 485, 189 S.E.2d 169 (1972).

Limitations on Use of Funds.—Property conveyed to a trustee for a charitable purpose is limited to the uses set forth in the terms of the trust, and that property conveyed to a charitable corporation, free of a trust, is limited to the purposes set forth in its corporate charter. YWCA v. Morgan, 281 N.C. 485, 189 S.E.2d 169 (1972).

Failure of method designed by trust for carrying out a general charitable purpose does not destroy the trust. Wachovia Bank & Trust Co. v. Morgan, 9 N.C. App. 460, 176 S.E.2d 860 (1970).

When a definite charity has been created, the failure of the particular mode in which it is to be effectuated does not destroy the trust. Wachovia Bank & Trust Co. v. Morgan, 9 N.C. App. 460, 176 S.E.2d 860 (1970).

Where the donation of property for a particular use has failed, that does not destroy a trust. Wachovia Bank & Trust Co. v. Morgan, 9 N.C. App. 460, 176 S.E.2d 860 (1970).

The substantial intention shall not depend on the insufficiency of the formal intention. Wachovia Bank & Trust Co. v. Morgan, 9 N.C. App. 460, 176 S.E.2d 860 (1970).

And the general intent of the testator must prevail over the particular mode prescribed. Wachovia Bank & Trust Co. v. Morgan, 9 N.C. App. 460, 176 S.E.2d 860 (1970).

Mode for Administering Trust Must Be Either Impossible or Impracticable. — In order for this section to apply, the evidence presented must establish that the mode directed by the settlor for administering the trust has become either impossible or impracticable for the reasons asserted in the petition, or because of the facts found by the court. Wachovia Bank & Trust Co. v. Morgan, 9 N.C. App. 460, 176 S.E.2d 860 (1970).

Plenary Authority of Trial Court.— Where a trial court correctly finds that it is now impossible or impracticable to administer a charitable trust in the manner directed by the settlor's will, the trial court has plenary authority, both inherent and under this section, to order that the trust be administered as nearly as possible thereto so as to fulfill the general charitable intention of the settlor. Wachovia Bank & Trust Co. v. Morgan, 9 N.C. App. 460, 176 S.E.2d 860 (1970).

When there is a charitable trust, bequest, or devise evidencing a general charitable intent by the grantor, and the specific, express purpose cannot be fulfilled because of illegality, impossibility or impracticability, this section specifically empowers the court, in the absence of alternate disposition, to modify the trust so as to apply the fund to a purpose as nearly as possible like the originally expressed purpose. YWCA v. Morgan, 281 N.C. 485, 189 S.E.2d 169 (1972).

Where the trust provisions no longer serve the intended purpose of providing medical and hospital services to people who cannot afford to pay for such services, and where the will itself contains no alternative plan, the superior court may order an administration of the trust which would as nearly as possible fulfill the general charitable intention of the testatrix. Wachovia Bank & Trust Co. v. Morgan, 279 N.C. 265, 182 S.E.2d 356 (1971).

Equitable Jurisdiction to Supervise Administration of Fund.—Notwithstanding the impossibility of effectuating a particular method prescribed for carrying out the provisions of a trust, the court will exercise its equitable jurisdiction and supervise the administration of the fund so as to accomplish the purposes expressed in the will. Wachovia Bank & Trust Co. v. Morgan, 9 N.C. App. 460, 176 S.E.2d 860 (1970).

§ 36-23.3. Charitable trusts tax exempt status.—(a) Notwithstanding any provisions in the laws of this State or in the governing instrument to the contrary unless otherwise decreed by a court of competent jurisdiction (except as provided in subsection (b)), the governing instrument of each trust which is a private foundation described in section 509 of the Internal Revenue Code of 1954 (including each nonexempt charitable trust described in section 4947(a)(1) of the code which is treated as a private foundation) and the governing instrument of each nonexempt split-interest trust described in section 4947(a)(2) of the code (but only to the extent that section 508(e) of the code is applicable to such nonexempt split-interest trust under section 4947(a)(2) of the code) shall be deemed to contain the following provisions: "The trust shall make distributions at such time and in such manner as not to subject it to tax under section 4942 of the code; the trust shall not engage in any act of self-dealing which would subject it to tax under section 4941 of the code; the trust shall not retain any excess business holdings which would subject it to tax under section 4943 of the code; the trust shall not make any investments which would subject it to tax under section 4944 of the code; and the trust shall not make any taxable expenditures which would subject it to tax under section 4945 of the code." With respect to any such trust created prior to January 1, 1970, this subsection (a) shall apply only for its taxable years beginning on or after January 1, 1972.

(b) The trustee of any trust described in subsection (a) may, (i) without judicial proceedings, amend such trust to expressly exclude the application of subsection (a) by executing a written amendment to the trust and filing a duplicate original of such amendment with the Attorney General of the State of North Carolina, and upon filing of such amendment, subsection (a) shall not apply to such trust, or (ii) institute an action in the superior court of North Carolina seeking reformation of the trust instrument pursuant to the authority set forth in G.S. 36-23.2.

(c) All references in this section to the "code" are to the Internal Revenue Code of 1954, and all references in this section to specific sections of the code include corresponding provisions of any subsequent federal tax laws. (1971, c. 1136, s. 4.)

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).

§ 36-32. Trustees holding stock or other securities in name of nominee.—A trustee may hold shares of stock or other securities in the name of a nominee without mention of the trust in the instrument representing stock or

other securities or in registration records of the issuer hereof: Provided, that (i) the trust records and all reports or accounts rendered by the trustee clearly show the ownership of the stock or other securities by the trustee and the facts regarding its holdings, and (ii) the nominee shall not have possession of the stock or other securities or access thereto except under the immediate supervision of the trustee. The trustee shall be personally liable for any loss of the trust resulting from any act of such nominee in connection with stock or other securities so held. (1939, c. 197, s. 9; 1945, c. 292; 1973, c. 144.)

Editor's Note. — Session Laws 1973, c. 144, ratified April 9, 1973, and effective Oct. 1, 1973, rewrote this section. The principal change made by this amendment was to make the section applicable to all trustees rather than to banks only.

Session Laws 1973, c. 497, s. 1, ratified May 15, 1973, and effective on ratification, again rewrote the section, without incorporating the changes made by the first amendment. The principal change made by the second amendment was the addition of "or when such securities are deposited by the fiduciary in a clearing corporation as defined in G.S. 25-8-102(3)" at the end of subdivision (2).

The effect of the two 1973 acts upon each other is unclear, and the amended section is therefore set out twice; first, as it appears in Session Laws 1973, c. 144, and second, as it appears in Session Laws 1973, c. 497.

§ **36-32. Banks holding securities in name of nominee.**—A bank holding securities as fiduciary may hold them in the name of a nominee, without mention of the trust in the certificate or securities registration book. Provided, that

(1) The trust records and all reports or accounts rendered by the fiduciary clearly show the ownership of the securities by the fiduciary and the facts regarding its holdings;

(2) The nominee shall not have possession of the securities or access thereto except under the immediate supervision of the fiduciary or when such securities are deposited by the fiduciary in a clearing corporation as defined in G.S. 25-8-102(3).

The fiduciary shall personally be liable for any loss to the trust resulting from an act of such nominee in connection with such securities so held. (1939, c. 197, s. 9; 1945, c. 292; 1973, c. 497, s. 1.)

Editor's Note.—Session Laws 1973, c. 144, ratified April 9, 1973, and effective Oct. 1, 1973, rewrote this section. The principal change made by this amendment was to make the section applicable to all trustees rather than to banks only.

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The effect of the two 1973 acts upon each other is unclear, and the amended section is therefore set out twice; first, as it appears in Session Laws 1973, c. 144, and second, as it appears in Session Laws 1973, c. 497.

§ **36-32.1. Bank and trust company assets kept separate; records of securities.**—Every trust company shall keep its trust assets separate and distinct from assets owned by the bank. The books and accounts of the trust company shall at all times show the ownership of all moneys, funds, investments, and property held by the company. Stock or other securities may be kept by the company in either of the following ways:

(1) All certificates representing the securities of an account may be held separate from those of all other accounts; or

(2) Certificates representing securities of the same class of the same issuer held for particular accounts may be held in bulk without certification as to ownership attached and, to the extent feasible, certificates of small denomination may be merged into one or more certificates of larger denomination, provided that the trust company, when operating under

the method of safekeeping security certificates described in this subdivision shall be subject to such rules and regulations as, in the case of State-chartered institutions, the State Banking Commission and, in the case of national banking associations, the Comptroller of the Currency, may from time to time issue and, upon demand by any person to whom it has a duty to account, it shall certify in writing the securities held by it for an account. (1973, c. 497, s. 2.)

§ 36-35. Contracts of trustee.

Protection of Beneficiaries of Charitable Trusts. — The State as parens partriae, through its Attorney General, has the common-law right and power to protect the beneficiaries of charitable trusts and the property to which they are or may be entitled. Sigmund Sternberger Foundation v. Tannenbaum, 273 N.C. 658, 161 S.E.2d 116 (1968).

Enforcement of Gift or Trust.—Because of the public interest necessarily involved in a charitable trust or gift to charity and essential to its legal classification as a charity, it is generally recognized that the Attorney General, in his capacity as representative of the State and of the public, is the, or at least a, proper party to institute and maintain proceedings for the enforcement of such a gift or trust. Sigmund Sternberger Foundation v. Tannenbaum, 273 N.C. 658, 161 S.E.2d 116 (1968).

§ 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).

ARTICLE 7.

Life Insurance Trusts.

§ 36-53. Interest of trustee as beneficiary of policy sufficient to support inter vivos trust.

Formality of Will Not Necessary in Execution of Insurance Trust. — The mere fact that the proceeds are not payable until the death of the insured does not make a disposition testamentary. An insurance trust will be upheld even though it has not been executed with the formality necessary to constitute a will. Ballard v. Lance, 6 N.C. App. 24, 169 S.E.2d 199 (1969).

Chapter 37.

Allocation of Principal and Income.

ARTICLE 1.

Uniform Principal and Income Act.

§§ 37-1 to 37-15: Repealed by Session Laws 1973, c. 729, s. 3, effective January 1, 1974.

ARTICLE 2.

Principal and Income Act of 1973.

§ 37-16. Short title. — This Article may be cited as the Principal and Income Act of 1973. (1973, c. 729, s. 2.)

Editor's Note.—Session Laws 1973, c. 729, s. 4, makes the act effective Jan. 1, 1974.

§ 37-17. Definitions.—(a) As used in this Article:

(1) "Income beneficiary" means the person to whom income is presently payable or for whom it is accumulated for distribution as income.

(2) "Inventory value" means the cost of property purchased by the trustee and the market value of other property at the time it became subject to the trust, but in the case of a testamentary trust the trustee may use any value finally determined for the purposes of an estate or inheritance tax.

(3) "Personal representative" shall include executor, any successor executor, administrator of intestate estates, administrator c.t.a., successor administrator, collector, or any fiduciary appointed to administer or conserve an estate.

(4) "Remainderman" means the person entitled to principal, including income which has been accumulated and added to principal.

(5) "Trustee" means an original trustee and any successor or added trustee and, where applicable, the personal representative of a decedent's estate.

(6) "Trust" includes, where applicable, a decedent's estate whether testate or intestate.

(7) "Tax" includes any interest or penalty thereon except where such interest or penalty is separately provided for in this Article. (1973, c. 729, s. 2.)

§ 37-18. Duty of trustee or personal representative as to receipts and expenditures.—(a) A trust or a decedent's estate shall be administered with due regard to the respective interests of income beneficiaries and remaindermen. A trust or a decedent's estate is so administered with respect to the allocation of receipts and expenditures if a receipt is credited or an expenditure is charged to income or principal or partly to each:

(1) In accordance with the terms of the trust instrument or will, notwithstanding contrary provisions of this Article; or

(2) In the absence of any contrary terms of the trust instrument or will, in accordance with the provisions of this Article; or

(3) If neither of the preceding rules of administration is applicable, in accordance with what is reasonable and equitable in view of the interests of those entitled to income as well as of those entitled to principal, and in view of the manner in which men of ordinary prudence, discretion and judgment would act in the management of their own affairs.

(b) If the trust instrument or will gives the trustee or personal representative discretion in crediting a receipt or charging an expenditure to income or principal or partly to each, no inference of imprudence, partiality or abuse of discretion arises from the fact that the trustee or personal representative has made an allocation contrary to a provision of this Article. (1973, c. 729, s. 2.)

§ 37-19. Income; principal; charges. — (a) Income is the return in money or property derived from the use of principal, including return received as:

(1) Rent of real or personal property, including sums received for cancellation or renewal of a lease;

(2) Interest on money lent, including sums received as consideration for the privilege of prepayment of principal, except as provided in G.S. 37-23 with respect to bond premium;

(3) Income earned during administration of a decedent's estate as provided in G.S. 37-21;

(4) Corporate distributions as provided in G.S. 37-22;

(5) Accrued increment on bonds or other obligations issued at discount, as provided in G.S. 37-23;

(6) Receipts from business and farming operations, as provided in G.S. 37-27;

(7) Receipts from disposition of natural resources, as provided in G.S. 37-25 and G.S. 37-26, and receipts from other principal subject to depletion, as provided in G.S. 37-27; or

(8) Receipts from disposition of underproductive property as provided in G.S. 37-28.

(b) Principal is the property which has been set aside by the owner or the person legally empowered so that it is held to be delivered eventually to a remainderman while the return or use of the principal is in the meantime taken or received by or held for accumulation for an income beneficiary. Principal includes:

(1) Consideration received by the trustee or personal representative on the sale or other transfer of principal or on repayment of a loan or as a refund or replacement or change in the form of principal;

(2) Proceeds of property taken in eminent domain proceedings;

(3) Proceeds of insurance upon property forming part of the principal ex-

cept proceeds of insurance upon a separate interest of an income beneficiary;

(4) Certain stock dividends, receipts on liquidation of a corporation, and other corporate distributions, as provided in G.S. 37-22;

(5) Amortization of premium and certain receipts from the disposition of securities, as provided in G.S. 37-23;

(6) Royalties and other receipts from disposition of natural resources, as provided in G.S. 37-25 and G.S. 37-26, and receipts from other principal subject to depletion provided in G.S. 37-27;

(7) Any profit resulting from any change in the form of principal except as provided in G.S. 37-28 on underproductive property;

(8) Receipts from disposition of underproductive property as provided in G.S. 37-28; and

(9) Any allowances for depreciation established under G.S. 37-24 and G.S. 37-27.

(c) After determining income and principal in accordance with this Article, the trustee or personal representative shall charge expenses and other charges to income or principal as provided in G.S. 37-21 and G.S. 37-29 through G.S. 37-39. (1973, c. 729, s. 2.)

§ 37-20. When right to income arises; apportionment of income.— (a) An income beneficiary is entitled to income for the period beginning on the date specified in the trust instrument or will, or, if no date is specified, on the date an asset becomes subject to the trust or on the date of the decedent's death and ending on the date the income interest of the beneficiary terminates. In the case of an asset becoming subject to a trust by reason of a will, it becomes subject to the trust as of the date of the death of the testator even though there is an intervening period of administration of the testator's estate.

(b) In the administration of a decedent's estate or when an asset becomes subject to a trust by reason of a will:

(1) Receipts due but not paid at the date of death are principal; and

(2) Receipts in the form of periodic payments (other than corporate distributions to stockholders and receipts incident to the operation of a trade or business), including rent, interest or annuities, not due at the date of death shall be treated as accruing day to day. That portion of any receipt accruing before the date of death is principal, and the balance is income.

(c) On termination of an income interest, the income beneficiary whose interest is terminated, or his estate, is entitled to:

(1) Income undistributed on the date of termination;

(2) Income due but not paid to the trustee or personal representative on the date of termination; and

(3) Income in the form of periodic payments (other than corporate distributions to stockholders and receipts incident to the operation of a trade or business), including rent, interest, or annuities, not due on the date of termination, accrued, on a day-to-day basis, on or before the date of termination.

(d) In the administration of a decedent's estate or when an asset becomes subject to a trust, income defined in G.S. 37-24 for the period ending on the date of death or when the asset becomes subject to a trust is principal.

(e) Corporate distributions to stockholders shall be treated as due on the day fixed by the corporation for determination of stockholders of record entitled to distribution or, if no date is fixed, on the date of declaration of the distribution by the corporation.

(f) In all other cases any receipt from an income-producing asset is income as

of the date of receipt even though it was earned or accrued in whole or in part before or after such date. (1973, c. 729, s. 2.)

§ 37-21. Income earned and expenses incurred during administration of a decedent's estate.—(a) Unless the will otherwise provides or the court otherwise directs:

(1) All expenses incurred in connection with the administration and settlement of a decedent's estate (other than expenses of management and operation of the estate property), including debts, funeral and burial expenses, death taxes, penalties concerning death taxes, [and] family allowances, shall be charged against the principal of the estate; and

(2) Compensation of attorneys and personal representatives and court costs, to the extent they are incurred in the administration and settlement of a decedent's estate, shall be charged against the principal of the estate. All expenses incurred in the management and operation of the estate property shall be charged against principal or income of the estate in accordance with the rules applicable to a trustee under this Article.

(b) Unless the will otherwise provides, or the court otherwise directs, income from the assets of a decedent's estate after the death of the decedent and before distribution, including income from property used to discharge liabilities, shall be determined in accordance with the rules applicable to a trustee under this Chapter and distributed as follows:

(1) To specific legatees and devisees, the income from the property bequeathed or devised to them respectively, less taxes, ordinary repairs and other expenses of management and operation of the property, and appropriate portions of interest expense accrued since the death of the decedent and taxes imposed on income (excluding taxes chargeable against principal) which accrue during the period of administration;

(2) To all other legatees and devisees (except legatees of pecuniary bequests not in trust) and to all takers by intestacy, the balance of the income, less the balance of taxes, ordinary repairs and other expenses of management and operation of all property from which the estate is entitled to income, interest expense accrued since the death of the decedent and taxes imposed on income (excluding taxes chargeable against principal) which accrue during the period of administration, in proportion to their respective interests in the undistributed assets of the estate computed at times of distribution on the basis of inventory value.

(c) Income received under subsection (b) by a trustee shall be treated as income of the trust. (1973, c. 729, s. 2.)

§ 37-22. Corporate distributions. — (a) Except as otherwise provided in this section, corporate distributions of shares of the distributing corporation, including distributions in the form of a stock split or stock dividend, are principal. A right to subscribe to shares or other securities issued by the distributing corporation accruing to stockholders on account of their stock ownership and the proceeds of any sale of the right are principal.

(b) Except to the extent that the corporation indicates that some part of a corporate distribution is a settlement of preferred or guaranteed dividends accrued since the trustee or personal representative became a stockholder or is in lieu of an ordinary cash dividend, a corporate distribution is principal if the distribution is pursuant to:

(1) A call of shares;

(2) A merger, consolidation, reorganization, or other plan by which assets of the corporation are acquired by another corporation; or

(3) A total or partial liquidation of the corporation, including any distribution which the corporation indicates is a distribution in total or partial liquidation or any distribution of assets, other than cash, pursuant to a court decree or final administrative order by a government agency ordering distribution of the particular assets.

(c) Except as otherwise provided in this section, distributions made from ordinary income or from realized capital gains by a regulated investment company or by a trust qualifying and electing to be taxed under federal law as a real estate investment trust are income. All other distributions made by the company or trust, whether in the form of cash or an option to take new stock or cash or an option to purchase additional shares, are principal.

(d) Except as provided in subsections (a), (b), and (c), all corporate distributions are income, including cash dividends, distributions of or rights to subscribe to shares or securities or obligations of corporations other than the distributing corporation, and the proceeds of the rights or property distributions. In addition, in the following instances, a distribution is income notwithstanding that it is in shares of the distributing corporation:

(1) If the distribution is, at the election of any of the shareholders (whether exercised before or after the declaration thereof), payable either in the stock of the distributing corporation or in property;

(2) If the distribution (or a series of distributions of which such distribution is one) has the result of the receipt of property by some shareholders and an increase in the proportionate interests of other shareholders in the assets or earnings and profits of the distributing corporation;

(3) If the distribution (or a series of distributions of which such distribution is one) has the result of the receipt of preferred stock by some common shareholders and the receipt of common stock by other common shareholders; or

(4) If the distribution is with respect to preferred stock, other than an increase in the conversion ratio of convertible preferred stock made solely to take account of a stock dividend or stock split with respect to the stock into which such convertible stock is convertible.

(e) The trustee or personal representative may rely upon any statement of the distributing corporation as to any fact relevant under any provision of this section concerning the source or character of dividends or distributions of corporate assets. (1973, c. 729, s. 2.)

§ 37-23. Bond premium and discount.—(a) Bonds or other obligations for the payment of money are principal at their inventory value, except as provided in subsection (b) for discount bonds. No provision shall be made for amortization of bond premiums or for accumulation for discount. The proceeds of sale, redemption, or other disposition of the bonds or obligations are principal.

(b) The increment in value of a bond or other obligation for the payment of money payable at a future time in accordance with a fixed schedule of appreciation in excess of the price at which it was issued is distributable as income. The increment in value is distributable to the beneficiary who was the income beneficiary at the time of increment from the first principal cash available or, if none is available, when realized by sale, redemption, or other disposition. Whenever unrealized increment is distributed as income but out of principal, the principal shall be reimbursed for the increment when realized. (1973, c. 729, s. 2.)

§ 37-24. Business and farming operations.—(a) If a trustee or personal representative uses any part of the principal in the continuance of a business

of which the settlor or decedent was a sole proprietor or a partner, the net profits of the business, computed in accordance with generally accepted accounting principles for a comparable business, are income. If a loss results in any fiscal or calendar year, the loss falls on principal and shall not be carried into any other fiscal or calendar year for purposes of calculating net income.

(b) Generally accepted accounting principles shall be used to determine income from an agricultural or farming operation, including the raising of animals or the operation of a nursery. (1973, c. 729, s. 2.)

§ 37-25. Disposition of natural resources. — (a) If any part of the principal consists of a right to receive royalties, overriding or limiting royalties, working interests, production payments, net profit interests, or other interests in minerals or other natural resources in, on or under land, the receipts from taking the natural resources from the land shall be allocated as follows:

(1) If received as rent on a lease or extension payments on a lease, the receipts are income.

(2) If received from a production payment, the receipts are income to the extent of any factor for interest or its equivalent provided in the governing instrument. There shall be allocated to principal the fraction of the balance of the receipts which the unrecovered cost of the production payment bears to the balance owed on the production of payment, exclusive of any factor for interest or its equivalent. The receipts not allocated to principal are income.

(3) If received as a royalty, overriding or limited royalty, or bonus, or from a working, net profit, or any other interest in minerals or other natural resources, receipts not provided for in the preceding subdivisions of this section shall be apportioned on a yearly basis in accordance with this subdivision whether or not any natural resource was being taken from the land at the time the trust or decedent's estate came into existence. Fifty percent (50%) of the gross receipts attributable to the permanent severance of the natural resources (but not to exceed sixty-six and two-thirds percent (66⅔%) of the net receipts attributable to the permanent severance of the natural resources remaining after payment of all expenses, direct and indirect, computed without allowance for depletion) shall be added to principal as an allowance for depletion. The balance of the gross receipts, after provision therefrom for all expenses, direct and indirect, is income.

(b) If a trustee or personal representative, on January 1, 1974, held an item of depletable property of a type specified in this section, he shall allocate receipts from the property in the manner used before January 1, 1974, but as to all depletable property acquired after January 1, 1974 by an existing or new trust or decedent's estate, the method of allocation provided herein shall be used.

(c) This section does not apply to timber, water, soil, sod, dirt, turf, or mosses. (1973, c. 729, s. 2.)

§ 37-26. Timber.—If any part of the principal consists of land from which merchantable timber may be removed, the receipts from taking the timber from the land shall be allocated in accordance with G.S. 37-18(a)(3). (1973, c. 729, s. 2.)

§ 37-27. Other property subject to depletion.—Except as provided in G.S. 37-25 and G.S. 37-26, if the principal consists of tangible or intangible property subject to depletion, including leaseholds, patents, copyrights, royalty rights, and rights to receive payments on a contract for deferred compensation, or other intangible assets of a wasting nature, receipts from the property, not in excess of five percent (5%) per year of its inventory value or of its fair market value at the end of the particular fiscal or calendar year, whichever is greater, are income and the balance is principal. (1973, c. 729, s. 2.)

§ 37-28. Underproductive property.—(a) Except as otherwise provided in this section, a portion of the net proceeds of sale of any part of principal which part has not produced an average net income of at least one percent (1%) per year of its inventory value for more than a year (including as income the value of any beneficial use of the property by the income beneficiary) shall be treated as delayed income to which the income beneficiary is entitled as provided in this section. The net proceeds of sale are the gross proceeds received, including the value of any property received in substitution for the property disposed of, less the expenses, including capital gains tax, if any, incurred in disposition and less any carrying charges paid while the property was underproductive.

(b) The sum allocated as delayed income is the difference between the net proceeds and the amount which, had it been invested at simple interest at four percent (4%) per year while the property was underproductive, would have produced the net proceeds. This sum, plus any carrying charges and expenses previously charged against income while the property was underproductive, less any income received by the income beneficiary from the property and less the value of any beneficial use of the property by the income beneficiary, is income, and the balance is principal.

(c) Anything herein to the contrary notwithstanding:

(1) No amount shall be allocated as delayed income under this section on account of the sale of any underproductive part of principal from a trust, when the whole of such principal has produced an average net income of four percent (4%) per annum of its inventory value for each year that the trust principal included such underproductive part;

(2) The sum allocated as delayed income on account of the sale of the underproductive part of the trust principal shall not exceed that amount which is the difference between the actual average net income of the trust principal and that greater amount which would have been produced if the trust principal had yielded four percent (4%) per annum of its inventory value during the years in which the trust contained such underproductive part.

(d) An income beneficiary or his estate is entitled to delayed income under this section as if it accrued from day to day during the time he was a beneficiary.

(e) If principal subject to this section is disposed of by conversion into property which cannot be apportioned easily, including land or mortgages (for example, realty acquired by or in lieu of foreclosure), the income beneficiary is not, on account of such conversion, entitled to any allocation as delayed income under this section; however, the income beneficiary is entitled to the net income from any property or obligation into which the original principal is converted while the substituted property or obligation is held. (1973, c. 729, s. 2.)

§ 37-29. Expenses.—Expenses not included in G.S. 37-30 through G.S. 37-39 shall be charged against income if such expenses are ordinary expenses reasonably incurred in connection with the administration, management or preservation of the trust property; otherwise they shall be charged against principal. (1973, c. 729, s. 2.)

§ 37-30. Taxes.—(a) Regularly recurring taxes assessed against any portion of the principal and any tax levied on receipts defined as income under this Article or the trust instrument shall be charged against income.

(b) Any tax levied upon profits, gains or receipts allocated to principal shall be charged against principal notwithstanding denomination of the tax as an income tax by the taxing authority.

(c) If an estate or inheritance tax is levied in respect of a trust in which both an income beneficiary and a remainderman have an interest, any amount ap-

portioned to the trust shall be charged against principal even though the income beneficiary also has rights in the principal. (1973, c. 729, s. 2.)

§ **37-31. Compensation of trustee.**—(a) Unless the court otherwise directs, one half of the regular compensation of the trustee, whether based on a percentage of principal or income, shall be charged against income, and one half of such compensation shall be charged against principal.

(b) Unless the court otherwise directs, compensation of the trustee other than regular compensation shall be charged against income if the matter primarily concerns the income interest, shall be charged against principal if the matter primarily concerns principal and shall be charged one-half against each if the primary concern cannot readily be determined; provided that compensation computed on principal as an acceptance, distribution or termination fee shall be charged against principal. (1973, c. 729, s. 2.)

§ **37-32. Court costs and attorneys' fees.**—(a) Unless the court otherwise directs, one half of court costs and attorneys' fees on periodic judicial accountings shall be charged against income and one half shall be charged against principal.

(b) Unless the court otherwise directs, court costs, attorneys' fees and other expenses incurred in any judicial proceeding, other than periodic judicial accountings, shall be charged against income if the matter primarily concerns the income interest and shall be charged against principal if the matter primarily concerns principal and shall be charged one-half against each if the primary concern cannot readily be determined. (1973, c. 729, s. 2.)

§ **37-33. Management of principal and application of income.**—All expenses reasonably incurred for current management of principal and application of income shall be charged against income; except that the direct costs of investing and reinvesting principal shall be charged against principal. (1973, c. 729, s. 2.)

§ **37-34. Interest and payments on indebtedness.**—Interest paid by the trustee, including interest on death tax deficiencies, shall be charged against income. Payments on principal of an indebtedness (including a mortgage amortized by periodic payments of principal) shall be charged against principal. (1973, c. 729, s. 2.)

§ **37-35. Premiums on insurance.**—Premiums on insurance taken upon the interests of the income beneficiary, remainderman, or trustee shall be charged against income. (1973, c. 729, s. 2.)

§ **37-36. Repairs, improvements, and special assessments.**—(a) Ordinary repairs shall be charged against income.

(b) Expenses, other than ordinary repairs, in connection with the preparation of property for rental or sale, extraordinary repairs, expenditures for capital improvements to principal, and special assessments shall be charged against principal. (1973, c. 729, s. 2.)

§ **37-37. Depreciation.**—A reasonable allowance for depreciation of property subject to depreciation under generally accepted accounting principles shall be charged against income, but no allowance for depreciation shall be made for that portion of any real property used by a beneficiary as a residence and no allowance for depreciation need be made for any property held by the trustee on January 1, 1974 for which the trustee was not then required to make and was not then making an allowance for depreciation. (1973, c. 729, s. 2.)

§ **37-38. Spreading charges against income.**—If charges against income are of unusual amount, the trustee may by means of reserves or other reasonable means charge them over a reasonable period of time and withhold from distribution sufficient sums to regularize distributions. (1973, c. 729, s. 2.)

§ 37-39. Recurring charges; apportionment. — Regularly recurring charges payable from income shall be apportioned to the same extent and in the same manner that income is apportioned under G.S. 37-20. (1973, c. 729, s. 2.)

§ 37-40. Application of Article.—Except as specifically provided in the trust instrument or the will or in this Article, this Article shall apply to any receipt or expense received or incurred after January 1, 1974 by any trust or decedent's estate whether established before or after January 1, 1974 and whether the asset involved was acquired by the trustee before or after January 1, 1974. (1973, c. 729, s. 2.)

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).

Effect of Agreement, etc.—

A boundary line agreement executed by a plaintiff and a defendant is an effective plea in bar to the plaintiff's proceeding to establish the true boundary line between her property and the property of defendant, notwithstanding (1) the plaintiff failed to acknowledge her signature to the agreement before a notary public and (2) the plaintiff did not know where the line would be located on the ground at the time she signed the agreement. Smith v. Digh, 9 N.C. App. 678, 177 S.E.2d 321 (1970).

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); Vail v. Smith, 1 N.C. App. 498, 162 S.E.2d 78 (1968); Glen Forest Corp. v. Bensch, 9 N.C. App. 587, 176 S.E.2d 851 (1970).

§ 38-2. Occupation sufficient ownership.

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

§ 38-3. Procedure.—(a) Petition; Summons; Hearing.

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).

(b) Appeal to Session.—Either party may within 10 days after such determination by the clerk serve notice of appeal from the ruling of the clerk determining the said location. When notice of appeal is served it shall be the duty of the clerk to transmit the issues raised before him to the next session of the superior court of the county for trial by a jury, when the question shall be heard de novo.

(1971, c. 528, s. 35.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term" in the subcatchline and in the second sentence of subsection (b).

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

§ 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 fees, 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.

Better Practice Is to Order Survey.—While this section does not require the court to order a survey of the lands in dispute when the boundaries of lands are in question, it is the better practice to do so. Smothers v. Schlosser, 2 N.C. App. 272, 163 S.E.2d 127 (1968).

When Expenses of Surveys Are Taxable as Costs.—The expense of procuring surveys, maps, plans, photographs and documents are not taxable as costs unless there is clear statutory authority therefor or they have been ordered by the court. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

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. Fee presumed, though word "heirs" omitted.

Editor's Note.—

For case law survey as to real property, see 45 N.C.L. Rev. 964 (1967).

For article on "Doubt Reduction Through Conveyancing Reform — More Suggestions in the Quest for Clear Land Titles," see 46 N.C.L. Rev. 284 (1968).

Construction of Deed as Imposing Condition Subsequent Is Not Favored.—The law does not favor a construction of the language contained in a deed which would constitute a condition subsequent unless the intention of the parties to create such a restriction upon the title is clearly manifested. Mattox v. State, 280 N.C. 471, 186 S.E.2d 378 (1972).

A fee upon a condition subsequent is not created unless the grantor expressly reserves the right to reenter or provides for a forfeiture or for a reversion or that the instrument shall be null and void. Mattox v. State, 280 N.C. 471, 186 S.E.2d 378 (1972).

If a deed contains both the apt words to create a condition and an express clause of reentry, reverter, or forfeiture, an estate on condition subsequent is created. Mattox v. State, 280 N.C. 471, 186 S.E.2d 378 (1972).

Deed Held to Create Fee on Condition Subsequent.—The words used in a deed "upon condition however," then fully setting out the conditions, followed by a provision that "if and when" the grantee fails to carry out the specified conditions, "the said land shall revert to, and the title shall vest in the grantor, her heirs and assigns, with the same force and effect as if this deed had not been made, executed or delivered," were sufficient to show the grantor intended to create a fee on condition subsequent, and by this language did create such estate. Mattox v. State, 280 N.C. 471, 186 S.E.2d 378 (1972).

Determining Whether Grant Is of Easement Appurtenant or in Gross.—

In accord with original. See Gibbs v. Wright, 17 N.C. App. 495, 195 S.E.2d 40 (1973).

§ 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.

For comment on the rule in Shelley's case, see 4 Wake Forest Intra. L. Rev. 132 (1968).

§ 39-5. Official deed, when official selling or empowered to sell is not in office.—When a sheriff, coroner, or tax collector, in virtue of his office, sells any real or personal property and goes out of office before executing a proper deed therefor, he may execute the same after his term of office has expired; and

when he dies or removes from the State before executing the deed, his successor in office shall execute it. When a sheriff or tax collector dies having a tax list in his hands for collection, and his personal representative or surety, in collecting the taxes, makes sale according to law, his successor in office shall execute the conveyance for the property to the person entitled. (R. C., c. 37, s. 30; Code, s. 1267; 1891, c. 242; Rev., ss. 950, 951; C. S., s. 995; 1971, c. 528, s. 36.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, deleted "constable" following "coroner" near the beginning of the first sentence.

§ 39-6. Revocation of deeds of future interests made to persons not in esse.

Cited in Starling v. Taylor, 1 N.C. App. 287, 161 S.E.2d 204 (1968).

§ 39-6.3. Inter vivos and testamentary conveyances of future interests permitted.

Contingent interests are transmissible to executors, and are not lost by the death of the person before the event happens on which they are to vest in possession. Jernigan v. Lee, 279 N.C. 341, 182 S.E.2d 351 (1971).

Contingent interests, such as contingent remainders, springing uses, and executory devises may be sold, assigned, transmitted, or devised provided the identity of the persons who will take the estate upon the happening of the contingency be ascertained. Jernigan v. Lee, 279 N.C. 341, 182 S.E.2d 351 (1971).

Contingent interests may be assigned both in real and personal estate, and by any mode of conveyance by which they might be transferred had they been vested remainders. Jernigan v. Lee, 279 N.C. 341, 182 S.E.2d 351 (1971).

The interest in an executory devise or bequest is transmissible to the heir or executor of one dying before the happening of the contingency upon which it depends. Jernigan v. Lee, 279 N.C. 341, 182 S.E.2d 351 (1971).

Executory devises are not considered as mere possibilities, but as certain interests and estates. Jernigan v. Lee, 279 N.C. 341, 182 S.E.2d 351 (1971).

The grantee can take no greater estate than that possessed by his grantor. Jernigan v. Lee, 279 N.C. 341, 182 S.E.2d 351 (1971).

The grantee of a future interest takes it subject to the same conditions or contingencies imposed upon his grantor. Jernigan v. Lee, 279 N.C. 341, 182 S.E.2d 351 (1971).

Applied in Duplin County Bd. of Educ. v. Carr, 15 N.C. App. 690, 190 S.E.2d 653 (1972).

ARTICLE 2.

Conveyances by Husband and Wife.

§ 39-7. Instruments affecting married person's title; joinder of spouse; exceptions.

I. GENERAL CONSIDERATION.

Editor's Note.—

For comment on the enforceability of marital contracts, see 47 N.C.L. Rev. 815 (1969).

Quoted in Heller v. Heller, 7 N.C. App. 120, 171 S.E.2d 335 (1969).

§ 39-13.1. Validation of certain deeds, etc., executed by married women without private examination.—(a) No deed, contract, conveyance, leasehold or other instrument executed since the seventh day of November, one thousand nine hundred and forty-four, shall be declared invalid because of the failure to take the private examination of any married woman who was a party to such deed, contract, conveyance, leasehold or other instrument.

(b) Any deed, contract, conveyance, lease or other instrument executed prior to February 7, 1945, which is in all other respects regular except for the failure to take the private examination of a married woman who is a party to such deed, contract, conveyance, lease or other instrument is hereby validated and confirmed to the same extent as if such private examination had been taken, pro-

vided that this section shall not apply to any instruments now involved in any pending litigation. (1945, c. 73, s. 21½; 1969, c. 1008, s. 1.)

Editor's Note. — The 1969 amendment designated the former provisions of this section as subsection (a) and added subsection (b). Section 3 of the amendatory act provides that the act shall not affect pending litigation.

A contract between a husband and wife to make a joint will was void as to the wife because it was not executed by her in accordance with § 52-6, and its invalidity was not affected by the curative statutes, § 52-8 and this section, where both curative statutes were enacted after the rights of the parties under the contract vested upon the death of the husband, and the contract was not "in all other respects regular" except for the failure to privately examine the wife as required by the curative statutes. Mansour v. Rabil, 277 N.C. 364, 177 S.E.2d 849 (1970).

§ 39-13.2. Married persons under 18 made competent as to certain transactions; certain transactions validated.—(a) Any married person under 18 years of age is authorized and empowered and shall have the same privileges as are conferred upon married persons 18 years of age or older to:

(1) Waive, release or renounce by deed or other written instrument any right or interest which he or she may have in the real or personal property (tangible or intangible) of the other spouse; or

(2) Jointly execute with his or her spouse, if such spouse is 18 years of age or older, any note, contract of insurance, deed, deed of trust, mortgage, lien of whatever nature or other instrument with respect to real or personal property (tangible or intangible) held with such other spouse either as tenants by the entirety, joint tenants, tenants in common, or in any other manner.

(1971, c. 1231, s. 1.)

Editor's Note.—

The 1971 amendment, in subsection (a), substituted "18" for "twenty-one" in the introductory language and in subdivision (2).

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

Stated in Gastonia Personnel Corp. v. Rogers, 276 N.C. 279, 172 S.E.2d 19 (1970).

§ 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).

Quoted in Council v. Pitt, 272 N.C. 222, 158 S.E.2d 34 (1967).

§ 39-13.4. Conveyances by husband or wife under deed of separation.—Any conveyance of real property, or any interest therein, by the husband or wife who have previously executed a valid and lawful deed of separation which authorizes said husband or wife to convey real property or any interest therein without the consent and joinder of the other and which deed of separation or a memorandum of the deed of separation setting forth such authorization is recorded in the county where the land lies, shall be valid to pass such title as the husband or wife may have to his or her grantee, unless an instrument in writing canceling the deed of separation or memorandum thereof and properly executed and acknowledged by said husband and wife is recorded in the office of said register of deeds. The instrument which is registered under this section to authorize the conveyance of an interest in real property or the cancellation of the deed of separation or memorandum thereof shall comply with G.S. 52-6 with respect to a certificate of private examination of the wife. (1959, c. 512; 1973, c. 133.)

Editor's Note. — The 1973 amendment rewrote the first sentence and added the second sentence.

"Free Trader". — Characterization of a plaintiff as a "free trader" is, in effect, no more than a shorthand description of a woman's freedom to convey realty under this section. The term is derived from practice under old statutes before 1965 and is currently devoid of legal significance. Britt v. Smith, 6 N.C. App. 117, 169 S.E.2d 482 (1969).

§ 39-13.5. Creation of tenancy by entirety in partition of real property.—When either a husband or a wife owns an undivided interest in real property as a tenant in common with some person or persons other than his or her spouse and there occurs an actual partition of the property, a tenancy by the entirety may be created in the husband or wife who owned the undivided interest and his or her spouse in the manner hereinafter provided:

(1) In a division by cross-deed or deeds, between or among the tenants in common provided that the intent of the tenant in common to create a tenancy by the entirety with his or her spouse in this exchange of deeds must be clearly stated in the granting clause of the deed or deeds to such tenant and his or her spouse, and further provided that whenever the tenant in common is a married woman, the deed or deeds to such tenant and her spouse is signed by them and is acknowledged before a certifying officer who shall make a private examination of the married woman in accordance with G.S. 52-6; or

(2) In a judicial proceeding for partition. In such proceeding, both spouses have the right to become parties to the proceeding and to have their pleadings state that the intent of the tenant in common is to create a tenancy by the entirety with his or her spouse. The order of partition shall provide that the real property assigned to such tenant and his or her spouse shall be owned by them as tenants by the entirety; provided that whenever the tenant in common is a married woman, the pleading showing her intent to create a tenancy by the entirety is acknowledged before a certifying officer who shall make the private examination of the married woman in accordance with G.S. 52-6. (1969, c. 748, s. 1.)

Editor's Note. — Session Laws 1969, c. 748, s. 3, makes the act effective Oct. 1, 1969.

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).

Cited in Pilot Title Ins. Co. v. Northwestern Bank, 11 N.C. App. 444, 181 S.E.2d 799 (1971).

§ 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 con-

veyance 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 4.

Voluntary Organizations and Associations.

§ 39-24. Authority to acquire and hold real estate.

Stated in Goard v. Branscom, 15 N.C. App. 34, 189 S.E.2d 667 (1972).

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 2.

Condemnation Proceedings.

ARTICLE 1.

Right of Eminent Domain.

§ 40-1. Corporation in this chapter defined.

Editor's Note.—

For article on recent developments in North Carolina law of eminent domain, see 48 N.C.L. Rev. 767 (1970). 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). For note on expansion of definition of "taking" in eminent domain proceedings, see 47 N.C.L. Rev. 441 (1969).

Applied in City of Durham v. Eastern Realty Co., 270 N.C. 631, 155 S.E.2d 231 (1967); Housing Authority v. Farabee, 17 N.C. App. 431, 194 S.E.2d 553 (1973).

Cited in Public Serv. Co. v. Lovin, 9 N.C. App. 709, 177 S.E.2d 448 (1970).

§ 40-2. By whom right may be exercised. — The right of eminent domain may, under the provisions of this Chapter, be exercised for the purpose of constructing their roads, canals, pipelines originating in North Carolina for the transportation of petroleum products or coal, pipelines and mains originating in North Carolina for the transportation, distribution, or both, of gas, lines of wires, or other works, which are authorized by law and which involve a public use or benefit, by the bodies politic, corporation, or persons following:

(9) The Board of Transportation, for the purpose of acquiring such land or property as may be necessary for the erection of or additions to any building or buildings for the purpose of housing its offices, shops, garages, for storage of supplies, material or equipment, for housing, caring or providing for prisoners, or for any other purpose necessary in its work, including the administration of the State prison system.

(1973, c. 507, s. 5.)

I. GENERAL CONSIDERATION.

Editor's Note.—

The 1973 amendment, effective July 1, 1973, substituted "Board of Transportation" for "State Highway Commission" in subdivision (9).

As the rest of the section was not changed by the amendment, only the introductory paragraph and subdivision (9) are set out.

For article on recent developments in North Carolina law of eminent domain, see 48 N.C.L. Rev. 767 (1970). 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).

Applied in North Carolina State Hwy. Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972).

Stated in City of Kings Mountain v. Goforth, 283 N.C. 316, 196 S.E.2d 231 (1973).

Cited in Hughes v. North Carolina State Highway Comm'n, 2 N.C. App. 1, 162 S.E.2d 661 (1968).

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 High-

way 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).

The term "public purposes" is employed in the same sense in the law of taxation and in the law of eminent domain. Thus, if the General Assembly may authorize a State agency to expend public money for the purpose of aiding in the construction of a hospital facility to be leased to and ultimately conveyed to a private agency, it may also authorize the acquisition of a site for such facility by exercise of the power of eminent domain. Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973).

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).

III. EXTENT OF POWER.

Right of Selection As to Route, Quantity, etc., Is Largely Discretionary.—Where the general power to condemn exists, the right of selection as to route, quantity, etc., is left largely to the discretion of the company or corporation, and does not become the subject of judicial inquiry except on allegations of fact tending to show bad faith on the part of the company or corporation or an oppressive and manifest abuse of the discretion conferred upon them by the law. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971).

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).

Where a landowner has granted a right-of-way over his land, he must look to his contract for compensation, as it cannot be awarded to him in condemnation proceedings, provided the contract is valid, and all its conditions have been complied with by the grantee. Feldman v. Trans-continental Gas Pipe Line Corp., 9 N.C. App. 162, 175 S.E.2d 713 (1970).

§ 40-3. Right to enter on and purchase lands.

Opinions of Attorney General. — Mr. James R. Taylor, Executive Director, Statesville Housing Authority, 40 N.C.A.G. 314 (1969).

Applied in Duke Power Co. v. Hogan, 16 N.C. App. 622, 192 S.E.2d 657 (1972).

§ 40-5. Condemning land for industrial sidings. — Any railroad company doing business in this State, whether such railroad be a domestic or foreign corporation, which has been or shall be ordered by the Utilities Commission to construct an industrial siding as provided in § 62-232, is empowered to exercise the right of eminent domain for such purpose, to condemn property as provided in this chapter, and to acquire such right-of-way as may be necessary to carry out the orders of the Utilities Commission. Whenever it is necessary for any railroad company doing business in this State to cross the street or streets in a town or city in order to carry out the orders of the Utilities Commission, to construct an industrial siding, the power is hereby conferred upon such railroad

company to occupy such street or streets of any such town or city within the State: Provided, license so to do be first obtained from the board of aldermen, board of commissioners, or other governing authorities of such town or city. (1911, c. 203; C. S., s. 1709; 1933, c. 134, s. 8; 1941, c. 97, s. 1; 1969, c. 723, s. 1.)

Editor's Note. — The 1969 amendment, effective Sept. 15, 1969, substituted "§ 62-232" for "§ 62-45" near the beginning of the section.

Applied in North Carolina State Hwy. Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972).

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).

Cross Reference.—

As to application of this Article to condemnation by counties, see § 153A-159.

Applicability of Procedure under Article. —The procedure prescribed by this Article was applicable to condemnation proceedings instituted by the Board of Transportation prior to July 1, 1960. The procedure presently applicable to condemnation proceedings by the Board of Transportation is prescribed by § 136-103 et seq City of Kings Mountain v. Goforth, 283 N.C. 316, 196 S.E.2d 231 (1973).

Proceedings Instituted, etc.—

This section provides that before the right of eminent domain accrues to the condemnor thereunder, there must exist an inability to agree for the purchase price. This has been held to be a preliminary jurisdictional fact in eminent domain proceedings under this chapter. State Highway Comm'n v. Matthis, 2 N.C. App. 233, 163 S.E.2d 35 (1968).

Landowner may not maintain proceeding under this chapter unless there has been a taking under the power of eminent domain. Hughes v. North Carolina State Highway Comm'n, 275 N.C. 121, 165 S.E.2d 321 (1969).

When Condemnor Acquires Right to Possession. — A condemnor acquires no right to possession, in a condemnation proceeding under this article, until it pays into court the value of the subject property as determined by appraisers. City of Kings Mountain v. Goforth, 283 N.C. 316, 196 S.E.2d 231 (1973).

And Title. — A condemnor acquires no title to the property until it obtains a final judgment and pays to the landowner the amount of compensation fixed by such judgment. City of Kings Mountan v. Goforth, 283 N.C. 316, 196 S.E.2d 231 (1973).

Absent unusual circumstances, the landowner may continue to use his property from the commencement of a condemnation proceeding under this Article until the payment into court by the condemnor of the value of the property as determined by commissioners to the same extent and in the same manner in which he had been using it prior to the commencement of the condemnation proceeding. City of Kings Mountain v. Goforth, 283 N.C. 316, 196 S.E.2d 231 (1973).

Land Is Valued as of Date of Taking.— For the purpose of determining the sum to be paid as compensation for land taken under the right of eminent domain, the value of the land taken should be ascertained as of the date of the taking. City of Kings Mountain v. Goforth, 283 N.C. 316, 196 S.E.2d 231 (1973).

And the land is taken within the meaning of this principle when the proceeding is begun. City of Kings Mountain v. Gofort, 283 N.C. 316, 196 S.E.2d 231 (1973).

Acquisition of Property by Redevelopment Corporation. — When a redevelopment corporation, possessing the power of eminent domain under § 160-462, is unable to agree with the owner for the purchase of property required for its purposes, the procedure to acquire the property is by a special proceeding as provided in this article, except as modified by the provision of § 160-465. Redevelopment Comm'n v. Grimes, 8 N.C. App. 376, 174 S.E.2d 839 (1970).

The basic prerequisites to a redevelopment commission's gaining authority to exercise power of eminent domain are now, and at all times have been, the prerequisite procedures required by this article, and chapter 160, article 37, with the modifications as now set out in § 160-465. Redevelopment Comm'n v. Abeyounis, 1 N.C. App. 270, 161 S.E.2d 191 (1968).

A redevelopment commission must exercise the power of eminent domain pursuant

to Chapter 160, Article 37, and Chapter 40, Article 2, and in order to invoke this power the redevelopment commission must affirmatively allege compliance with the statutory requirements. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971).

A petition to condemn land for urban renewal is sufficient under the Rules of Civil Procedure to state a claim for relief, where it gives notice of the nature and basis of the petitioners' claim and the type of case brought, and alleges generally the occurrence or performance of the conditions precedent required by Chapter 160, Article 37 and Chapter 40, Article 2. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971).

Applied in Carolina Power & Light Co. v. Briggs, 268 N.C. 158, 150 S.E.2d 16 (1966); Prestige Realty Co. v. State Highway Comm'n, 1 N.C. App. 82, 160 S.E.2d 83 (1968); City of Kings Mountain v. Cline, 281 N.C. 269, 188 S.E.2d 284 (1972).

Cited in Hughes v. North Carolina State Highway Comm'n, 2 N.C. App. 1, 162 S.E.2d 661 (1968).

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

Editor's Note.—

For article on recent developments in North Carolina law of eminent domain, see 48 N.C.L. Rev. 767 (1970).

Strict Construction. — Statutes prescribing the procedure to condemn lands should be strictly construed. Redevelopment Comm'n v. Grimes, 8 N.C. App. 376, 174 S.E.2d 839 (1970).

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).

By the very terms of this section the petition must state in detail the nature of the public business and the specific use to which the land will be put. These allegations are as much jurisdictional in their character as is an allegation of the fact that the petitioner and the respondents have been unable to agree. Redevelopment Comm'n v. Abeyounis, 1 N.C. App. 270, 161 S.E.2d 191 (1968); State Highway Comm'n v. Matthis, 2 N.C. App. 233, 163 S.E.2d 35 (1968).

In order for a redevelopment commission to establish a right to acquire property by condemnation, the petition must affirmatively show that the provisions of this section and Chapter 160, Article 37 have been complied with. Redevelopment Comm'n v. Grimes, 8 N.C. App. 376, 174 S.E.2d 839 (1970).

Description of Property, etc.—

When the condemnor seeks to follow the procedure permitted by statute, his petition must contain a description of the property actually in litigation, and not merely a description of the entire tract. The property must "first be located." Hughes v. North Carolina State Highway Comm'n, 275 N.C. 121, 165 S.E.2d 321 (1969).

Ordinarily, proceedings under this chapter are instituted by the condemnor by petition containing an accurate description of the property which it seeks to condemn, thereby placing the landowner on the defendant's side of the indexes and cross-indexes of the public records and furnishing accessible means by which the property may be identified. Hughes v. North Carolina State Highway Comm'n, 275 N.C. 121, 165 S.E.2d 321 (1969).

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).

Applied in Hughes v. North Carolina State Highway Comm'n, 2 N.C. App. 1, 162 S.E.2d 661 (1968); Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971).

Cited in City of Kings Mountain v. Goforth, 283 N.C. 316, 196 S.E.2d 231 (1973).

§ 40-12.1. Notice of proceedings. — Notice of all proceedings brought hereunder shall be filed with the clerk of superior court of each county in which any part of the real estate is located in the form and manner provided by G.S. 1-116, and the clerk shall index and cross-index this notice as required by G.S. 1-117, provided the clerk shall always index the name of the condemnor in the record of lis pendens and in the judgment docket as required by G.S. 2-42 as the plaintiff and the name of the property owner or property owners as the defendants

irrespective of whether the condemning party is the plaintiff or defendant. The filing of such notice shall be constructive notice of the proceeding to any person who subsequently acquires any interest in or lien upon said property, and the condemnor shall take all property condemned under this article free of the claims of any such person. (1969, c. 864.)

Editor's Note.—Section 2-42, referred to in this section, was transferred to § 7A-109 by Session Laws 1971, c. 363, s. 6.

§ 40-14. Service where parties unknown.—If the person on whom such service of summons and petition is to be made is unknown, or his residence is unknown and cannot by reasonable diligence be ascertained, then such service may be made under the direction of the court, by publishing a notice, stating the time and place within which such person must appear and plead, the object thereof, with a description of the land to be affected by the proceedings, in accordance with the provisions of G.S. 1A-1, Rule 4(j)(9)c. (Code, s. 1944, subsec. 5; Rev., s. 2582; C. S., s. 1718; 1971, c. 1093, s. 18.)

Editor's Note. — The 1971 amendment substituted "accordance with the provisions of G.S. 1A-1, Rule 4(j)(9)c" for the language beginning "a paper, if there be one" and ending "city of Raleigh."

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

Strict Construction. — Statutes prescribing the procedure to condemn lands should be strictly construed. Redevelopment Comm'n v. Grimes, 8 N.C. App. 376, 174 S.E.2d 839 (1970).

Pretrial Conference.—In a condemnation proceeding, the trial court should conduct a pretrial conference where the record shows that the parties have different concepts of what phase of the matter they were going to try. Redevelopment Comm'n v. Grimes, 8 N.C. App. 376, 174 S.E.2d 839 (1970).

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).

Where issuable matters are raised, etc.—When respondents in a special proceeding to condemn land for urban renewal deny the allegations of the petition, the clerk of superior court has the duty, after notice, to hear the parties and pass upon the disputed matters presented on the record; if the allegations of the petition are found to be true, the clerk must then appoint commissioners to appraise the property and assess damages for the taking. Redevelopment Comm'n v. Grimes, 8 N.C. App. 376, 174 S.E.2d 839 (1970).

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).

Clerk Has No Authority to Appoint Commissioners Until Controverted Facts Have Been Determined.—In a special proceeding to condemn land for urban renewal, the clerk of superior court does not have authority to issue an order appointing commissioners of appraisal where respondents deny the allegations of the petition, and the record does not show that after a proper hearing the controverted facts had been determined in favor of petitioner, the clerk's finding that commis-

sioners should be appointed not being a sufficient finding of the controverted facts. Redevelopment Comm'n v. Grimes, 8 N.C. App. 376, 174 S.E.2d 839 (1970).

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).

Appeal from Ruling of Clerk.—It is only after the clerk of superior court confirms or fails to confirm the report of the commissioners that either party aggrieved by the ruling of the clerk may appeal, and such appeal carries the entire record up for review by the trial judge upon the questions of fact. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971).

Applied in City of Kings Mountain v. Cline, 281 N.C. 269, 188 S.E.2d 284 (1972).

Cited in City of Kings Mountain v. Goforth, 283 N.C. 316, 196 S.E.2d 231 (1973).

§ 40-17. Powers and duties of commissioners.

Invoking Power of Eminent Domain.—A redevelopment commission must exercise the power of eminent domain pursuant to Chapter 160, Article 37, and Chapter 40, Article 2, and in order to invoke this power the redevelopment commission must affirmatively allege compliance with the statutory requirements. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971).

A petition to condemn land for urban renewal is sufficient under the Rules of Civil Procedure to state a claim for relief where it gives notice of the nature and basis of the petitioners' claim and the type of case brought, and alleges generally the occurrence or performance of the conditions precedent required by Chapter 160, Article 37 and Chapter 40, Article 2. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971).

The method prescribed by this chapter for arriving at compensation for condemnation of land for highway purposes is open to the landowner as well as to the Highway Commission. Hughes v. North Carolina State Highway Comm'n, 275 N.C. 121, 165 S.E.2d 321 (1969).

Market Value.—

In estimating the fair market value of property acquired by eminent domain, all of the capabilities of the property, and all of the uses to which it may be applied, or for which it is adapted, which affect its value in the market are to be considered, and not merely the condition it is in at the time and the use to which it is then applied by the owner. City of Statesville v. Bowles, 6 N.C. App. 124, 169 S.E.2d 467 (1969).

Matters such as the accessibility of property, its slope and elevation, and costs that will be involved for necessary grading and filling are often important factors to be considered in arriving at an opinion as to its value. City of Statesville v. Bowles, 6 N.C. App. 124, 169 S.E.2d 467 (1969).

The use of property in combination with other property may be considered as a basis for awarding damages if the possibility of combination is so reasonably sufficient and the use so reasonably probable as to affect the market value. City of Statesville v. Bowles, 6 N.C. App. 124, 169 S.E.2d 467 (1969).

Expert Appraisers Should Give Reasons upon Which Opinion of Value Is Based.—It is proper and in fact desirable that expert real estate appraisers give the reasons upon which they base their opinion as to the fair market value of property immediately before and immediately after a taking for a sanitary sewer line easement. City of Statesville v. Bowles, 6 N.C. App. 124, 169 S.E.2d 467 (1969).

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).

General benefits are those which arise from the fulfillment of the public object which justified the taking. State Highway Comm'n v. Mode, 2 N.C. App. 464, 163 S.E.2d 429 (1968).

Special Benefits. — Special benefits are those which arise from the peculiar relation of the land in question to the public improvement. State Highway Comm'n v. Mode, 2 N.C. App. 464, 163 S.E.2d 429 (1968).

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).

Compensation for Land Containing Stone Deposit. — See State Highway Comm'n v. Mode, 2 N.C. App. 464, 163 S.E.2d 429 (1968).

Compensation for Land Containing Mineral Deposits. — See State Highway Comm'n v. Mode, 2 N.C. App. 464, 163 S.E.2d 429 (1968).

Appeal from Ruling of Clerk.—It is only after the clerk of superior court confirms or fails to confirm the report of the commissioners that either party aggrieved by the ruling of the clerk may appeal, and such appeal carries the entire record up for review by the trial judge upon the questions of fact. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971).

Cited in City of Kings Mountain v. Cline, 281 N.C. 269, 188 S.E.2d 284 (1972); City of Kings Mountain v. Goforth, 283 N.C. 316, 196 S.E.2d 231 (1973).

§ 40-18. Form of commissioners' report.

Cited in Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971); City of Kings Mountain v. Cline, 281 N.C. 269, 188 S.E.2d 284 (1972).

§ 40-19. Exceptions to report; hearing; appeal; when title vests; restitution.—Within 20 days after filing the report the corporation or any person interested in the said land may file exceptions to said report, and upon the determination of the same by the court, either party to the proceedings may appeal to the court during a session, and thence, after judgment, to the Appellate Division. The court or judge on the hearing may direct a new appraisal, modify or confirm the report, or make such order in the premises as to him shall seem right and proper. If the said corporation, at the time of the appraisal, shall pay into court the sum appraised by the commissioners, then and in that event the said corporation may enter, take possession of, and hold said lands, notwithstanding the pendency of the appeal, and until the final judgment rendered on said appeal. And if there shall be no appeal, or if the final judgment rendered upon said petition and proceedings shall be in favor of the corporation, and upon the payment by said corporation of the sum adjudged, together with the costs and counsel fees allowed by the court, into the office of the clerk of the superior court, then and in that event all persons who have been made parties to the proceedings shall be divested and barred of all right, estate and interest in such easement in such

real estate during the corporate existence of the corporation aforesaid or if the proceedings have been instituted by such corporation to acquire a fee simple title to such real estate, then all persons who have been made parties to the proceedings shall be divested and barred of all right, title and interest in such real estate. The original of such judgment or a certified copy thereof, such original or certified copy to be under the seal of the court if recorded outside the county in which the court rendering the judgment is located, shall be registered in the county where the land is situated, and the original judgment or a certified copy thereof or a certified copy of the registered instrument may be given in evidence in all actions and proceedings as deeds for land are now allowed to be read in evidence. All real estate acquired by any corporation under and pursuant to the provisions of this Chapter for its purposes shall be deemed to be acquired for the public use. But if the court shall refuse to condemn the land, or any portion thereof, to the use of such corporation, then, and in that event, the money paid into court, or so much thereof as shall be adjudged, shall be refunded to the corporation. And the corporation shall have no right to hold said land not condemned, but shall surrender the possession of the same, on demand, to the owner or owners, or his or their agent or attorney. And the court or judge shall have full power and authority to make such orders, judgments and decrees, and issue such executions and other process as may be necessary to carry into effect the final judgment rendered in such proceedings. If the amount adjudged to be paid the owner of any property condemned under this Chapter shall not be paid within one year after final judgment in the proceeding, the right under the judgment to take the property or rights condemned shall ipso facto cease and determine, but the claimant under the judgment shall still remain liable for all amounts adjudged against him except the consideration for the property. (Code, s. 1946; 1893, c. 148; Rev., s. 2587; 1915, c. 207; C. S., s. 1723; 1951, c. 59, s. 2; 1955, c. 29, s. 1; 1969, c. 44, s. 47; 1971, c. 528, s. 37.)

Editor's Note.—The 1969 amendment substituted "appellate division" for "Supreme Court" at the end of the first sentence.

The 1971 amendment, effective Oct. 1, 1971, substituted "during a session" for "at term" near the end of the first sentence.

Strict Construction. — The exercise of the power of eminent domain is in derogation of common right, and all laws conferring such power must be strictly construed. Greensboro-High Point Airport Authority v. Irvin, 2 N.C. App. 341, 163 S.E.2d 118 (1968).

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).

Erroneous Transfer from Clerk to Superior Court.—Although a proceeding to condemn property for urban renewal is erroneously transferred from the clerk to the superior court before the clerk has acted on the exceptions to the commissioners' report, the judge of superior court has full power to consider and determine all matters in controversy as if the cause was originally before him. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971).

Temporary possession, pendente lite, subject to removal by final adverse judgment, is quite different from a final judicial determination that the condemnor is entitled as a matter of right to permanent possession. Greensboro-High Point Airport Authority v. Irvin, 2 N.C. App. 341, 163 S.E.2d 118 (1968).

Title Is Not Divested, etc.—In accord with original. See Greensboro-High Point Airport Authority v. Irvin, 2 N.C. App. 341, 163 S.E.2d 118 (1968); City

of Kings Mountain v. Goforth, 283 N.C. 316, 196 S.E.2d 231 (1973).

Appeal from Ruling of Clerk.—It is only after the clerk of superior court confirms or fails to confirm the report of the commissioners that either party aggrieved by the ruling of the clerk may appeal, and such appeal carries the entire record up for review by the trial judge upon the questions of fact. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971).

Pretrial Conference.—In a condemnation proceeding, the trial court should conduct a pretrial conference where the record shows that the parties have different concepts of what phase of the matter they were going to try. Redevelopment Comm'n v. Grimes, 8 N.C. App. 376, 174 S.E.2d 839 (1970).

The counsel fees authorized, etc.—

With one exception, contained in § 1-209.1, in eminent domain proceedings the court is authorized to tax counsel fees as a part of the costs only for an attorney appointed by the court to appeal for and protect the rights of any party in interest who is unknown or whose residence is unknown. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

It is counsel appointed under § 40-24 to which this section refers in providing that a landowner is divested of title when the condemnor pays into court the sum assessed as damages for the taking of his property, together with costs and counsel fees allowed by the court. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Property Involved in Voluntary Sale as Guide to Value.—Whether property involved in a voluntary sale is sufficiently similar in nature, location, and condition to the property appropriated by condemnation to admit evidence of its sale and the price paid therefor as a guide to the value of the condemned property, is a question to be determined by the trial judge in the exercise of his sound discretion. Redevelopment Comm'n v. Denny Roll & Panel Co., 273 N.C. 368, 159 S.E.2d 861 (1968).

The issue as to amount of compensation is for determination de novo by jury trial in the superior court. Redevelopment Comm'n v. Smith, 272 N.C. 250, 158 S.E.2d 65 (1967); Redevelopment Comm'n v. Denny Roll & Panel Co., 273 N.C. 368, 159 S.E.2d 861 (1968).

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).

Judge has the discretionary power to allow the withdrawal of a deposit in a condemnation proceeding without prejudice to the withdrawing party to continue further litigation. It is incumbent upon a petitioner, if aggrieved by this order, to object and except thereto. Public Serv. Co. v. Lovin, 9 N.C. App. 709, 177 S.E.2d 448 (1970).

Provision Granting Temporary Possession and Use Not Applicable to Cartway Proceedings.—The provision in this section, which gives the court the authority to give possession and use of land to the condemnor while pending appeal, is not applicable to proceedings to establish a cartway brought under § 136-68 et seq. Lowe v. Rhodes, 9 N.C. App. 111, 175 S.E.2d 721 (1970).

Estoppel to Contest Right to Condemn.—All questions, except the question of just compensation, were rendered moot by a stipulation which agreed that a city's payment should be treated as if it were the

amount of damages assessed by commissioners and paid into the office of the clerk of the superior court under this section. In the face of the stipulation that upon payment of the stipulated sum the city would acquire title, defendants are estopped to contest the city's right to condemn. City of Kings Mountain v. Cline, 281 N.C. 269, 188 S.E.2d 284 (1972).

§ 40-20. Provision for jury trial on exceptions to report. — In any action or proceeding by any railroad or other corporation to acquire rights-of-way or real estate for the use of such railroad or corporation, and in any action or proceeding by any city or town to acquire any real property or easements with respect thereto or rights-of-way for streets, any person interested in the land, or the city, town, railroad or other corporation shall be entitled to have the amount of damages assessed by the commissioners or jurors heard and determined upon appeal before a jury of the superior court during a session, if upon the hearing of such appeal a trial by jury be demanded. (1893, c. 148; Rev., s. 2588; C. S., s. 1724; 1957, c. 582; 1971, c. 528, s. 38.)

Editor's Note.—

The 1971 amendment, effective Oct. 1, 1971, substituted "during a session" for "in term" near the end of the section.

Strict Construction. — The exercise of the power of eminent domain is in derogation of common right, and all laws conferring such power must be strictly construed. Redevelopment Comm'n v. Abeyounis, 1 N.C. App. 270, 161 S.E.2d 191 (1968).

The only question for determination by the jury is the issue of just compensation. Redevelopment Comm'n v. Abeyounis, 1 N.C. App. 270, 161 S.E.2d 191 (1968).

The issue as to the amount of compensation is for determination de novo by jury trial in the superior court. Redevelopment Comm'n v. Smith, 272 N.C. 250, 158 S.E.2d 65 (1967); Redevelopment Comm'n v. Denny Roll & Panel Co., 273 N.C. 368, 159 S.E.2d 861 (1968).

Property Involved in Voluntary Sale as Guide to Value.—Whether property involved in a voluntary sale is sufficiently similar in nature, location, and condition to the property appropriated by condemnation to admit evidence of its sale and the price paid therefor as a guide to the value of the condemned property, is a question to be determined by the trial judge in the exercise of his sound discretion. Redevelopment Comm'n v. Denny Roll & Panel Co., 273 N.C. 368, 159 S.E.2d 861 (1968).

Cited in City of Kings Mountain v. Cline, 281 N.C. 269, 188 S.E.2d 284 (1972).

§ 40-24. Attorney for unknown parties appointed; pleadings amended; new commissioners appointed.

Counsel fees, etc.—

With one exception, contained in § 1-209.1, in eminent domain proceedings the court is authorized to tax counsel fees as a part of the costs only for an attorney appointed by the court to appeal for and protect the rights of any party in interest who is unknown or whose residence is unknown. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

It is counsel appointed under this section to which § 40-19 refers in providing that a landowner is divested of title when the condemnor pays into court the sum assessed as damages for the taking of his property, together with costs and counsel fees allowed by the court. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

§ 40-26. Change of ownership pending proceeding.

The proceedings by this section are constituted a lis pendens. Hughes v. North Carolina State Highway Comm'n, 2 N.C. App. 1, 162 S.E.2d 661 (1968).

Subsequent Purchaser May Recover Compensation.—

In accord with 4th paragraph in original. See City of Kings Mountain v. Goforth, 283 N.C. 316, 196 S.E.2d 231 (1973).

Applied in Hughes v. North Carolina State Highway Comm'n, 275 N.C. 121, 165 S.E.2d 321 (1969).

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).

§ 40-33. Institution of proceedings; venue; immediate hearing; entry upon land by petitioner.—Any federal agency, State public body or authorized corporation may institute proceedings hereunder for the acquisition of any real property necessary for any public works project.

Such proceedings may be instituted in the superior court in any county in which any part of the real property or of the proposed public works project is situate. The clerk of the superior court shall cause said proceedings to be heard and determined without delay. All condemnation proceedings shall be preferred cases, and shall be entitled to precedence over all other civil cases.

Upon demand of any party, trial before the superior court judge shall be with a jury. Demand for jury trial shall be made in accordance with the requirements of the Rules of Civil Procedure, G.S. 1A-1.

The petitioner may enter upon the land proposed to be acquired for the purpose of making a survey and of posting any notice thereon which is required by this Article: Provided, that such survey and posting of notice shall be done in such manner as will cause the least possible inconvenience to the owners of the real property. (1935, c. 470, s. 4; 1947, c. 781; 1971, c. 382. s. 1.)

Editor's Note. — The 1971 amendment added the third paragraph.

Section 2, c. 382, Session Laws 1971, provides: "This act shall become effective upon ratification and shall apply to all trials commenced after that date pursuant to G.S. 40-33." The act was ratified May 14, 1971.

Opinions of Attorney General. — Mr. James R. Taylor, Executive Director, Statesville Housing Authority, 40 N.C.A.G. 314 (1969).

§ 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).

§ 40-38. Appointment of special master. — The court, at the time of said hearing, shall appoint a special master to fix the amount of damages and compensation for the taking and condemnation of the property described in the petition and the persons entitled thereto, and to report thereon to the court. The special master shall be a disinterested person not related to anyone having an interest in or lien upon the property sought to be condemned. The compensation of said special master shall be fixed by the court. The special master immediately after his appointment shall subscribe to an oath that to the best of his ability he will truly find and return the compensation for the taking and condemnation of the property and the persons entitled thereto. (1935, c. 470, s. 9; 1969, c. 1016.)

Editor's Note. — The 1969 amendment rewrote the third sentence.

Chapter 41.

Estates.

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

I. GENERAL CONSIDERATION.

Editor's Note.—

For case law survey as to real property, see 45 N.C.L. Rev. 964 (1967).

"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).

For comment on the rule in Shelley's case, see 4 Wake Forest Intra. L. Rev. 132 (1968).

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).

Effect on Common Law Application to Joint Bank Accounts.—See opinion of Attorney General to Mr. W.C. York, Department of Insurance, 41 N.C.A.G. 352 (1971).

Applied in Jernigan v. Lee, 9 N.C. App. 582, 176 S.E.2d 899 (1970).

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

(b) A deposit account established under subsection (a) of this section shall have the following incidents:

(1) Either party to the agreement may add to or draw upon any part or all of the deposit account, and any withdrawal by or upon the order of either party shall be a complete discharge of the banking institution with respect to the sum withdrawn.

(2) During the lifetime of both or all the parties, the deposit account shall be subject to their respective debts to the extent that each has contributed to the unwithdrawn account. In the event their respective contributions are not determined, the unwithdrawn fund shall be deemed owned by both or all equally.

(3) Upon the death of either or any party to the agreement, the survivor, or survivors, becomes the sole owner, or owners, of the entire unwithdrawn deposit subject to the claims of the creditors of the deceased and to governmental rights in that portion of the unwithdrawn deposit which would belong to the deceased had said unwithdrawn deposit been divided equally between both or among all the joint tenants at the time of the death of said deceased.

(4) Upon the death of one of the joint tenants provided herein the banking institution in which said joint deposit is held shall pay to the legal representative of the deceased, or to the clerk of the superior court if the amount is less than one thousand dollars ($1,000.00), in accordance with G.S. 28-68, the portion of the unwithdrawn deposit made subject to the claims of the creditors of the deceased and to governmental rights as provided in subdivision (3) above, and may pay the remainder to the surviving joint tenant or joint tenants. Said legal representative shall hold the portion of said unwithdrawn deposit paid to him and not use the same for the payment of the claims of the creditors of the deceased or governmental rights unless and until all other personal assets of the estate have been exhausted, and shall then use so much thereof as may be necessary to pay any remaining debts of the deceased or governmental claims. Any part of said unwithdrawn deposit not used for the payment of such debts or charges of administration of the deceased shall, upon the settlement of the estate, be paid to the surviving joint tenant or tenants.

(1969, c. 863.)

Editor's Note.—

The 1969 amendment inserted, near the beginning of subdivision (4) of subsection (b), "or to the clerk of the superior court

if the amount is less than one thousand dollars ($1,000.00), in accordance with G.S. 28-68."

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

For article on joint ownership of corporate securities in North Carolina, see 44 N.C.L. Rev. 290 (1966); 46 N.C.L. Rev. 520 (1968).

For note on joint bank accounts with the right of survivorship in North Carolina, see 46 N.C.L. Rev. 669 (1968).

Joint Bank Account; Decedent's Share Applied in Payment of Debts; As Basis for Computing Administrator's Bond Required.—See opinion of Attorney General to Mr. Everitte Barbee, Clerk, Superior Court of Onslow County, 40 N.C.A.G. 23 (1970).

Unwithdrawn Deposits Which Would Have Belonged to Decedent Are Subject to Computation of Costs of Administration.—See opinion of Attorney General to Mr. R.J. White, Jr., 42 N.C.A.G. 316 (1973).

§ 41-2.2. Joint ownership of corporate stock and investment securities. — (a) In addition to other forms of ownership, shares of corporate stock or investment securities may be owned by a husband and wife as joint tenants with rights of survivorship, and not as tenants in common, in the manner provided in this section.

(b) (1) A joint tenancy in shares of corporate stock or investment securities as provided by this section shall exist when such shares or securities indicate that they are owned with the right of survivorship, or otherwise clearly indicate an intention that upon the death of either spouse the interest of the decedent shall pass to the surviving spouse.

(2) Such a joint tenancy may also exist when a broker or custodian holds the shares or securities for the joint tenants and by book entry or otherwise indicates (i) that the shares or securities are owned with the right of survivorship, or (ii) otherwise clearly indicates that upon the death of either spouse, the interest of the decedent shall pass to the surviving spouse. Money in the hands of such broker or custodian derived from the sale of, or held for the purpose of, such shares or securities shall be treated in the same manner as such shares or securities.

(c) Upon the death of a joint tenant his interest shall pass to the surviving joint tenant. The interest of the deceased joint tenant, even though it has passed to the surviving joint tenant, remains liable for the debts of the decedent in the same manner as the personal property included in his estate, and recovery thereof shall be made from the surviving joint tenant when the decedent's estate is insufficient to satisfy such debts.

(d) Nothing herein contained shall be construed to repeal or modify any of the provisions of G.S. 105-2, G.S. 105-11, and G.S. 105-24, relating to the administration of the inheritance tax laws, or any other provisions of the law relating to inheritance taxes. (1967, c. 864, s. 1; 1969, c. 1115, s. 2.)

Editor's Note.—Prior to the enactment of Session Laws 1969, c. 1115, effective at midnight June 30, 1969, the provisions of the above section were codified as § 25-8-407.

For article on joint ownership of corporate securities in North Carolina, see 46 N.C.L. Rev. 520 (1968).

§ 41-3. Survivorship among trustees.

Cited in In re Michal, 273 N.C. 504, 160 S.E.2d 495 (1968).

§ 41-6. "Heirs" construed to be "children" in certain limitations.

Cited in Jernigan v. Lee, 9 N.C. App. 582, 176 S.E.2d 899 (1970).

§ 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.)

§ 41-7. Possession transferred to use in certain conveyances.

Rule Does Not Apply to Resulting Trust.—Where the plaintiff cited no North Carolina authority to support the argument that the statute of uses would be operative, and since the general rule is that the statute of uses applies only to express passive trusts and not to resulting or constructive trusts which arise by operation of law, under North Carolina law a resulting trust would not be executed. Greer v. United States, 448 F.2d 937 (4th Cir. 1971).

§ 41-9. Spendthrift trusts.

Editor's Note.—

For note on direct restraints on alienation, see 48 N.C.L. Rev. 173 (1969).

Cited in Swink v. Swink, 6 N.C. App. 161, 169 S.E.2d 539 (1969).

§ 41-10. Titles quieted.

I. GENERAL CONSIDERATION.

This section is liberally construed. York v. Newman, 2 N.C. App. 484, 163 S.E.2d 282 (1968).

The beneficial purpose of this section is to free the land of the cloud resting upon it and make its title clear and indisputable, so that it may enter the channels of commerce and trade unfettered and without the handicap of suspicion. Resort Dev. Co. v. Phillips, 278 N.C. 69, 178 S.E.2d 813 (1971).

The distinction between a suit to remove a cloud upon title and an action to quiet title under this section is clear. In the old equity action, to remove a cloud upon title to real property, the proceeding was an equitable one and was intended to remove a particular instrument or documentary evidence of title or encumbrance against the title, which was hanging over or threatening a plaintiff's rights therein. In a suit to quiet title to real property under this section, the proceeding is designed and intended to provide a means for determining all adverse claims, equitable or otherwise. It is not limited to a particular instrument, bit of evidence, or encumbrance but is aimed at silencing all adverse claims, documentary or otherwise. Any action that could have been brought under the old equitable proceeding to remove a cloud upon title may now be brought under the provision of this section. York v. Newman, 2 N.C. App. 484, 163 S.E.2d 282 (1968).

The General Assembly did not include personal property under the provisions of this section. Newman Machine Co. v. Newman, 2 N.C. App. 491, 163 S.E.2d 279 (1968).

A bill to quiet title or to remove a cloud on title to personal property may be maintained in equity, in the absence of statutory authorization, where, by reason of exceptional circumstances, there is no adequate remedy at law. Newman Machine Co. v. Newman, 275 N.C. 189, 166 S.E.2d 63 (1969).

Even though there is no statute in North Carolina authorizing suits to quiet title to personalty, the Supreme Court adheres to the general rule that such suits may be maintained in equity where, due to exceptional circumstances, there is no adequate remedy at law. Newman Machine Co. v. Newman, 275 N.C. 189, 166 S.E.2d 63 (1969).

Since North Carolina has no statute regarding suits in equity to remove cloud or quiet title to personalty, the Supreme Court applies to such suits the same principles which obtained prior to enactment of this section when title to land was involved. Newman Machine Co. v. Newman, 275 N.C. 189, 166 S.E.2d 63 (1969).

In order to remove a cloud from a title, it is not necessary to allege and prove that the plaintiff had an estate in or title to the lands in controversy. It is only required that the plaintiff or plaintiffs have such an interest in the lands as to make the claim of the defendants adverse to him or them. Resort Dev. Co. v. Phillips, 278 N.C. 69, 178 S.E.2d 813 (1971).

Title Not Necessarily Put in Issue.—By suit to remove a cloud from title, a plaintiff does not necessarily put his title in issue. Resort Dev. Co. v. Phillips, 278 N.C. 69, 178 S.E.2d 813 (1971).

For requirements in equity suits to remove cloud and quiet title to realty prior to enactment of this section, see Newman Machine Co. v. Newman, 275 N.C. 189, 166 S.E.2d 63 (1969).

A declaratory action is an appropriate remedy to perform the function of the customary action to quiet title. York v. Newman, 2 N.C. App. 484, 163 S.E.2d 282 (1968).

Cited in Newbern v. Barnes, 3 N.C. App. 521, 165 S.E.2d 526 (1969); Mayberry v. Campbell, 16 N.C. App. 375, 192 S.E.2d 27 (1972).

II. NATURE AND SCOPE OF REMEDY.

A. Purpose.

In General.—

This section was designed to avoid some of the limitations imposed upon the remedies formerly embraced by a bill of peace or a bill quia timet, and to establish an easy method of quieting titles of land against adverse claims. Newman Machine Co. v. Newman, 275 N.C. 189, 166 S.E.2d 63 (1969).

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).

A complaint meets the minimum requirements of this section where it alleges that the plaintiffs own the described land and that the defendant claims an interest therein adverse to them. York v. Newman, 2 N.C. 484, 163 S.E.2d 282 (1968).

A cause of action to remove a cloud from title is made out when the plaintiff introduces evidence that he has an interest in a described tract of land and the defendant is asserting, or attempting to assert, an unjust claim thereto. Resort Dev. Co. v. Phillips, 278 N.C. 69, 178 S.E.2d 813 (1971).

Plaintiff's failure to show fee simple title to all the lands claimed is not fatal to its case. Resort Dev. Co. v. Phillips, 278 N.C. 69, 178 S.E.2d 813 (1971).

Admission.—Where the defendants, by answer, admitted that the plaintiff owned an interest in the described lands, but asserted they also had an interest therein, this admission gave the plaintiff standing in court to challenge the defendants' claim as a cloud upon its title. Resort Dev. Co. v. Phillips, 278 N.C. 69, 178 S.E.2d 813 (1971).

The burden rests upon the defendant to establish a title which he has set up to defeat the complainant's claim of ownership. Resort Dev. Co. v. Phillips, 278 N.C. 69, 178 S.E.2d 813 (1971).

When the defendants alleged their title had its origin in a certain grant, from which they and their predecessors derived title, they thereby assumed the burden of locating the calls of the grant on the ground, and of showing that the grant covered at least a part of the lands described in the complaint. Resort Dev. Co. v. Phillips, 278 N.C. 69, 178 S.E.2d 813 (1971).

Where the defendants claim by record title, and not by adverse possession, and allege their record title had its genesis in a certain grant, the state of the pleadings casts upon them the burden of tracing their title to that grant. Resort Dev. Co. v. Phillips, 278 N.C. 69, 178 S.E.2d 813 (1971).

§ 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).

Applied in Roten v. State, 8 N.C. App. 643, 174 S.E.2d 384 (1970).

§ 41-11. Sale, lease or mortgage in case of remainders.—In all cases where there is a vested interest in real estate, and a contingent remainder over to persons who are not in being, or when the contingency has not yet happened which will determine who the remaindermen are, there may be a sale, lease or mortgage of the property by a special proceeding in the superior court, which proceeding shall be conducted in the manner pointed out in this section. Said proceeding may be commenced by summons by any person having a vested interest in the land, and all persons in esse who are interested in said land shall be made parties defendant and served with summons in the way and manner now provided by law for the service of summons in other special proceedings, as provided by Rule 4 of the Rules of Civil Procedure, and service of summons upon nonresi-

dents, or persons whose names and residences are unknown, shall be by publication as now required by law or such service in lieu of publication as now provided by law. In cases where the remainder will or may go to minors, or persons under other disabilities, or to persons not in being, or whose names and residences are not known, or who may in any contingency become interested in said land, but because of such contingency cannot be ascertained, the clerk of the superior court shall, after due inquiry of persons who are in no way interested in or connected with such proceeding, designate and appoint some discreet person as guardian ad litem, to represent such remainderman, upon whom summons shall be served as provided by law for other guardians ad litem, and it shall be the duty of such guardian ad litem to defend such actions, and when counsel is needed to represent him, to make this known to the clerk, who shall by an order give instructions as to the employment of counsel and the payment of fees.

The court shall, if the interest of all parties require or would be materially enhanced by it, order a sale of such property or any part thereof for reinvestment, either in purchasing or in improving real estate, less expense allowed by the court for the proceeding and sale, and such newly acquired or improved real estate shall be held upon the same contingencies and in like manner as was the property ordered to be sold. The court may authorize the loaning of such money subject to its approval until such time when it can be reinvested in real estate. And after the sale of such property in all proceedings hereunder, where there is a life estate, in lieu of said interest or investment of proceeds to which the life tenant would be entitled to, or to the use of, the court may in its discretion order the value of said life tenant's share during the probable life of such life tenant, to be ascertained as now provided by law, and paid out of the proceeds of such sale absolutely, and the remainder of such proceeds be reinvested as herein provided. Any person or persons owning a life estate in lands which are unproductive and from which the income is insufficient to pay the taxes on and reasonable upkeep of said lands shall be entitled to maintain an action, without the joinder of any of the remaindermen or reversioners as parties plaintiff, for the sale of said property for the purpose of obtaining funds for improving other nonproductive and unimproved real estate so as to make the same profit-bearing, all to be done under order of the court, or reinvestment of the funds under the provisions of this section, but in every such action when the rights of minors or other persons not sui juris are involved, a competent and disinterested attorney shall be appointed by the court to file answer and represent their interests. The provisions of the preceding sentence, being remedial, shall apply to cases where any title in such lands shall have been acquired before, as well as after, its passage—March 7, 1927.

The clerk of the superior court is authorized to make all orders for the sale, lease or mortgage of property under this section, and for the reinvestment or securing and handling of the proceeds of such sales, but no sale under this section shall be held or mortgage given until the same has been approved by the resident judge of the district, or the judge holding the courts of the district at the time said order of sale is made. The approval by the resident judge of the district may be made by him either during a session of court or at chambers. All orders of approval under said statute by judges resident in the district heretofore made either during a session of court or at chambers are hereby ratified and validated.

The court may authorize the temporary reinvestment, pending final investment in real estate, of funds derived from such sale in any direct obligation of the United States of America or any indirect obligation guaranteed both as to principal and interest or bonds of the State of North Carolina issued since the year one thousand eight hundred and seventy-two; but in the event of such reinvestment, the commissioners, trustees or other officers appointed by the court to hold such funds shall hold the bonds in their possession and shall pay to the life tenant and owner of the vested interest in the lands sold only the interest accruing on

the bonds, and the principal of the bonds shall be held subject to final reinvestment and to such expense only as is provided in this section. Temporary reinvestments, as aforesaid, in any direct obligation of the United States of America or any indirect obligation guaranteed both as to principal and interest or State bonds heretofore made with the approval of the court of all or a part of the funds derived from such sales are ratified and declared valid.

The court shall, if the interest of the parties require it and would be materially enhanced by it, order such property mortgaged for such term and on such condition as to the court seems proper and to the best interest of the interested parties. The proceeds derived from the mortgage shall be used for the purpose of adding improvements to the property or to remove existing liens on the property as the court may direct, but for no other purpose. The mortgagees shall not be held responsible for determining the validity of the liens, debts and expenses where the court directs such liens, debts and expenses to be paid. In all cases of mortgages under this section the court shall authorize and direct the guardian representing the interest of minors and the guardian ad litem representing the interest of those persons unknown or not in being to join in the mortgage for the purpose of conveying the interest of such person or persons. In all cases of mortgages under this section the owner of the vested interest or his or her legal representative shall within six months from the date of the mortgage file with the court an itemized statement showing how the money derived from the said mortgage has been expended, and shall exhibit to the court receipts for said money. Said report shall be audited in the same manner as provided for the auditing of guardian's accounts. The owner of the vested interest or his or her legal representative shall collect the rents and income from the property mortgaged and apply the proceeds first to taxes and discharge of interest on the mortgage and the annual curtailment as provided thereby, or if said person uses or occupies said premises he or she shall pay the said taxes, interest and curtailments and said party shall enter into a bond to be approved by the court for the faithful performance of the duties hereby imposed, and such person shall annually file with the court a report and receipts showing that taxes, interest and the curtailment as provided by the mortgage have been paid.

The mortgagee shall not be held responsible for the application of the funds secured or derived from the mortgage. The word "mortgage" whenever used herein shall be construed to include deeds in trust. (1903, c. 99; 1905, c. 548; Rev., s. 1590; 1907, cc. 956, 980; 1919, c. 17; C. S., s. 1744; Ex. Sess. 1921, c. 88; 1923, c. 69; 1925, c. 281; 1927, cc. 124, 186; 1933, c. 123; 1935, c. 299; 1941, c. 328; 1943, cc. 198, 729; 1947, c. 377; 1951, c. 96; 1967, c. 954, s. 3; 1971, c. 528, s. 39.)

I. GENERAL CONSIDERATION.

Editor's Note.—

The 1967 amendment, effective Jan. 1, 1970, substituted "Rule 4 of the Rules of Civil Procedure" for "§ 1-94" in the second sentence.

The 1971 amendment, effective Oct. 1, 1971, substituted "during a session of court" for "in term" in the second and third sentences of the third paragraph.

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

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

Cited in De Lotbiniere v. Wachovia Bank & Trust Co., 2 N.C. App. 252, 163 S.E.2d 59 (1968).

§ 41-11.1. Sale, lease or mortgage of property held by a "class," where membership may be increased by persons not in esse.—Wherever there is a gift, devise, bequest, transfer or conveyance of a vested estate or interest in real or personal property, or both, to persons described as a class, and at the effective date thereof, one or more members of the class are in esse, and there is a possibility in law that the membership of the class may later be increased by one or more members not then in esse, a special proceeding may be instituted in

the superior court for the sale, lease or mortgage of such real or personal property, or both, as provided in this section.

All petitions filed under this section wherein an order is sought for the sale, lease or mortgage of real property, or of both real and personal property, shall be filed in the office of the clerk of the superior court of the county in which all or any part of the real property is situated. If the order sought is for sale, lease or mortgage of personal property, the petition may be filed in the office of the clerk of the superior court of the county in which any or all of such personal estate is situated.

All members of the class in esse shall be parties to the proceeding, and where any of such members are under legal disability, their duly appointed general guardians or their guardians ad litem shall be made parties. The clerk of the superior court shall appoint a guardian ad litem to represent the interests of the possible members of the class not in esse, and such guardian ad litem shall be a party to the proceeding.

Upon a finding by the clerk of the superior court that the interests of all members of the class, both those in esse and those not in esse, would be materially promoted by a sale, lease or mortgage of any such property, he shall enter an order that the sale, lease or mortgage be made, and shall appoint a trustee to make such sale, lease or mortgage, in such manner and on such terms as the clerk may find to be most advantageous to the interests of the members of the class, both those in esse and those not in esse; but no sale, lease or mortgage shall be made, or shall be valid, until approved and confirmed by the resident judge of the district, or the judge holding the courts of the district. As a condition precedent to receiving the proceeds of the sale, lease or mortgage, the trustee shall be bonded in the same manner as a guardian for minors.

In the event of a sale of any such property, the proceeds of sale shall be owned in the identical manner as the property was owned immediately prior to the sale; provided,

(1) The trustee appointed by the clerk as provided above may hold, manage, invest and reinvest said proceeds for the benefit of all members of the class, both those in esse and those not in esse, until the occurrence of the event which will finally determine the identity of all members of the class; all such investments and reinvestments shall be made in accordance with the laws of North Carolina relating to the investment of funds held by guardians or minors; and all the provisions of G.S. 36-4, relating to the reduction in bonds of guardians or trustees upon investment in certain registered securities and the deposit of the securities with the clerk of the superior court, shall be applicable to the trustee appointed hereunder;

(2) The clerk by appropriate order, in lieu of holding, managing, investing and reinvesting the proceeds of sale, may pay or authorize the trustee to pay the entire amount of such proceeds to the living members of the class as they may be then constituted or to their duly appointed guardians, or to pay the ratable portion or portions of such proceeds to one or more of such living members or to their guardians; provided that, where the class would be closed by the death of the mother or mothers of the members of the class, said mother or mothers are living and have attained the age of 55, and upon the further condition that there be first filed with the clerk a bond conditioned upon the payment of the lawful share of any member of the class not then in esse, but who may thereafter come into being or otherwise become a member of the class, to such member or his guardian whenever he becomes a living member of the class. Such bond shall be payable to the State to the use of the additional members of the class and shall be either a cash bond or a premium bond executed by a surety company

authorized to transact business in North Carolina. The penalty of such bond shall not be less than one and one fourth the amount of the proceeds of sale. Any bond filed hereunder shall be acknowledged before and approved by the clerk of the superior court.

In the event the proceeds of sale shall be paid over to a trustee and invested by him as authorized above, the entire income actually received by the trustee from such investment shall be paid by said trustee periodically, and not less often than annually, in equal shares to the living members of the class as they shall be constituted at the time of each such payment, or to the duly appointed guardians of any such living members under legal disability.

In the event the court orders a lease of the property, the proceeds from the lease shall be first used to defray the expenses, if any, of the upkeep and maintenance of the property, and the discharge of taxes, liens, charges and encumbrances thereon, and any remaining proceeds shall be paid over by the trustee in their entirety, not less often than annually, in equal shares to the living members of the class as they shall be constituted at the time of each such payment or to the duly appointed guardians of any such members under legal disability.

Payments of income to the living members of the class as aforesaid shall constitute a full and final acquittance and disposition of the income so paid, it being the intent of this section that only the living members of the class (as they may be constituted at the time of each respective income payment) shall be entitled to the income which is the subject of the respective payment, and that possible members of the class not in esse shall not share in, or become entitled to the benefit of any income payment made prior to the time that such members are born and become living members of the class.

In the event that there has been a sale of any of the property, and the proceeds of sale are being held, managed, invested and reinvested by a trustee as provided above, any member of the class who is of legal age and who is not otherwise under legal disability may sell, assign and transfer his entire right, title and interest (both as to principal and income) in the funds or investments so held by the trustee. Upon receiving written notice of such sale, assignment or transfer, the trustee shall recognize the purchaser, assignee and transferee as the lawful successor in all respects whatsoever to the right, title and interest (both as to principal and income) of the seller, assignor and transferor; but no such sale, transfer or assignment shall divest the trustee of his legal title in, or possession of, said funds or investments or (except as provided above) affect his administration of the trusts for which he was appointed.

The court shall order a mortgage of the property only for one or more of the following purposes:

(1) To provide funds for the costs and expenses of court incurred in carrying out any of the provisions of this section;

(2) To provide funds for the necessary upkeep and maintenance of the property;

(3) To make reasonable improvements to the property;

(4) To pay off taxes, other existing liens, charges and encumbrances on the property.

The mortgagee shall not be held responsible for the application of the funds secured or derived from the mortgage. As used in this section, references to mortgages shall also apply to deeds of trust executed for loan security purposes.

Every trustee appointed pursuant to the provisions of this section shall file with the clerk of the superior court an inventory and annual accounts in the same manner as is now provided by law with respect to guardians.

The superior court shall allow commissions to the trustee for his time and trouble in the effectuation of a sale, lease or mortgage, and in the investment and

management of the proceeds, in the same manner and under the same rules and restrictions as allowances are made to executors, administrators, and collectors.

Provided, however, this section shall not be applicable where the instrument creating the gift, devise, bequest, transfer or conveyance specifically directs, by means of the creation of a trust or otherwise, the manner in which the property shall be used or disposed of, or contains specific limitations, conditions or restrictions as to the use, form, investment, leasing, mortgage, or other disposition of the property.

And provided further, this section shall not alter or affect in any way laws or legal principles heretofore, now, or hereafter existing relating to the determination of the nature, extent or vesting of estates or property interests, and of the persons entitled thereto. But where, under the laws and legal principles existing without regard to this section, a gift, devise, bequest, transfer or conveyance has the legal effect of being made to all members of a class, some of whom are in esse and some of whom are in posse, the procedures authorized hereby may be utilized for the purpose of promoting the best interests of all members of the class, and this section shall be liberally construed to effectuate this intent. The remedies and procedures herein specified shall not be exclusive, but shall be cumulative, in addition to, and without prejudice to, all other remedies and procedures, if any, which now exist or hereafter may exist either by virtue of statute, or by virtue of the inherent powers of any court of competent jurisdiction, or otherwise.

The provisions of this section shall apply to gifts, devises, bequests, transfers, and conveyances made both before and after April 5, 1949. (1949, c. 811, s. 1; 1971, c. 641, s. 1.)

Editor's Note.—

The 1971 amendment designated the former proviso in the fifth paragraph as subdivision (1) and added subdivision (2) of that paragraph.

Session Laws 1971, c. 641, s. 2, provides: "The provisions of this act shall apply to gifts, devises, bequests, transfers, and conveyances made both before and after the date of ratification of this act."

Cited in De Lotbiniere v. Wachovia Bank & Trust Co., 2 N.C. App. 252, 163 S.E.2d 59 (1968).

§ 41-12. Sales or mortgages of contingent remainders validated.

Cited in McRorie v. Shinn, 11 N.C. App. 475, 181 S.E.2d 773 (1971).

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); 45 N.C.L. Rev. 968 (1967).

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

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

§ 42-4. Recovery for use and occupation.

Editor's Note.—For article on remedies for trespass on land in North Carolina, see 47 N.C.L. Rev. 334 (1969).

§ 42-9. Agreement to rebuild, how construed in case of fire.

Provisions of section are limited to destruction of house by fire. Atlantic Discount Corp. v. Mangel's of N.C., Inc., 2 N.C. App. 472, 163 S.E.2d 295 (1968).

§ 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 reason-

able 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 possession 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).

A Statutory Remedy.—

The only statutory landlord's lien in this jurisdiction is that provided for by this section. Dunham's Music House, Inc. v. Asheville Theatres, Inc., 10 N.C. App. 242, 178 S.E.2d 124 (1970).

A lien on personal property granted a lessor by contract is not excluded from the provisions of the Uniform Commercial Code. Dunham's Music House, Inc. v. Asheville Theatres, Inc., 10 N.C. App. 242, 178 S.E.2d 124 (1970).

No Right of Distress. — A landlord's right of distress as a security for the payment of rent available under English common law has never existed in North Carolina. Dunham's Music House, Inc. v. Asheville Theatres, Inc., 10 N.C. App. 242, 178 S.E.2d 124 (1970).

§ 42-17. Action to settle dispute between parties.—When any controversy arises between the parties, and neither party avails himself of the provisions of this Chapter, it is competent for either party to proceed at once to have the matter determined in the appropriate trial division of the General Court of Justice. (1876-7, c. 283, s. 3; Code, s. 1756; Rev., s. 1995; C. S., s. 2357; 1971, c. 533, s. 1.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "the appropriate trial division of the General Court of Justice" for "the court of a justice of the peace, if the amount claimed is two hundred dollars or less, or in the superior court of the county where the property is situate if the amount so claimed is more than two hundred dollars" at the end of the section.

§ 42-18. Tenant's undertaking on continuance or appeal.—In case there is a continuance or an appeal from the magistrate's decision to the district court, the lessee or cropper, or the assigns of either, shall be allowed to retain possession of said property upon his giving an undertaking to the lessor or his assigns, or the adverse party, in a sum double the amount of the claim, if such claim does not amount to more than the value of such property, otherwise to double the value of such property, with good and sufficient surety, to be approved by the magistrate or the clerk of the superior court, conditioned for the faithful payment to the adverse party of such damages as he shall recover in said action.

(1876-7, c. 283, s. 3; Code, s. 1756; Rev., s. 1995; C. S., s. 2358; 1971, c. 533, s. 2.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "magistrate's" for "justice's" and "district" for "superior" near the beginning of the section and "magistrate" for "justice of the peace" near the end of the section.

§ 42-19. Crops delivered to landlord on his undertaking.—In case the lessee or cropper, or the assigns of either, at the time of the appeal or continuance mentioned in G.S. 42-18, fails to give the undertaking therein required, then the sheriff or other lawful officer shall deliver the property into the actual possession of the lessor or his assigns, upon the lessor or his assigns giving to the adverse party an undertaking in double the amount of said property, to be justified as required in G.S. 42-18, conditioned for the forthcoming of such property, or the value thereof, in case judgment is pronounced against him. (1876-7, c. 283, s. 4; Code, s. 1757; Rev., s. 1996; C. S., s. 2359; 1973, c. 108, s. 17.)

Editor's Note. — The 1973 amendment substituted "sheriff" for "constable."

§ 42-20. Crops sold, if neither party gives undertaking.—If neither party gives the undertaking described in G.S. 42-18 and G.S. 42-19, it is the duty of the clerk of the superior court to issue an order to the sheriff, or other lawful officer, directing him to take into his possession all of said property, or so much thereof as may be necessary to satisfy the claimant's demand and costs, and to sell the same under the rules and regulations prescribed by law for the sale of personal property under execution, and to hold the proceeds thereof subject to the decision of the court upon the issue or issues pending between the parties. (1876-7, c. 283, s. 5; Code, s. 1758; Rev., s. 1997; C. S., s. 2360; 1971, c. 533, s. 3.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, deleted "the justice of the peace or" preceding "the clerk" and "constable or" preceding "sheriff" near the beginning of the section.

ARTICLE 3.

Summary Ejectment.

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

I. APPLICATION AND SCOPE.

Editor's Note.—For note on retaliatory evictions and housing code enforcement, see 49 N.C.L. Rev. 569 (1971).

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).

Cited in North Am. Acceptance Corp. v. Samuels, 11 N.C. App. 504, 181 S.E.2d 794 (1971).

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 automatically 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).

IV. RIGHTS OF PARTIES.

The hearing to be afforded tenants of public housing before the determination to evict them requires (1) timely and adequate notice detailing the reasons for a proposed termination, (2) an opportunity on the part of the tenant to confront and cross-examine adverse witnesses, (3) the right of a tenant to be represented by counsel, provided by him to delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination and generally to safeguard his interests, (4) a decision, based on evidence adduced at the hearing, in which the reasons for decision and the evidence relied on are set forth, and (5) an impartial decision maker. Caulder v. Durham Housing Authority, 433 F.2d 998 (4th Cir. 1970).

§ 42-28. Summons issued by clerk.—When the lessor or his assignee files a complaint pursuant to G.S. 42-26 or G.S. 42-27, and asks to be put in possession of the leased premises, the clerk of superior court shall issue a summons requiring the defendant to appear at a certain time and place (not to exceed five days from the issuing of the summons, without the consent of the plaintiff) to answer the complaint. The plaintiff may claim rent in arrears, and damages for the occupation of the premises since the cessation of the estate of the lessee, not to exceed three hundrd dollars ($300.00), but if he omits to make such claim, he shall not be prejudiced thereby in any other action for their recovery. (1868-9, c. 156, s. 20; 1869-70, c. 212; Code, s. 1767; Rev., s. 2002; C. S., s. 2367; 1971, c. 533, s. 4.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, rewrote this section.

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

§ 42-29. Service of summons.—The officer receiving the summons shall immediately deliver a copy of it, together with a copy of the complaint, to the defendant, or leave copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. If such service cannot be made, and if the defendant cannot be found in the county after due and diligent search, the officer shall affix copies to some conspicuous part of the premises claimed and make due return showing compliance with this section. (1868-9, c. 156, s. 21; Code, s. 1768; Rev., s. 2003; C. S., s. 2368; 1973, c. 87.)

Editor's Note. — The 1973 amendment rewrote this section.

§ 42-30. Judgment by confession or where plaintiff has proved case.—The summons shall be returned according to its tenor, and if on its return it appears to have been duly served, and if the plaintiff proves his case by a preponderance of the evidence, or the defendant admits the allegations of the complaint, the magistrate shall give judgment that the defendant be removed from, and the plaintiff be put in possession of, the demised premises; and if any rent or damages for the occupation of the premises after the cessation of the estate of the lessee, not exceeding three hundred dollars ($300.00), be claimed in the oath of the plaintiff as due and unpaid, the magistrate shall inquire thereof, and give judgment as he may find the fact to be. (1868-9, c. 156, s. 22; Code, s. 1769; Rev., s. 2004; C. S., s. 2369; 1971, c. 533, s. 5; 1973, c. 10.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "magistrate" for "justice" in two places and substituted "three hundred dollars ($300.00)" for "two hundred dollars."

The 1973 amendment substituted "plain-

tiff proves his case by a preponderance of the evidence, or the defendant" for "defendant fails to appear, or" near the beginning of the section.

§ 42-31. Trial by magistrate.—If the defendant by his answer denies any material allegation in the oath of the plaintiff, the magistrate shall hear the evidence and give judgment as he shall find the facts to be. (1868-9, c. 156, s. 23; Code, s. 1770; Rev., s. 2005; C. S., s. 2370; 1971, c. 533, s. 6.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "magistrate" for "justice" and eliminated the former second sentence, providing for trial by jury, judgment and execution.

§ 42-32. Damages assessed to trial.—On appeal to the district court, the jury trying issues joined shall assess the damages of the plaintiff for the detention of his possession to the time of the trial in that court; and, if the jury finds that the detention was wrongful and that the appeal was without merit and taken for the purpose of delay, the plaintiff, in addition to any other damages allowed, shall be entitled to double the amount of rent in arrears, or which may have accrued, to the time of trial in the district court. Judgment for the rent in arrears and for the damages assessed may, on motion, be rendered against the sureties to the appeal. (1868-9, c. 156, s. 28; Code, s. 1775; Rev., s. 2006; C. S., s. 2371; 1945, c. 796; 1971, c. 533, s. 7.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "district" for "superior" near the beginning and again near the end of the first sentence.

§ 42-34. Undertaking on appeal; when to be increased.—(a) Upon appeal to the district court, either party may demand that the case be tried at the first session of the court after the appeal is docketed, but the presiding judge, in his discretion, may first try any pending case in which the rights of the parties or the public demand it.

(b) No execution commanding the removal of a defendant from possession of the rented premises shall be suspended until the defendant gives an undertaking in an amount not less than three month's rent of the premises, with sufficient surety or sureties to be approved by the magistrate, to be void if the defendant pays any judgment which the plaintiff may recover for rent, and for damages for the detention of the land. At any session of the district court of the county in which the appeal is docketed after the lapse of three months from the date of the filing of the undertaking required in this subsection, the tenant, after legal notice has been duly served on him, may be required to show cause why the undertaking should not be increased to an amount sufficient to cover rents and damages for such period as the court may deem proper, and if the tenant fails to show proper cause and does not file an increased undertaking for rents and damages as the court may direct, or make affidavit that he is unable to do so, his appeal shall be dismissed and the judgment of the magistrate shall be affirmed. (1868-9, c. 156, s. 25; 1883, c. 316; Code, s. 1772; Rev., s. 2008; C. S., s. 2373; 1921, c. 90; Ex. Sess. 1921, c. 17; 1933, c. 154; 1937, c. 294; 1949, c. 1159; 1971, c. 533, s. 8.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, rewrote this section.

No Provision for Waiver of Bond.— Examination of this section fails to disclose any provision for waiver of the bond to perfect the appeal. Caulder v. Durham Housing Authority, 433 F.2d 998 (4th Cir. 1970).

Cited in Crockett v. Lowry, 8 N.C. App. 71, 173 S.E.2d 566 (1970).

§ 42-35. Restitution of tenant, if case quashed, etc., on appeal.—If the proceedings before the magistrate are brought before a district court and quashed, or judgment is given against the plaintiff, the district or other court in which final judgment is given shall, if necessary, restore the defendant to the pos-

session, and issue such writs as are proper for that purpose. (1868-9, c. 156, s. 27; Code, s. 1774; Rev., s. 2009; C. S., s. 2374; 1971, c. 533, s. 9.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "magistrate" for "justice" near the beginning of the section and substituted "district" for "superior" in two places.

§ 42-36. Damages to tenant for dispossession, if proceedings quashed, etc.—If, by order of the magistrate, the plaintiff is put in possession, and the proceedings shall afterwards be quashed or reversed, the defendant may recover damages of the plaintiff for his removal. (1868-9, c. 156, s. 30; Code, s. 1776; Rev., s. 2010; C. S., s. 2375; 1971, c. 533, s. 10.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "magistrate" for "justice" near the beginning of the section.

§ 42-36.1. Lease or rental of mobile homes.—The provisions of this Article shall apply to the lease or rental of mobile homes, as defined in G.S. 143-145. (1971, c. 764.)

ARTICLE 4.

Forms.

§ 42-37: Repealed by Session Laws 1971, c. 533, s. 11, effective October 1, 1971.

Chapter 43.

Land Registration.

ARTICLE 1.

Nature of Proceeding.

§ 43-1. Jurisdiction in superior court.

The Torrens Act manifests a purpose on the part of the General Assembly to establish a title in the registered owner, impregnable against attack at the time of the decree, and also to protect him against all claims or demands not noted on the book for the registration of titles, and to make that book a complete record and the only conclusive evidence of the title. State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

The basic principle of this system is the registration of the official and conclusive evidence of the title of land, instead of registering, as the old system requires, the wholly private and inconclusive evidences of such title. State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

The principle of the "Torrens System" is conveyance by registration and certificate instead of by deed, and assimilates the transfer of land to the transfer of stocks in corporations. State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

The purpose of a proceeding, etc.—

The general purpose of the Torrens System is to secure by a decree of court, or other similar proceedings, a title impregnable against attack; to make a permanent and complete record of the exact status of the title with the certificate of registration showing at a glance all liens, encumbrances, and claims against the title; and to protect the registered owner against all claims or demands not noted on the book for the registration of titles. State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

Cited in International Serv. Ins. Co. v. Iowa Nat'l Mut. Ins. Co., 276 N.C. 243, 172 S.E.2d 55 (1970).

ARTICLE 2.

Officers and Fees.

§ 43-5. Fees of officers.—The examiner hereinbefore provided for shall receive, as may be allowed by the clerk, a minimum fee of five dollars ($5.00) for such examination of each title of property assessed upon the tax books at the amount of five thousand dollars ($5,000.00) or less; for each additional thousand dollars ($1,000.00) of assessed value of property so examined he shall receive fifty cents (50¢); for examination outside of the county he shall receive a reasonable allowance. There shall be allowed to the register of deeds for copying the plot upon registration of titles book one dollar ($1.00); for issuing the certificate and new certificates under this Chapter, fifty cents (50¢) for each; for noting the entries or memorandum required and for the entries noting the cancellation of mortgages and all other entries, if any, herein provided for, a total of twenty-five cents (25¢) for the entry or entries connected with one transaction. The county or other surveyor employed under the provisions of this Chapter shall not be allowed to charge more than forty cents (40¢) per hour for his time actually employed in making the survey and the map, except by agreement with the petitioner: Provided, however, that a minimum fee of two dollars ($2.00) in any case may be allowed.

There shall be no other fees allowed of any nature except as herein provided, and the bond of the register, clerk and sheriff shall be liable in case of any mistake, malfeasance, or misfeasance as to the duties imposed upon them by this Chapter in as full a manner as such bond is now liable by law. (1913, c. 90, s. 30; C. S., s. 2381; 1971, c. 1185, s. 1.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, deleted a former first sentence.

ARTICLE 3.

Procedure for Registration.

§ 43-6. Who may institute proceedings.

Quoted in State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

§ 43-8. Petition filed; contents.

Stated in State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

§ 43-9. Summons issued and served; disclaimer. — Summons 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. The summons shall be served at least ten days before the return thereof and the return recorded in the same manner as in other special proceedings; and all parties under disabilities shall be represented by guardian, either general or ad litem. If the persons named as interested are not residents of the State of North Carolina, and their residence is known, which must appear by affidavit, the summons must be served on such nonresidents as is now prescribed by law for service of summons on nonresidents.

Any party defendant to such proceeding may file a disclaimer of any claim or interest in the land described in the petition, which shall be deemed an admission of the allegations of the petition, and the decree shall bar such party and all persons thereafter claiming under him, and such party shall not be liable for any costs or expenses of the proceeding except such as may have been incurred by reason of his delay in pleading. (1913, c. 90, s. 6; C. S., s. 2385; 1967, c. 954, s. 3.)

Editor's Note. — **The 1967 amendment, effective July 1, 1969, rewrote the first sentence.**

The amendment to this section eliminated a former provision that summons should be directed to the sheriff. Compare Rule 4 of the Rules of Civil Procedure (§ 1A-1) and the amendment to the special proceedings statute, § 1-394.

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

Stated in State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

§ 43-10. Notice of petition published.

Evidence of Publication.—The recital in a final Torrens decree of registration that "publication of notice has been duly made" is conclusive evidence of the fact, and any attack on the decree is foreclosed by the limitation imposed in § 43-26. State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

When viewed in light of the purpose of the Torrens Act, it is clear that the proviso, that recital of service of summons and publication in the decree and the certificate shall be conclusive evidence thereof, is intended to cure any jurisdictional defect with respect to issuance and service of summons and the publication of notice so as to foreclose all jurisdictional attacks on a Torrens title. State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

§ 43-11. Hearing and decree.

(c) Exceptions to Report.—Any of the parties to the proceeding may, within twenty days after such report is filed, file exceptions, either to the conclusions of law or fact. Whereupon the clerk shall transmit the record to the judge of the superior court for his determination thereof; such judge may on his own motion certify any issue of fact arising upon any such exceptions to the superior court of the county in which the proceeding is pending, for a trial of such issue by jury, and he shall so certify such issue of fact for trial by jury upon the demand of any party to the proceeding. If, upon consideration of such record, or the record and verdict of issues to be certified and tried by jury, the title be found in the petitioner, the judge shall enter a decree to that effect, ascertaining all limitations,

liens, etc., declaring the land entitled to registration accordingly, and the same, together with the record, shall be docketed by the clerk of the court as in other cases, and a copy of the decree certified to the register of deeds of the county for registration as hereinafter provided. Any of the parties may appeal from such judgment to the appellate division, as in other special proceedings.

(1969, c. 44, s. 48.)

Editor's Note.—The 1969 amendment substituted "appellate division" for "Supreme Court" in the last sentence of subsection (c).

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

For article "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

Stated in State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

§ 43-12. Effect of decree; approval of judge.

Quoted in State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

ARTICLE 4.

Registration and Effect.

§ 43-15. Certificate issued.

Stated in State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

§ 43-16. Certificates numbered; entries thereon.

Stated in State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

§ 43-17.1. Issuance of certificate upon death of registered owner; petition and contents; dissolution of corporation; certificate lost or not received by grantee.—Upon the death of any person who is the registered owner of any estate or interest in land which has been brought under this Chapter, a petition may be filed with the clerk of the superior court of the county in which the title to such land is registered by anyone having any estate or interest in the land, or any part thereof, the title to which has been registered under the terms of this Chapter, attaching thereto the registered certificate of title issued to the deceased holder and setting forth the nature and character of the interest or estate of such petitioner in said land, the manner in which such interest or estate was acquired by the petitioner from the deceased person—whether by descent, by will, or otherwise, and setting forth the names and addresses of any and all other persons, firms or corporations which may have any interest or estate therein, or any part thereof, and the names and addresses of all persons known to have any claims or liens against the said land; and setting forth the changes which are necessary to be made in the registered certificate of title to land in order to show the true owner or owners thereof occasioned by the death of the registered owner of said certificate. Such petition shall contain all such other information as is necessary to fully inform the court as to the status of the title and the condition as to all liens and encumbrances against said land existing at the time the petition is filed, and shall contain a prayer for such relief as the petitioner may be entitled to under the provisions hereof. Such petition shall be duly verified.

Like procedure may be followed as herein set forth upon the dissolution of any corporation which is the registered owner of any estate or interest in the land which has been brought under this Chapter.

In the event the registered certificate of title has been lost and after due diligence cannot be found, and this fact is made to appear by allegation in the petition, such registered certificate of title need not be attached to the petition as hereinabove required, but the legal representatives of the deceased registered owner shall

be made parties to the proceeding. If such persons are unknown or, if known cannot after due diligence be found within the State, service of summons upon them may be made by publication of the notice prescribed in G.S. 43-17.2. In case the registered owner is a corporation which has been dissolved, service of summons upon such corporation and any others who may have or claim any interest in such land thereunder shall be made by publication of the notice containing appropriate recitals as required by G.S. 43-17.2.

If any registered owner has by writing conveyed or attempted to convey a title to any registered land without the surrender of the certificate of title issued to him, the person claiming title to said lands under and through said registered owner by reason of his or its conveyance may file a petition with the clerk of the superior court of the county in which the land is registered and in the proceeding under which the title was registered praying for the cancellation of the original certificate and the issuance of the new certificate. Upon the filing of such petition notice shall be published as prescribed in G.S. 43-17.2. The clerk of the superior court with whom said petition is filed shall by order determine what additional notice, if any, shall be given to registered owners. If the registered owner is a natural person, deceased, or a corporation dissolved the court may direct what additional notice, if any, shall be given. The clerk shall hear the evidence, make findings of fact, and if found as a fact that the original certificate of the registered owner has been lost and cannot be found, shall enter his order directing the register of deeds to cancel the same and to issue a new certificate to such person or persons as may be entitled thereto, subject to such claims or liens as the court may find to exist.

Any party within 10 days from the rendition of such judgment or order by the clerk of superior court of the county in which said land is registered may appeal to the superior court during a session of court, where the cause shall be heard de novo by the judge, unless a jury trial be demanded, in which event the issues of fact shall be submitted to a jury. From any order or judgment entered by the superior court during a session of court an appeal may be taken to the appellate division in the manner provided by law. (1943, c. 466, s. 1; 1945, c. 44; 1969, c. 44, s. 49; 1971, c. 1185, s. 2.)

Editor's Note.—The 1969 amendment substituted "appellate division" for "Supreme Court" in the last sentence.

The 1971 amendment, effective Oct. 1, 1971, in the fifth paragraph, substituted "during a session of court" for "in term time" in the first and second sentences.

§ 43-18. Registered owner's estate free from adverse claims; exceptions.

Unrecorded Deed Does Not Affect Lands Covered by Torrens Title.—Where title to lands was registered under the provisions of the Torrens Law, and the deed seeking to establish a boundary line and reserving a right-of-way across the lands was not recorded in the registration of title book, and no notice of the existence thereof was made in said registration of title book or upon the certificate of title, the deed and purported reservation of right-of-way had no effect whatever on the lands covered by the Torrens title. State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

§ 43-21. No right by adverse possession.

Editor's Note.—For article "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

Quoted in State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

§ 43-22. Jurisdiction of courts; registered land affected only by registration.

Unrecorded Deed Does Not Affect Lands Covered by Torrens Title—Where title to lands was registered under the provisions of the Torrens Law, and the deed seeking to establish a boundary line and reserving a right-of-way across the lands was not recorded in the registration of title book, and no notice of the existence there-

of was made in said registration of title book or upon the certificate of title, hence the deed and purported reservation of right-of-way had no effect whatever on the lands covered by the Torrens title. State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

ARTICLE 5.

Adverse Claims and Corrections after Registration.

§ 43-26. Limitations.

Evidence of Publication.—The recital in a final Torrens decree of registration that "publication of notice has been duly made" was conclusive evidence of the fact, and any attack on the decree was foreclosed by the limitation imposed in § 43-26. State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

§ 43-27. Adverse claim subsequent to registry; affidavit of claim prerequisite to enforcement; limitation.

Stated in State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

§ 43-28. Suit to enforce adverse claim; summons and notice necessary.

Stated in State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

ARTICLE 6.

Method of Transfer.

§ 43-31. When whole of land conveyed.

Stated in State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

§ 43-32. Conveyance of part of registered land.

Stated in State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

§ 43-33. Duty of register of deeds upon part conveyance.

Stated in State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

§ 43-37. Owner's certificate presented with transfer.

Stated in State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

Chapter 44.

Liens.

ARTICLE 1.

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

§ 44-1: Repealed by Session Laws 1969, c. 1112, s. 4, effective January 1, 1970.

Editor's Note. — Session Laws 1969, c. 1112, s. 4.1, provides that the act shall not apply to pending litigation.

§§ 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 1A.

Wage Liens.

§ 44-5.1. Wages for two months' lien on assets.

This section grants a priority lien for the wages paid regular employees, and such priority does not extend to those who are independent contractors and not regular employees. First Citizens Bank & Trust Co. v. Academic Archives, Inc., 15 N.C. App. 186, 189 S.E.2d 551 (1972).

Independent Contractor Defined. — An independent contractor is one who (a) is engaged in an independent business, calling or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and, (h) selects his own time. First Citizens Bank & Trust Co. v. Academic Archives, Inc., 15 N.C. App. 186, 189 S.E.2d 551 (1972).

Test of Employee Status.—The vital test of who are regular employees or independent contractors is to be found in the fact that the employer has or has not retained the right of control or superintendence over the contractor or employee as to details. First Citizens Bank & Trust Co. v. Academic Archives, Inc., 15 N.C. App. 186, 189 S.E.2d 551 (1972).

A practicing attorney rendering professional services to a client is an independent contractor, and his claim is not entitled to a priority under this section. First Citizens Bank & Trust Co. v. Academic Archives, Inc., 15 N.C. App. 186, 189 S.E.2d 551 (1972).

ARTICLE 2.

Subcontractors', etc., Liens and Rights against Owners.

§ 44-6: Repealed by Session Laws 1971, c. 880, s. 2, effective October 1, 1971.

Cross Reference.—For present provisions as to statutory liens of mechanics, laborers and materialmen dealing with one other than the owner, see §§ 44A-17 to 44A-23.

Editor's Note. — Session Laws 1971, c. 880, s. 4, provides: "This act shall become effective on and after October 1, 1971, and shall not affect pending litigation."

§§ 44-8 to 44-13: Repealed by Session Laws 1971, c. 880, s. 2, effective October 1, 1971.

Cross Reference.—For present provisions as to statutory liens of mechanics, laborers and materialmen dealing with one other than the owner, see §§ 44A-17 to 44A-23.

Editor's Note. — Session Laws 1971, c. 880, s. 4, provides: "This act shall become effective on and after October 1, 1971, and shall not affect pending litigation."

Subsequent to its repeal by Session Laws 1971, c. 880, s. 2, effective Oct. 1, 1971, § 44-10 was amended by Session Laws 1971, c. 1185, s. 3, effective Oct. 1, 1971.

§ 44-14. Contractor on municipal building to give bond; action on bond.

I. GENERAL CONSIDERATION.

Cited in West Durham Lumber Co. v. Aetna Cas. & Sur. Co., 12 N.C. App. 641, 184 S.E.2d 399 (1971).

II. PROTECTION AFFORDED BY BOND.

This section was intended, etc.—
In accord with 1st paragraph in original.

See Amarr Co. v. J.M. Dixon, Inc., 5 N.C. App. 479, 168 S.E.2d 475 (1969).

Provisions of Section, etc.—

The court is required by this section to treat a bond as including the section. The bond, therefore, must give, as a minimum, that protection commensurate with the protection afforded workers in private construction. Amarr Co. v. J.M. Dixon, Inc., 5 N.C. App. 479, 168 S.E.2d 475 (1969).

This section prescribes the minimum protection that must be furnished but does not undertake to stipulate the maximum. Amarr Co. v. J.M. Dixon, Inc., 5 N.C. App. 479, 168 S.E.2d 475 (1969).

A clause seeking to limit protection afforded the laborer or materialman to less than that afforded the same persons when engaged in private construction violates the meaning and intent of this section. Amarr Co. v. J.M. Dixon, Inc., 5 N.C. App. 479, 168 S.E.2d 475 (1969).

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.—All claims shall be filed in the office of the clerk of superior court in the county where the labor has been performed or the materials furnished, specifying in detail the materials furnished or the labor performed, and the time thereof. If the parties interested make a special contract for such labor performed, or if such material and labor are specified in writing, in such cases it shall be decided agreeably to the terms of the contract, provided the terms of such contract do not affect the lien for such labor performed or materials furnished. (1869-70, c. 206, s. 4; 1876-7, c. 53, s. 1; Code, s. 1784; Rev., s. 2026; C. S., s. 2469; 1971, c. 1185, s. 4.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, rewrote the first sentence.

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).

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 to 44-46: Repealed by Session Laws 1969, c. 1112, s. 4, effective January 1, 1970.

Editor's Note.—Session Laws 1969, c. 1112, s. 4.1, provides that the act shall not apply to pending litigation.

§ 44-47: Repealed by Session Laws 1971, c. 1185, s. 5, effective October 1, 1971.

§ 44-48. Discharge of liens.—All liens created by this Chapter may be discharged as follows:

(1) By filing with the clerk a receipt or acknowledgment, signed by the claimant, that the lien has been paid or discharged.

(2) By depositing with the clerk money equal to the amount of the claim, which money shall be held by said officer for the benefit of the claimant.

(3) By an entry in the lien docket that the action on the part of the claimant to enforce the lien has been dismissed, or a judgment rendered against the claimant in such action.

(4) By a failure of the claimant to commence an action for the enforcement of the lien within six months from the notice of lien filed. (1868-9, c. 117, s. 12; Code, s. 1793; Rev., s. 2033; C. S., s. 2479; 1971, c. 1185, s. 6.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, deleted "justice or" preceding "clerk" in subdivisions (1) and (2).

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, corporation, municipal corporation or county to whom the person so recovering, or the person in whose behalf the recovery has been made, may be indebted for drugs, medical supplies, ambulance services, 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 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, furnish 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; 1969, c. 450, 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.

The 1969 amendment rewrote the first sentence so as to make it applicable to municipal corporations and counties and to ambulance services and deleted "and effectively" near the end of the second sentence of the first paragraph.

For article concerning liens on personal property not governed by the Uniform Commercial Code, see 44 N.C.L. Rev. 322 (1966). For comment on new North Carolina wrongful death statute, see 48 N.C.L. Rev. 594 (1970).

Minor Cannot, etc.—

In accord with 1st paragraph in original. See Price v. Seaboard Air Line R.R., 274 N.C. 32, 161 S.E.2d 590 (1968).

This section and § 44-50 make any plaintiff's unpaid medical expenses a lien upon his recovery in a personal injury action. Travelers Ins. Co. v. Keith, 283 N.C. 577, 196 S.E.2d 731 (1973).

But they impose no obligation with reference to such expenses upon the defendant against whom judgment has been rendered. Travelers Ins. Co. v. Keith, 283 N.C. 577, 196 S.E.2d 731 (1973).

Stated in Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

§ 44-50. Receiving person charged with duty of retaining funds for purpose stated; evidence; attorney's fees; charges.—Such a lien as provided for in G.S. 44-49 shall also attach upon all funds paid to any person in compensation for or settlement of the said injuries, whether in litigation or otherwise; and it shall be the duty of any person receiving the same before disbursement thereof to retain out of any recovery or any compensation so received a sufficient amount to pay the just and bona fide claims for such drugs, medical supplies, ambulance service and medical attention and/or hospital service, after having received and accepted notice thereof: Provided, that evidence as to the amount of such charges shall be competent in the trial of any such action: Provided, further, that nothing herein contained shall be construed so as to interfere with any amount due for attorney's services: Provided, further, that the lien hereinbefore provided for shall in no case, exclusive of attorneys' fees, exceed fifty percent of the amount of damages recovered. (1935, c. 121, s. 2; 1959, c. 800, s. 2; 1969, c. 450, s. 2.)

Editor's Note.—The 1969 amendment inserted "ambulance service" near the middle of the section.

This section and § 44-49 make plaintiff's unpaid medical expenses a lien upon his recovery in a personal injury action. Travelers Ins. Co. v. Keith, 283 N.C. 577, 196 S.E.2d 731 (1973).

But they impose no obligation with reference to such expenses upon the defendant against whom judgment has been rendered. Travelers Ins. Co. v. Keith, 283 N.C. 577, 196 S.E.2d 731 (1973).

Applied in Travelers Ins. Co. v. Keith, 15 N.C. App. 551, 190 S.E.2d 428 (1972).

ARTICLE 9A.

Liens for Ambulance Service.

§ 44-51.1. Lien on real property of recipient of ambulance service paid for or provided by county or municipality.—There is hereby created a general lien upon the real property of any person who has been furnished ambulance service by a county or municipal agency or at the expense of county or municipal government. The lien created by this section shall continue from the date of filing until satisfied, except that no action to enforce it may be brought more than ten years after the date on which ambulance service was furnished nor more than three years after the date of recipient's death. Failure to bring action within such times shall be a complete bar against any recovery and shall extinguish the lien. (1969, c. 684.)

§ 44-51.2. Filing within ninety days required.—No lien created by G.S. 44-51.1 shall be valid but from the time of filing in the office of the clerk of superior court a statement containing the name and address of the person against whom the lien is claimed, the name of the county or municipality claiming the lien, the amount of the unpaid charge for ambulance service, and the date and place of furnishing ambulance service for which charges are asserted and the lien claimed. No lien under this article shall be valid unless filed in accordance with this section within 90 days of the date of the furnishing the ambulance service. (1969, c. 684.)

§ 44-51.3. Discharge of lien.—Liens created by this article may be discharged as follows:

(1) By filing with the clerk of superior court a receipt or acknowledgment, signed by the county or municipal treasurer, that the lien has been paid or discharged;

(2) By depositing with the clerk of superior court money equal to the amount of the claim, which money shall be held for the benefit of the claimant; or

(3) By an entry in the lien docket that the action on the part of the lien

claimant to enforce the lien has been dismissed, or a judgment has been rendered against the claimant in such action. (1969, c. 684.)

ARTICLE 9B.

Attachment or Garnishment and Lien for Ambulance Service in Certain Counties.

§ 44-51.4. Attachment or garnishment for county or city ambulance service.—Whenever ambulance services are provided by a county or by a municipally owned and operated ambulance service and a recipient of such ambulance services or one legally responsible for the support of a recipient of such services fails to pay charges fixed for such services for a period of ninety days after the rendering of such services, the county or municipality providing the ambulance services may treat the amount due for such services as if it were a tax due to the county or municipality and may proceed to collect the amount due through the use of attachment and garnishment proceedings as set out in G.S. 105-385 (d). (1969, c. 708, s. 1.)

Editor's Note.—Section 105-385, referred to in this section, was revised by Session Laws 1971, c. 806, effective July 1, 1971. See now § 105-366.

§ 44-51.5. General lien for county or city ambulance service.—There is hereby created a general lien upon the real property of any person who has been furnished ambulance service by a county or municipal agency or at the expense of a county or municipal government or upon the real property of one legally responsible for the support of any person who has been furnished such ambulance service. (1969, c. 708, s. 2.)

§ 44-51.6. Lien to be filed.—No lien created by § 44-51.5 shall be valid but from the time of filing in the office of the clerk of superior court a statement containing the name and address of the person against whom the lien is claimed, the name of the county or municipality claiming the lien, the amount of the unpaid charge for ambulance service, and the date and place of furnishing the ambulance service for which charges are asserted and the lien claimed. No lien under this section shall be valid unless filed after ninety days of the date of the furnishing of ambulance service, and within one hundred eighty days of the date of the furnishing of ambulance service. (1969, c. 708, s. 3.)

§ 44-51.7. Discharging lien.—Liens created by § 44-51.5 may be discharged as follows:

(1) By filing with the clerk of superior court a receipt of acknowledgment, signed by the county treasurer, that the lien has been paid or discharged;

(2) By depositing with the clerk of superior court money equal to the amount of the claim, which money shall be held for the benefit of the claimant; or

(3) By an entry in the lien docket that the action on the part of the lien claimant to enforce the lien has been dismissed, or a judgment has been rendered against the claimant in such action. (1969, c. 708, s. 4.)

§ 44-51.8. Counties to which Article applies.—The provisions of this Article shall apply only to Anson, Bladen, Brunswick, Buncombe, Caldwell, Caswell, Catawba, Columbus, Davidson, Edgecombe, Forsyth, Franklin, Gaston, Granville, Greene, Guilford, Halifax, Hertford, Hoke, Johnston, Jones, Lee, Lenoir, Lincoln, Madison, Mitchell, Montgomery, Moore, Nash, Onslow, Pasquotank, Person, Pitt, Richmond, Robeson, Rockingham, Scotland, Vance, Warren, Washington, Watauga, Wilkes, Wilson, and Yancey Counties. (1969, c. 708, s. 5; c. 1197; 1971, c. 132.)

Editor's Note. — The 1969 amendment inserted Hertford in the list of counties. The 1971 amendment inserted Washington in the list of counties.

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 11.

Uniform Federal Tax Lien Registration Act.

§§ 44-65 to 44-68: Repealed by Session Laws 1969, c. 216, effective October 1, 1969.

Cross reference.—See Editor's note to § 44-68.1.

Editor's Note. — Prior to its repeal by Session Laws 1969, c. 216, § 44-66 had been amended by Session Laws 1969, c. 80, s. 10.

§ 44-68.1. Federal tax lien; place of filing.—(a) Notices of liens upon real property for taxes payable to the United States, and certificates and notices affecting the liens shall be filed in the office of the clerk of superior court of the county in which the real property subject to a federal tax lien is situated.

(b) Notices of liens upon personal property, whether tangible or intangible, for taxes payable to the United States and certificates and notices affecting the liens shall be filed as follows:

(1) If the person against whose interest the tax lien applies is a corporation or a partnership whose principal executive office is in this State, as these entities are defined in the internal revenue laws of the United States, in the office of the Secretary of State;

(2) In all other cases in the office of the clerk of superior court of the county where the taxpayer resides at the time of filing of the notice of lien. (Ex. Sess. 1924, c. 44, s. 1; 1969, c. 216.)

Editor's Note.—Session Laws 1969, c. 216, repealed former article 11, entitled "Liens for Internal Revenue," consisting of §§ 44-65 to 44-68, and enacted present article 11, effective Oct. 1, 1969, in lieu thereof.

§ 44-68.2. Execution of notices and certificates.—Certificate by the secretary of the treasury of the United States or his delegate of notices of liens, certificates, or other notices affecting tax liens entitles them to be filed and no other attestation, certification, or acknowledgment is necessary. (1969, c. 216.)

§ 44-68.3. Duties of filing officer.—(a) If a notice of federal tax lien, a refiling of a notice of tax lien, or a notice of revocation of any certificate described in subsection (b) is presented to the filing officer and

(1) He is the Secretary of State, he shall cause the notice to be marked, held and indexed in accordance with the provisions of § 25-9-403 (4) of the Uniform Commercial Code as if the notice were a financing statement within the meaning of that Code; or

(2) He is the clerk of superior court, he shall endorse and stamp thereon the name of the office in which it is presented and the date and time of receipt, and shall file, alphabetically index, and docket the notice so that the docket shows the name and address of the person named in the notice, the date and time of receipt, the serial number of the district director, and the total unpaid balance of the assessment appearing on the notice of lien. No administrative rules or regulations shall be made which modify or are inconsistent with the Federal Tax Lien Act and this article.

(b) If a certificate of release, nonattachment, discharge or subordination of any tax lien is presented to the Secretary of State for filing he shall

(1) Cause a certificate of release or nonattachment to be marked, held and indexed as if the certificate were a termination statement within the meaning of the Uniform Commercial Code, except that the notice of lien to which the certificate relates shall not be removed from the files, and

(2) Cause a certificate of discharge or subordination to be held, marked and indexed as if the certificate were a release of collateral within the meaning of the Uniform Commercial Code.

(c) If a refiling notice of federal tax lien referred to in subsection (a) or any of the certificates or notices referred to in subsection (b) is presented for filing with the clerk of superior court, he shall endorse or stamp thereon the name of the office in which it is presented and the date and time of receipt, permanently attach the refiled notice or certificate to the original notice of lien, alphabetically index the same and docket the notice or certificate on the same page where the original notice of lien is docketed.

(d) Upon request of any person, the filing officer shall issue his certificate showing whether there is on file, on the date and time stated therein, any notice of federal tax lien or certificate or notice affecting the lien, filed on or after October 1, 1969, naming a particular person, and if a notice or certificate is on file, giving the date and time of receipt of each notice or certificate. Upon request the filing officer shall furnish a copy of any notice of federal tax lien or notice or certificate affecting a federal tax lien. (Ex. Sess. 1924, c. 44, ss. 2, 3; 1953, c. 1106, ss. 1, 2; 1963, c. 544; 1969, c. 216.)

§ **44-68.4. Fees.**—(a) The fee for filing and indexing each notice of lien or certificate or notice affecting the tax lien in the office of the Secretary of State is:

(1) For a tax lien on tangible and intangible personal property, two dollars ($2.00);

(2) For a certificate of discharge or subordination, two dollars ($2.00);

(3) For all other notices, including a certificate of release or nonattachment, one dollar ($1.00).

(b) The fee for furnishing the certificate provided for in § 44-68.3 (d) in the office of the Secretary of State is two dollars ($2.00), and the fee for furnishing copies provided for in § 44-68.3 (d) is one dollar ($1.00) per page.

(c) The fee for filing and indexing each notice of lien or certificate or notice affecting the tax lien in the office of the clerk of superior court and the fee for furnishing the certificate or copies provided for in § 44-68.3 (d), is as provided in G.S. 7A-308.

(d) The officer shall bill the district directors of internal revenue on a monthly basis for fees for documents filed by them. (1969, c. 216.)

§ **44-68.5. Tax liens and notices filed before October 1, 1969.**—Federal tax liens, certificates and notices affecting such liens filed before October 1, 1969, and the indexes thereto shall be transferred and maintained in the offices of the clerks of court. If a notice of lien was filed before October 1, 1969, any certificate or notice affecting the lien shall, after May 14, 1973, be filed in the offices of the clerks of court. (1969, c. 216; 1973, c. 480.)

Editor's Note. — The 1973 amendment rewrote this section.

§ **44-68.6. Uniformity of interpretation.**—This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1969, c. 216.)

§ **44-68.7. Short title.**—This article may be cited as the Uniform Federal Tax Lien Registration Act. (1969, c. 216.)

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.

§ 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 tows, alters, repairs, stores, services, treats, or improves personal property other than a motor vehicle 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 G.S. 44A-4. This lien shall have priority over perfected and unperfected security interests.

(d) Any person who repairs, services, tows, or stores motor vehicles in the ordinary course of his business pursuant to an express or implied contract with an owner or legal possessor of the motor vehicle has a lien upon the motor vehicle for reasonable charges for such repairs, servicing, towing, or storing. This lien shall have priority over perfected and unperfected security interests.

(e) The lessor of any house, room, apartment, office, store or other demised premises has a lien on all furniture, household furnishings, trade fixtures, equipment and other personal property remaining on the demised premises 60 or more days after the tenant having legal title to such property has vacated the premises, unless the tenant has continued to pay the rental or unless the lessor, or his agent, and the tenant have an agreement to the contrary. This lien shall be for the amount of any rents which were due the lessor at the time the tenant vacated the premises and for the time, up to 60 days, from the vacating of the premises to the date of sale; and for any sums necessary to repair damages to the premises caused by the tenant, normal wear and tear excepted; and for reasonable costs and expenses of sale. The lien created by this subsection shall be enforced by sale at a public sale pursuant to the provisions of G.S. 44A-4(d). This lien shall not have priority over any security interest in the property which is perfected at the time the lessor acquires this lien. (1967, c. 1029, s. 1; 1971, cc. 261, 403; c. 544, s. 1; c. 1197.)

Editor's Note.—The first 1971 amendment added subsection (d).

The second 1971 amendment inserted "tows" and "stores" in the first sentence of subsection (a).

The third 1971 amendment, effective July 1, 1971, added subsection (e).

The fourth 1971 amendment inserted "other than a motor vehicle" in the first sentence of subsection (a).

Session Laws 1971, c. 544, s. 3, contains a severability clause.

§ 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 fur-

nished 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; but when such person cannot be found, the surplus shall be paid to the clerk of superior court of the county in which the sale took place, to be held by the clerk for the person entitled thereto. (1967, c. 1029, s. 1; 1971, c. 544, s. 2.)

Editor's Note. — The 1971 amendment, effective July 1, 1971, added that part of subdivision (3) following the semicolon. Session Laws 1971, c. 544, s. 3, contains a severability clause.

§ 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.)

ARTICLE 2.

PART 1. Statutory Liens on Real Property.

Liens of Mechanics, Laborers and Materialmen

Dealing with Owner.

§ 44A-7. Definitions.—Unless the context otherwise requires in this article:

(1) "Improve" means to build, effect, alter, repair, or demolish any improvement upon, connected with, or on or beneath the surface of any real property, or to excavate, clear, grade, fill or landscape any real property, or to construct driveways and private roadways, or to furnish materials, including trees and shrubbery, for any of such purposes, or to perform any labor upon such improvements.
(2) "Improvement" means all or any part of any building, structure, erection, alteration, demolition, excavation, clearing, grading, filling, or landscaping, including trees and shrubbery, driveways, and private roadways, on real property.
(3) An "owner" is a person who has an interest in the real property improved

and for whom an improvement is made and who ordered the improvement to be made. "Owner" includes successors in interest of the owner and agents of the owner acting within their authority.

(4) "Real property" means the real estate that is improved, including lands, leaseholds, tenements and hereditaments, and improvements placed thereon. (1969, c. 1112, s. 1.)

Editor's Note. — Session Laws 1969, c. 1112, s. 5.1, makes the act effective Jan. 1, 1970, and s. 4.1 provides that the act shall not apply to pending litigation.

§ 44A-8. Mechanics', laborers' and materialmen's lien; persons entitled to lien.—Any person who performs or furnishes labor or furnishes materials pursuant to a contract, either express or implied, with the owner of real property, for the making of an improvement thereon shall, upon complying with the provisions of this article, have a lien on such real property to secure payment of all debts owing for labor done or material furnished pursuant to such contract. (1969, c. 1112, s. 1.)

Third Party Contract Not Implied. — This Article does not provide an exception to the principle that where there is a contract between persons for the furnishing of services or goods to a third, the latter is not liable on an implied contract simply because he has received such services or goods. Suffolk Lumber Co. v. White, 12 N.C. App. 27, 182 S.E.2d 215 (1971).

Plaintiff Must Prove Performance Pursuant to Contract with Defendant.—Plaintiff has the burden of showing, not only that it performed labor or furnished materials for the making of an improvement on defendants' property, but also that the labor was performed or the materials were furnished pursuant to a contract, either express or implied, with defendants. Wilson Elec. Co. v. Robinson, 15 N.C. App. 201, 189 S.E.2d 758 (1972).

And Absence of Contract Justified Dismissal.—Where much of the evidence offered by plaintiff and all of the evidence offered by defendants tended to show that plaintiff's contract was with the general contractor employed to build the house, and not with defendants, the trial court acted properly in accepting the verdict of the jury and entering judgment dismissing the plaintiff's claim. Wilson Elec. Co. v. Robinson, 15 N.C. App. 201, 189 S.E.2d 758 (1972).

Cited in Pegram-West, Inc. v. Hiatt Homes, Inc., 12 N.C. App. 519, 184 S.E.2d 65 (1971).

§ 44A-9. Extent of lien.—Liens authorized under the provisions of this article shall extend to the improvement and to the lot or tract on which the improvement is situated, to the extent of the interest of the owner. When the lot or tract on which a building is erected is not surrounded at the time of making the contract with the owner by an enclosure separating it from adjoining land of the same owner, the lot or tract to which any lien extends shall be such area as is reasonably necessary for the convenient use and occupation of such building, but in no case shall the area include a building, structure, or improvement not normally used or occupied or intended to be used or occupied with the building with respect to which the lien is claimed. (1969, c. 1112, s. 1.)

§ 44A-10. Effective date of liens.—Liens granted by this article shall relate to and take effect from the time of the first furnishing of labor or materials at the site of the improvement by the person claiming the lien. (1969, c. 1112, s. 1.)

Cited in Wachovia Bank & Trust Co. v. Harris, 455 F.2d 841 (4th Cir. 1972).

§ 44A-11. Perfecting liens.—Liens granted by this article shall be perfected as of the time set forth in G.S. 44A-10 upon filing of claim of lien pursuant to G.S. 44A-12 and may be enforced pursuant to G.S. 44A-13. (1969, c. 1112, s. 1.)

§ 44A-12. Filing claim of lien.—(a) Place of Filing.—All claims of lien against any real property must be filed in the office of the clerk of superior court in each county wherein the real property subject to the claim of lien is located. The

clerk of superior court shall note the claim of lien on the judgment docket and index the same under the name of the record owner of the real property at the time the claim of lien is filed. An additional copy of the claim of lien may also be filed with any receiver, referee in bankruptcy or assignee for benefit of creditors who obtains legal authority over the real property.

(b) Time of Filing.—Claims of lien may be filed at any time after the maturity of the obligation secured thereby but not later than 120 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the lien.

(c) Contents of Claim of Lien to Be Filed.—All claims of lien must be filed using a form substantially as follows:

CLAIM OF LIEN

(1) Name and address of the person claiming the lien:

(2) Name and address of the record owner of the real property claimed to be subject to the lien at the time the claim of lien is filed:

(3) Description of the real property upon which the lien is claimed: (Street address, tax lot and block number, reference to recorded instrument, or any other description of real property is sufficient, whether or not it is specific, if it reasonably identifies what is described.)

(4) Name and address of the person with whom the claimant contracted for the furnishing of labor or materials:

(5) Date upon which labor or materials were first furnished upon said property by the claimant:

(6) General description of the labor performed or materials furnished and the amount claimed therefor:

.....

Lien Claimant

Filed this ..... day of ....., 19....

.....

Clerk of Superior Court

A general description of the labor performed or materials furnished is sufficient. It is not necessary for lien claimant to file an itemized list of materials or a detailed statement of labor performed.

(d) No Amendment of Claim of Lien.—A claim of lien may not be amended. A claim of lien may be cancelled by a claimant or his authorized agent or attorney and a new claim of lien substituted therefor within the time herein provided for original filing.

(e) Notice of Assignment of Claim of Lien.—When a claim of lien has been filed, it may be assigned of record by the lien claimant in a writing filed with the clerk of superior court who shall note said assignment in the margin of the judgment docket containing the claim of lien. Thereafter the assignee becomes the lien claimant of record. (1969, c. 1112, s. 1.)

Editor's Note. — For article "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

§ 44A-13. Action to enforce lien.—(a) Where and When Action Instituted.—An action to enforce the lien created by this article may be instituted in any county in which the lien is filed. No such action may be commenced later than 180 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the lien. If the title to the real property against which the lien is asserted is by law vested in a receiver or trustee in bankruptcy, the lien

shall be enforced in accordance with the orders of the court having jurisdiction over said real property.

(b) Judgment.—Judgment enforcing a lien under this article may be entered for the principal amount shown to be due, not exceeding the principal amount stated in the claim of lien enforced thereby. The judgment shall direct a sale of the real property subject to the lien thereby enforced. (1969, c. 1112, s. 1.)

Applied in H & B Co. v. Hammond, 17 N.C. App. 534, 195 S.E.2d 58 (1973).

Cited in T.A. Loving Co. v. Latham, 15 N.C. App. 441, 190 S.E.2d 248 (1972).

§ 44A-14. Sale of property in satisfaction of judgment enforcing lien or upon order prior to judgment; distribution of proceeds.—(a) Execution Sale; Effect of Sale.—Except as provided in subsection (b) of this section, sales under this article and distribution of proceeds thereof shall be made in accordance with the execution sale provisions set out in G.S. 1-339.41 through G.S. 1-339.76. The sale of real property to satisfy a lien granted by this article shall pass all title and interest of the owner to the purchaser, good against all claims or interests recorded, filed or arising after the first furnishing of labor or materials at the site of the improvement by the person claiming a lien.

(b) Sale of Property upon Order Prior to Judgment.—A resident judge of superior court in the district in which the action to enforce the lien is pending, a judge regularly holding the superior courts of the said district, any judge holding a session of superior court, either civil or criminal, in the said district, a special judge of superior court residing in the said district, or the Chief Judge of the District Court in which the action to enforce the lien is pending, may, upon notice to all interested parties and after a hearing thereupon and upon a finding that a sale prior to judgment is necessary to prevent substantial waste, destruction, depreciation or other damage to said real property prior to the final determination of said action, order any real property against which a lien under this article is asserted, sold in any manner determined by said judge to be commercially reasonable. The rights of all parties shall be transferred to the proceeds of the sale. Application for such order and further proceedings thereon may be heard in or out of session. (1969, c. 1112, s. 1.)

Cited in T.A. Loving Co. v. Latham, 15 N.C. App. 441, 190 S.E.2d 248 (1972).

§ 44A-15. Attachment available to lien claimant.—In addition to other grounds for attachment, in all cases where the owner removes or attempts or threatens to remove an improvement from real property subject to a lien under this article, without the written permission of the lien claimant or with the intent to deprive the lien claimant of his lien, the remedy of attachment of the property subject to the lien shall be available to the lien claimant or any other person. (1969, c. 1112, s. 1.)

§ 44A-16. Discharge of record lien.—Any lien filed under this Article may be discharged by any of the following methods:

(1) The lien claimant of record, his agent or attorney, in the presence of the clerk of superior court may acknowledge the satisfaction of the lien indebtedness, whereupon the clerk of superior court shall forthwith make upon the record of such lien an entry of such acknowledgment of satisfaction, which shall be signed by the lien claimant of record, his agent or attorney, and witnessed by the clerk of superior court.

(2) The owner may exhibit an instrument of satisfaction signed and acknowledged by the lien claimant of record which instrument states that the lien indebtedness has been paid or satisfied, whereupon the clerk of superior court shall cancel the lien by entry of satisfaction on the record of such lien.

(3) By failure to enforce the lien within the time prescribed in this Article.

(4) By filing in the office of the clerk of superior court the original or certified copy of a judgment or decree of a court of competent jurisdiction showing that the action by the claimant to enforce the lien has been dismissed or finally determined adversely to the claimant.

(5) Whenever a sum equal to the amount of the lien or liens claimed is deposited with the clerk of court, to be applied to the payment finally determined to be due, whereupon the clerk of superior court shall cancel the lien or liens of record.

(6) Whenever a corporate surety bond, in a sum equal to one and one-fourth (1¼) times the amount of the lien or liens claimed and conditioned upon the payment of the amount finally determined to be due in satisfaction of said lien or liens, is deposited with the clerk of court, whereupon the clerk of superior court shall cancel the lien or liens of record. (1969, c. 1112, s. 1; 1971, c. 766.)

Editor's Note.—The 1971 amendment added subdivision (6).

Part 2. Statutory Liens on Real Property.

Liens of Mechanics, Laborers and Materialmen Dealing with One Other Than Owner.

§ **44A-17. Definitions.**—Unless the context otherwise requires in this Article:

(1) "Contractor" means a person who contracts with an owner to improve real property.

(2) "First tier subcontractor" means a person who contracts with a contractor to improve real property.

(3) "Obligor" means an owner, contractor or subcontractor in any tier who owes money to another as a result of the other's partial or total performance of a contract to improve real property.

(4) "Second tier subcontractor" means a person who contracts with a first tier subcontractor to improve real property.

(5) "Third tier subcontractor" means a person who contracts with a second tier subcontractor to improve real property. (1971, c. 880, s. 1.)

Editor's Note.—Session Laws 1971, c. 880, s. 4, provides: "This act shall become effective on and after October 1, 1971, and shall not affect pending litigation."

§ **44A-18. Grant of lien; subrogation; perfection.** — Upon compliance with this Article:

(1) A first tier subcontractor who furnished labor or materials at the site of the improvement shall be entitled to a lien upon funds which are owed to the contractor with whom the first tier subcontractor dealt and which arise out of the improvement on which the first tier subcontractor worked or furnished materials.

(2) A second tier subcontractor who furnished labor or materials at the site of the improvement shall be entitled to a lien upon funds which are owed to the first tier subcontractor with whom the second tier subcontractor dealt and which arise out of the improvement on which the second tier subcontractor worked or furnished materials. A second tier subcontractor, to the extent of his lien provided in this subdivision, shall also be entitled to be subrogated to the lien of the first tier subcontractor with whom he dealt provided for in subdivision (1) and shall be entitled to perfect it by notice to the extent of his claim.

(3) A third tier subcontractor who furnished labor or materials at the site of the improvement shall be entitled to a lien upon funds which are owed to the second tier subcontractor with whom the third tier sub-

contractor dealt and which arise out of the improvement on which the third tier subcontractor worked or furnished materials. A third tier subcontractor, to the extent of his lien provided in this subdivision, shall also be entitled to be subrogated to the lien of the second tier subcontractor with whom he dealt and to the lien of the first tier subcontractor with whom the second tier subcontractor dealt to the extent that the second tier subcontractor is entitled to be subrogated thereto, and in either case shall be entitled to perfect the same by notice to the extent of his claim.

(4) Subcontractors more remote than the third tier who furnished labor or material at the site of the improvement shall be entitled to a lien upon funds which are owed to the person with whom they dealt and which arise out of the improvement on which they furnished labor or material, but such remote tier subcontractor shall not be entitled to subrogation to the rights of other persons.

(5) The liens granted under this section shall secure amounts earned by the lien claimant as a result of his having furnished labor or materials at the site of the improvement under the contract to improve real property, whether or not such amounts are due and whether or not performance or delivery is complete.

(6) The liens granted under this section are perfected upon the giving of notice in writing to the obligor as hereinafter provided and shall be effective upon the receipt thereof by such obligor. (1971, c. 880, s. 1.)

§ **44A-19. Notice to obligor.**—(a) Notice of a claim of lien shall set forth:

(1) The name and address of the person claiming the lien,

(2) A general description of the real property improved,

(3) The name and address of the person with whom the lien claimant contracted to improve real property,

(4) The name and address of each person against or through whom subrogation rights are claimed,

(5) A general description of the contract and the person against whose interest the lien is claimed, and

(6) The amount claimed by the lien claimant under his contract.

(b) All notices of claims of liens by first, second or third tier subcontractors must be given using a form substantially as follows:

NOTICE OF CLAIM OF LIEN BY
FIRST, SECOND OR THIRD TIER SUBCONTRACTOR

TO:

1. ....., owner of property involved.
(Name and address)

2. ....., general contractor.
(Name and address)

3. ....., first tier subcontractor against or through whom subrogation is claimed, if any.
(Name and address)

4. ....., second tier subcontractor against or through whom subrogation is claimed, if any.
(Name and address)

General description of real property where labor performed or material furnished:

.....
.....
.....

General description of undersigned lien claimant's contract including the names of the parties thereto: .....
.....
.....

The amount of lien claimed pursuant to the above described contract: $.....

The undersigned lien claimant gives this notice of claim of lien pursuant to North Carolina law and claims all rights of subrogation to which he is entitled under Part 2 of Article 2 of Chapter 44A of the General Statutes of North Carolina.

Dated .....

....., Lien Claimant
.....
(Address)

(c) All notices of claims of liens by subcontractors more remote than the third tier must be given using a form substantially as follows:

NOTICE OF CLAIM OF LIEN BY SUBCONTRACTOR MORE REMOTE THAN THE THIRD TIER

To:
....., person holding funds against which lien is
(Name and Address)
claimed.

General description of real property where labor performed or material furnished:
.....
.....
.....

General description of undersigned lien claimant's contract including the names of the parties thereto: .....
.....
.....

The amount of lien claimed pursuant to the above described contract: $.....

The undersigned lien claimant gives this notice of claim of lien pursuant to North Carolina law and claims all rights to which he is entitled under Part 2 of Article 2 of Chapter 44A of the General Statutes of North Carolina.

Dated: .....

....., Lien Claimant
.....
(Address)

(1971, c. 880, s. 1.)

§ 44A-20. Duties and liability of obligor.—(a) Upon receipt of the notice provided for in this Article the obligor shall be under a duty to retain any funds subject to the lien or liens under this Article up to the total amount of such liens as to which notice has been received.

(b) If, after the receipt of the notice to the obligor, the obligor shall make further payments to a contractor or subcontractor against whose interest the lien or liens are claimed, the lien shall continue upon the funds in the hands of the contractor or subcontractor who received the payment, and in addition the obligor shall be personally liable to the person or persons entitled to liens up to the amount of such wrongful payments, not exceeding the total claims with respect to which the notice was received prior to payment.

(c) If an obligor shall make a payment after receipt of notice and incur personal liability therefor, the obligor shall be entitled to reimbursement and indemnification from the party receiving such payment.

(d) If the obligor is an owner of the property being improved, the lien claimant shall be entitled to a lien upon the interest of the obligor in the real property to the extent of the owner's personal liability under subsection (b), which lien shall be enforced only in the manner set forth in G.S. 44A-7 through G.S. 44A-16 and which lien shall be entitled to the same priorities and subject to the same filing requirements and periods of limitation applicable to the contractor. (1971, c. 880, s. 1.)

§ 44A-21. Pro rata payment.—In the event that the funds in the hands of the obligor and the obligor's personal liability, if any, under the previous section [G.S. 44A-20] are less than the amount of valid lien claims that have been filed with the obligor under this Article the parties entitled to liens shall share the funds on a pro rata basis. (1971, c. 880, s. 1.)

§ 44A-22. Priority of lien.—Liens perfected under this Article have priority over all other interests or claims theretofore or thereafter created or suffered in the funds by the person against whose interest the lien is asserted, including, but not limited to, liens arising from garnishment, attachment, levy, judgment, assignments, security interests, and any other type of transfer, whether voluntary or involuntary. Any person who receives payment from an obligor in bad faith with knowledge of a claim of lien shall take such payment subject to the claim of lien. (1971, c. 880, s. 1.)

§ 44A-23. Contractor's lien; subrogation rights of subcontractor.—A first, second or third tier subcontractor, who gives notice as provided in this Article, may, to the extent of his claim, enforce the lien of the contractor created by Part 1 of Article 2 of this Chapter. The manner of such enforcement shall be as provided by G.S. 44A-7 through G.S. 44A-16. Upon the filing of the notice and claim of lien and the commencement of the action, no action of the contractor shall be effective to prejudice the rights of the subcontractor without his written consent. (1971, c. 880, s. 1.)

Part 3. Criminal Sanctions.

Criminal Sanctions for Furnishing a False Statement in Connection with Improvement to Real Property.

§ 44A-24. False statement a misdemeanor.—If any contractor, subcontractor or other person receiving payment from an obligor for an improvement to real property shall knowingly furnish to an obligor a false written statement of the sums due or claimed to be due for labor or material furnished at the site of an improvement to real property, and, after the furnishing of said false statement, receive payment from an obligor, such person shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not to exceed five hundred dollars ($500.00), by imprisonment not to exceed six months, or by both, in the discretion of the court. The elements of the offenses herein stated are the furnishing of the false written statement with knowledge that it is false and the subsequent receipt of payment from an obligor by the person furnishing said statement, and in any prosecution hereunder it shall not be necessary for the State to prove that the obligor relied upon the false statement or that any person was injured thereby. (1971, c. 880, s. 1.1.)

Editor's Note. — Session Laws 1971, c. 880, s. 4, provides: "This act shall become effective on and after October 1, 1971, and shall not affect pending litigation."

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 instruments 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.

Cited in In re Sale of Land of Warrick, 1 N.C. App. 387, 161 S.E.2d 630 (1968).

§ 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.

§ 45-12. Certificate by clerk of superior court. — Whenever the powers set out in G.S. 45-10 shall be exercised, or whenever a trustee is substituted pursuant to the powers and according to the methods contained in any deed of trust, the clerk of the superior court shall certify that it has been made to appear to him that the paper-writing by which a trustee is substituted has been executed by the owner or owners of a majority in amount of the indebtedness, evidenced by the notes, bonds, or other instruments secured by said deed of trust, that the cause of substitution set forth therein is true, and that the substituted trustee is a fit and proper person or corporation to perform the duties of said trust. Unless such certificate is attached to or made a part of the paper-writing, and registered therewith, the purported substitution shall be invalid. (1931, c. 78, s. 3; 1973, c. 459.)

Editor's Note. — The 1973 amendment, effective Oct. 1, 1973, rewrote this section.

§ 45-13. Right of appeal by any person interested; judge to review finding of clerk de novo.—Whenever the power contained in G.S. 45-10 or in G.S. 45-11 is exercised in respect to any deed of trust, mortgage or other instrument creating the lien which was executed prior to March 4, 1931, then, at any time within 12 months from the registration of the instrument designating the new trustee but within 30 days from actual knowledge of the same, any person interested therein may appeal from the findings of the clerk of the superior court pursuant to G.S. 45-12, and such appeal shall be duly constituted when a written notice signed by, or on behalf of such person, shall have been served in any of the methods of service of summons provided by law on all other parties interested therein, including the said substituted trustee. The notice shall state that a motion will be made before the judge of the superior court of the county of the clerk who made such certificate at the next regular session of such superior court beginning more than 10 days after the service of said notice on all interested parties, and the docketing of such notices on the civil issue docket of said county. On the hearing of said motion it shall be open to all parties to contest and defend the findings of said clerk, and the judge shall review said findings de novo and make such findings in respect thereof as shall appear to him from the evidence to be true, and if the said substituted trustee shall be removed at said hearing another trustee shall be substituted in his stead by the court upon a finding that he or it is a proper person or corporation to perform the functions of said trusteeship, but

only one such appeal shall be allowed as to each appointment. (1931, c. 78, s. 4; 1941, c. 115, s. 2; 1971, c. 1185, s. 7.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term" in the second sentence.

§ 45-18. Validation of certain acts of substituted trustees.—Whenever before January 1, 1973, a trustee has been substituted in a deed of trust in the manner provided by G.S. 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 G.S. 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 had 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; 1969, c. 477; 1971, c. 57; 1973, c. 20.)

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.

The 1969 amendment substituted "1969" for "1967" near the beginning of the section The amendatory act is effective May 12, 1969, but provides that it shall not affect pending litigation.

The 1971 amendment substituted "January 1, 1971" for "April 1, 1969" near the beginning of this section. The amendatory act provides that it shall not apply to pending litigation.

Editor's Note.—

The 1973 amendment substituted "1973" for "1971" near the beginning of the section. The amendatory act provides that it shall not apply to 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, 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, 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; 1969, c. 984, s. 1.)

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.

The 1969 amendment, effective Oct. 1, 1969, deleted references to conditional sales contracts in subsection (a) and the first sentence of subsection (b).

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."

Due Process Satisfied. — The notice of foreclosure by sale as provided for in a deed of trust and as required under this section was held sufficient to meet the minimum due process requirements. Huggins v. Dement, 13 N.C. App. 673, 187 S.E.2d 412 (1972).

Purpose of Notice.—The principal object in publishing notice of sale of mortgaged property in the exercise of a power of sale is not so much to notify the grantor or mortgagor as it is to inform the public generally, so that bidders may be present at the sale and a fair price obtained. Huggins v. Dement, 13 N.C. App. 673, 187 S.E.2d 412 (1972).

Parties May Agree on Notice Procedure. —Compliance with the notice procedure as agreed upon by the parties, if strictly complied with, is sufficient to give notice of foreclosure by sale. Huggins v. Dement, 13 N.C. App. 673, 187 S.E.2d 412 (1972).

There is no requirement of personal notice absent a valid contract to give personal notice to the debtor who is in default. Huggins v. Dement, 13 N.C. App. 673, 187 S.E.2d 412 (1972).

§§ **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.

Cited in Millikan v. Hammond, 8 N.C. App. 429, 174 S.E.2d 835 (1970).

§ **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.

§ 45-21.26. Preliminary report of sale of real property.

Stated in Carlisle v. Commodore Corp., 15 N.C. App. 650, 190 S.E.2d 703 (1972).

§ 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."

Statutory Period for Filing Upset Bid.—This section provides that an upset bid may be filed with the clerk of superior court at any time within 10 days after the filing of the report of sale. Obviously, if no report of sale has been filed, the 10-day limitation has not begun to run. The trial court committed error in ordering the substitute trustee to convey the properties in accordance with the foreclosure proceedings thus far. The sales should remain open for an upset bid for a period of 10 days from the date this opinion is certified to the clerk of superior court. Carlisle v. Commodore Corp., 15 N.C. App. 650, 190 S.E.2d 703 (1972).

Statutory Period Tolled.—The issuance and service of the temporary restraining order on the substitute trustee halted all proceedings under the foreclosure and tolled the running of the statutory period of 10 days for filing an upset bid. Only nine days elapsed between the date of the sale and the date the substitute trustee was restrained. If the report of sale had been filed on the day of the sale, one day of the statutory 10-day period for filing an upset bid would remain. If the report of sale had been filed on the fifth day after the sale, the maximum time allowed under § 45-21.26, five days of the statutory period of

10 days for filing an upset bid would remain. Carlisle v. Commodore Corp., 15 N.C. App. 650, 190 S.E.2d 703 (1972).

Cited in Allied Mtge. & Dev. Co. v. Pitts, 272 N.C. 196, 158 S.E.2d 53 (1967).

§ 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."

The jurisdiction of the clerk vests at the moment an upset bid is filed with him. In re Register, 5 N.C. App. 29, 167 S.E.2d 802 (1969).

Statutory Provisions Incorporated. — Statutory provisions are, by operation of law, incorporated in all mortgages and deeds of trusts and control any sale under such instruments. In re Register, 5 N.C. App. 29, 167 S.E.2d 802 (1969); Huggins v. Dement, 13 N.C. App. 673, 187 S.E.2d 412 (1972).

Clerk May Not, etc.—

The provision of this section that on the resale of real property the clerk shall make all such orders as may be just and necessary to safeguard the interests of all parties extends to orders securing the rights of the parties as defined by statute, but not to orders abrogating or abridging such rights. In re Register, 5 N.C. App. 29, 167 S.E.2d 802 (1969).

Inadequacy of Purchase Price.—Mere inadequacy of the purchase price realized at a foreclosure sale, standing alone, is not sufficient to upset a sale duly and regularly made in strict conformity with the power of sale. In re Register, 5 N.C. App. 29, 167 S.E.2d 802 (1969).

Where there is an irregularity in the sale, gross inadequacy of purchase price may be considered on the question of the materiality of the irregularity. In re Register, 5 N.C. App. 29, 167 S.E.2d 802 (1969).

Gross inadequacy of consideration, when coupled with any other inequitable element, even though neither, standing alone, may be sufficient for the purpose, will induce a court of equity to interpose and do justice between the parties. In re Register, 5 N.C. App. 29, 167 S.E.2d 802 (1969).

The law presumes regularity in the execution of the power of sale in a deed of trust duly executed and regular upon its face. Huggins v. Dement, 13 N.C. App. 673, 187 S.E.2d 412 (1972).

Burden on Attacking Party.—If there is any failure to advertise a sale properly, the burden is on the attacking party to show it. Huggins v. Dement, 13 N.C. App. 673, 187 S.E.2d 412 (1972).

Applied in In re Sale of Land of Warrick, 1 N.C. App. 387, 161 S.E.2d 630 (1968).

Cited in Carlisle v. Commodore Corp., 15 N.C. App. 650, 190 S.E.2d 703 (1972).

§ 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."

Where no upset bid is filed, confirmation of the sale is not required. Britt v. Smith, 6 N.C. App. 117, 169 S.E.2d 482 (1969).

§ 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.

G.S. 105-408, referred to in this section, was repealed by Session Laws 1971, c. 806, s. 3.

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

Liens Attach to Surplus Money.—Surplus money arising upon a sale of land under a decree of foreclosure stands in the place of the land itself in respect to liens thereon or vested rights therein. It is constructively, at least, real property, and belongs to the mortgagor or his assigns. In re Castillian Apts., Inc., 281 N.C. 709, 190 S.E.2d 161 (1972).

Trustee Authorized to Pay Surplus to Clerk of Superior Court.—A trustee, upon completion of foreclosure on entirety property, is authorized by this section to pay the surplus to the clerk of superior court. Koob v. Koob, 283 N.C. 129, 195 S.E.2d 552 (1973).

And the clerk holds the money for safekeeping only, having no interest therein other than to protect himself from liabil-

ity on his official bond. Koob v. Koob, 283 N.C. 129, 195 S.E.2d 552 (1973).

Applied in Dixieland Realty Co. v. Wysor, 272 N.C. 172, 158 S.E.2d 7 (1967); Ridley v. Jim Walter Corp., 272 N.C. 673, 158 S.E.2d 869 (1968); Witten Supply Co. v. Redmond, 11 N.C. App. 173, 180 S.E.2d 487 (1971); Koob v. Koob, 16 N.C. App. 326, 192 S.E.2d 40 (1972), aff'd, 283 N.C. 129, 195 S.E.2d 552 (1973).

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

§ 45-21.32. Special proceeding to determine ownership of surplus.

Applied in Dixieland Realty Co. v. Wysor, 272 N.C. 172, 158 S.E.2d 7 (1967).

Cited in Smith v. Clerk of Superior Court, 5 N.C. App. 67, 168 S.E.2d 1 (1969); In re Castilian Apts., Inc., 281 N.C. 709, 190 S.E.2d 161 (1972); Koob v. Koob, 283 N.C. 129, 195 S.E.2d 552 (1973).

ARTICLE 2B.

Injunctions; Deficiency Judgments.

§ 45-21.34. Enjoining mortgage sales or confirmations thereof on equitable grounds.—Any owner of real estate, or other person, firm or corporation having a legal or equitable interest therein, may apply to a judge of the superior court, prior to the confirmation of any sale of such real estate by a mortgagee, trustee, commissioner or other person authorized to sell the same, to enjoin such sale or the confirmation thereof, upon the ground that the amount bid or price offered therefor is inadequate and inequitable and will result in irreparable damage to the owner or other interested person, or upon any other legal or equitable ground which the court may deem sufficient: Provided, that the court or judge enjoining such sale or the confirmation thereof, whether by a temporary restraining order or injunction to the hearing, shall, as a condition precedent, require of the plaintiff or applicant such bond or deposit as may be necessary to indemnify and save harmless the mortgagee, trustee, cestui que trust, or other person enjoined and affected thereby against costs, depreciation, interest and other damages, if any, which may result from the granting of such order or injunction: Provided further, that in other respects the procedure shall be as is now prescribed by law in cases of injunction and receivership, with the right of appeal to the appellate division from any such order or injunction. (1933, c. 275, s. 1; 1949, c. 720, s. 3; 1969, c. 44, s. 50.)

Editor's Note.—

The 1969 amendment substituted "appellate division" for "Supreme Court" in the last proviso.

The trustor in a deed of trust is entitled to restrain foreclosure if the note secured by the instrument is not in default. Princeton Realty Corp. v. Kalman, 272 N.C. 201, 159 S.E.2d 193 (1967).

When Restraining Order Should Be Continued to Final Hearing.—See Princeton Realty Corp. v. Kalman, 272 N.C. 201, 159 S.E.2d 193 (1967).

Cited in In re Register, 5 N.C. App. 29, 167 S.E.2d 802 (1969).

§ 45-21.35. Ordering resales before confirmation; receivers for property; tax payments.—The court or judge granting such order or injunction, or before whom the same is returnable, shall have the right before, but not after, any sale is confirmed to order a resale by the mortgagee, trustee, commissioner, or other person authorized to make the same in such manner and upon such terms as may be just and equitable: Provided, the rights of all parties in interest, or who may be affected thereby, shall be preserved and protected by bond or indemnity in such form and amount as the court may require, and the court or judge may also appoint a receiver of the property or the rents and proceeds thereof, pending any sale or resale, and may make such order for the payment of taxes or other prior lien as may be necessary, subject to the right of appeal

to the appellate division in all cases. (1933, c. 275, s. 2; 1949, c. 720, s. 3; 1969, c. 44, s. 51.)

Editor's Note.—
The 1969 amendment substituted "appellate division" for "Supreme Court" near the end of the section.

§ 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.

Cited in Kelly v. Davenport, 7 N.C. App. 670, 173 S.E.2d 600 (1970); Wendell Tractor & Implement Co. v. Lee, 9 N.C. App. 524, 176 S.E.2d 854 (1970).

§ 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.

For article "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

Legislative Intent.—The unique features of this section manifest the legislative intent that the statute as originally enacted should apply only to purchase-money mortgages and deeds of trust given by the vendee to the vendor, and that its application to third parties be limited to assignees of the seller. Childers v. Parker's, Inc., 274 N.C. 256, 162 S.E.2d 481 (1968).

Effect of 1961 amendment.—The 1961

amendment did not change the original meaning of this section; it merely made specific that which had theretofore been implicit. Childers v. Parker's, Inc., 274 N.C. 256, 162 S.E.2d 481 (1968).

This section was obviously designed to protect a vendor's assignee, who would not know the nature of the transaction. Childers v. Parker's, Inc., 274 N.C. 256, 162 S.E.2d 481 (1968).

Section Held Inapplicable.—

A deed of trust given by a vendee to his vendor to secure the purchase price of lands other than those described in the security instrument, cannot qualify as a purchase-money deed of trust under this section. This is true because a deed of trust is a purchase-money deed of trust only if it is made as a part of the same transaction in which the debtor purchases the land, embraces the land so purchased, and secures all or part of its purchase price. Childers v. Parker's, Inc., 274 N.C. 256, 162 S.E.2d 481 (1968).

ARTICLE 2C.

Validating Sections; Limitation of Time for Attacking Certain Foreclosures.

§ 45-21.44. Validation of foreclosure sales when provisions of § 45-21.17(c)(2) not complied with.—In all cases prior to February 1, 1968, where mortgages or deeds of trust on real estate with power of sale have been foreclosed pursuant to said power by proper advertisement except that the date of the last publication was from seven to twenty days preceding the date of sale, all such sales are fully validated, ratified, and confirmed and shall be as effective to pass title to the real estate described therein as fully and to the same extent as if the provisions of G.S. 45-21.17(c)(2) had been fully complied with. (1959, c. 52; 1963, c. 1157; 1971, c. 879, s. 1.)

Editor's Note.—

The 1971 amendment substituted "February 1, 1968" for "June 1, 1963."

Session Laws 1971, c. 879, s. 2, provides: "This act shall not apply to any pending litigation."

ARTICLE 4.

Discharge and Release.

§ 45-37. Discharge of record of mortgages, deeds of trust and other instruments.—(a) Subject to the provisions of G.S. 45-73 relating to secured instruments which secure future advances, any deed of trust or mortgage or other instrument intended to secure the payment of money or the performance of any other obligation registered as required by law may be discharged and released of record in the following manner:

(1) By acknowledgment of the satisfaction of the provisions of such deed of trust, mortgage or other instrument in the presence of the register of deeds by

a. The trustee,
b. The mortgagee,
c. The legal representative of a trustee or mortgagee, or
d. A duly authorized agent or attorney of any of the above.

Upon acknowledgment of satisfaction, the register of deeds shall forthwith make upon the margin of the record of such deed of trust, mortgage or other instrument an entry of such acknowledgment of satisfaction which shall be signed by the trustee, mortgagee, legal representative, agent or attorney and witnessed by the register of deeds who shall also affix his name thereto.

(2) By exhibition of any deed of trust, mortgage or other instrument accompanied with the bond, note, or other instrument thereby secured to the register of deeds, with the endorsement of payment and satisfaction appearing thereon by

a. The obligee,

b. The mortgagee,
c. The trustee,
d. An assignee of the obligee, mortgagee, or trustee; or
e. Any chartered banking institution, national or state, qualified to do business in and having an office in the State of North Carolina, when so endorsed in the name of the institution by an officer thereof.

Upon exhibition of the instruments, the register of deeds shall cancel the mortgage, deed of trust or other instrument by entry of satisfaction on the margin of the record. The person so claiming satisfaction, performance or discharge of the debt or other obligation may retain possession of all of the instruments exhibited. The exhibition of the mortgage, deed of trust or other instrument alone to the register of deeds, with endorsement of payment, satisfaction, performance or discharge shall be sufficient if the mortgage, deed of trust or other instrument itself sets forth the obligation secured or the performance of any other obligation and does not call for or recite any note, bond or other instrument secured by it. The register of deeds may require the person exhibiting the instruments for cancellation to furnish him an acknowledgment of cancellation of the mortgage, deed of trust or other instrument for the purpose of showing upon whose request and exhibition the mortgage, deed of trust or other instrument was cancelled.

(3) By exhibiting to the register of deeds by:

a. The grantor,
b. The mortgagor, or
c. An agent, attorney or successor in title of the grantor or mortgagor

of any mortgage, deed of trust or other instrument intended to secure the payment of money or the performance of any other obligation, together with the bond, note or other instrument secured thereby, or by exhibition of the mortgage, deed of trust or other instrument alone if such instrument itself sets forth the obligation secured or other obligation to be performed and does not call for or recite any note, bond or other instrument secured by it, if at the time of exhibition, all such instruments are more than ten years old counting from the maturity date of the last obligation secured. If the instrument or instruments so exhibited have an endorsement of partial payment, satisfaction, performance or discharge within the said period of ten years, the period of ten years shall be counted from the date of the most recent endorsement.

The register of deeds shall make proper entry of cancellation and satisfaction of said instrument on the margin of the record where the same is recorded, whether there be any such entries on the original papers or not.

(4) By exhibition to the register of deeds 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.

Upon exhibition of the deed of trust, and the evidences of indebtedness properly marked, the register of deeds shall cancel such deed of trust by entry of satisfaction upon the margin of the record, which entry shall be valid and binding upon all persons, if no person rightfully entitled to the deed of trust or evidences of indebtedness has

previously notified the register of deeds in writing of the loss or theft of the instrument or evidences of indebtedness and has caused the register of deeds to record the notice or loss or theft on the margin of the record of the deed of trust.

Upon receipt of written notice of loss or theft of the deed of trust or evidences of indebtedness the register of deeds shall make on the record of the deed of trust concerned a marginal entry in writing thereof, with the date of receipt of the notice. The deed of trust shall not be cancelled after such marginal entry until the ownership of said instrument shall have been lawfully determined. Nothing in this subdivision (4) shall be construed to impair the negotiability of any instrument otherwise properly negotiable, nor to impair the rights of any innocent purchaser for value thereof.

Every entry of acknowledgment of satisfaction or of satisfaction made or witnessed by the register of deeds as provided in subdivision (a) (1) 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.

(b) It shall be conclusively presumed that the conditions of any deed of trust, mortgage or other instrument securing the payment of money or securing the performance of any other obligation or obligations have been complied with or the debts secured thereby paid or obligations performed, as against creditors or purchasers for valuable consideration from the mortgagor or grantor, from and after the expiration of fifteen years from whichever of the following occurs last:

(1) The date when the conditions of such instrument were required by its terms to have been performed, or

(2) The date of maturity of the last installment of debt or interest secured thereby;

provided that the holder of the indebtedness secured by such instrument or party secured by any provision thereof may file an affidavit with the register of deeds which affidavit shall specifically state:

(1) The amount of debt unpaid, which is secured by said instrument; or

(2) In what respect any other condition thereof shall not have been complied with; or

may make on the margin of the record of the instrument a notation signed by the holder or party secured and witnessed by the register of deeds stating:

(1) Any payments that have been made on the indebtedness or other obligation secured by such instrument including the date and amount of payments and

(2) The amount still due or obligations not performed under the instrument.

The effect of the filing of the affidavit or of the notation made as herein provided shall be to postpone the effective date of the conclusive presumption of satisfaction to a date fifteen years from the filing of the affidavit or from the making of the notation. There shall be only one postponement of the effective date of the conclusive presumption provided for herein. The register of deeds shall record the affidavit provided for herein and shall make a reference on the margin of the record of the instrument referred to therein to the filing of such affidavit and to the book and page where the affidavit is recorded. This subsection 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 or rolling stock, or of other personal property.

(c) In any county in which deeds of trust and mortgages are recorded in the

office of the register of deeds by microphotographic process or any other method or process which renders impractical or impossible the subsequent entry of marginal notations upon the records of instruments, the register of deeds, in lieu of making entries of acknowledgment, of satisfaction or of cancellation and satisfaction, shall require the submission for recordation of a notice of satisfaction sufficient to comply with the provisions of G.S. 45-37.2.

(d) For the purposes of this section "register of deeds" means the register of deeds, his deputies or assistants of the county in which the mortgage, deed of trust, or other instrument intended to secure the payment of money or performance of other obligation is registered.

(e) 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. (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; 1969, c. 746.)

Editor's Note.—

The 1969 amendment, effective Jan. 1, 1970, rewrote this section as previously amended in 1967.

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

Registration of Collateral Instrument as Notice.—A purchaser is presumed to have examined each recorded deed or instrument in his line of title and to know its contents. He is not required to take notice of and examine recorded collateral instruments and documents which are not muniments of his title and are not referred to by the instruments in his chain of title. One need only to look to the muniments of title. Vitiating facts must appear in deraigning title, on the face of deeds in the chain of title, and in one of the muniments of title. Morehead v. Harris, 4 N.C. App. 235, 166 S.E.2d 476 (1969).

§ 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.

§ 45-38. Entry or recording of foreclosure.—In case of foreclosure of any deed of trust, or mortgage, the trustee or mortgagee shall enter upon the margin of the record thereof the fact that such foreclosure and the date when, and the person to whom, a conveyance was made by reason thereof. In the event the entire obligation secured by a mortgage or deed of trust is satisfied by a sale of only a part of the property embraced within the terms of the mortgage or deed of trust, the trustee or mortgagee shall make an additional notation as to which property was sold and which was not sold.

Provided, that in counties in which deeds of trust and mortgages are recorded in the office of the register of deeds by a microphotographic process or by any process or method which renders impractical or impossible the subsequent entering of marginal notations upon the records of instruments, the register of deeds shall record the foreclosure of each deed of trust or mortgage foreclosed by recording a notice of foreclosure which shall consist of a separate instrument, or

that part of the original deed of trust or mortgage rerecorded, reciting the information required hereinabove, the names of all parties to the original instrument, the amount of the obligation secured, a reference by book and page number to the record of the instrument foreclosed, and the date of recording the notice of foreclosure. (1923, c. 192, s. 2; C. S., s. 2594(a); 1949, c. 720, s. 2; 1963, c. 1021, s. 2; 1971, c. 985.)

Editor's Note.—
The 1971 amendment deleted the last sentence of the second paragraph.

ARTICLE 5.

Miscellaneous Provisions.

§§ 45-43.1 to 45-43.5: Repealed by Session Laws 1971, c. 1229, s. 1, effective July 1, 1971.

Editor's note.—For provisions similar to the repealed sections, see §§ 24-12 to 24-17.

§ 45-45. Spouse of mortgagor included among those having right to redeem real property.

Allegations of defendant that her husband conveyed property to a trustee without her joinder for the purpose of defeating her right to protect the property from a prior deed of trust, which contained her joinder, fail to state facts constituting a defense or counterclaim in an action in ejectment, since the husband's conveyance without her joinder does not prevent her from exercising her right to redemption from the prior deed of trust. Peoples Oil Co. v. Richardson, 271 N.C. 696, 157 S.E.2d 369 (1967).

§ 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.

ARTICLE 7.

Instruments to Secure Future Advances and Future Obligations.

§ 45-67. Definition.—As used in this article, "security instrument" means a mortgage, deed of trust, or other instrument relating to real property securing an obligation or obligations to a person, firm, or corporation specifically named in such instrument, as distinguished from being included in a class of security holders referred to therein, for the payment of money. (1969, c. 736, s. 1.)

Editor's Note. — Session Laws 1969, c. 736, s. 3, makes the act effective Oct. 1, 1969.

§ 45-68. Requirements.—A security instrument, otherwise valid, shall secure future obligations which may from time to time be incurred thereunder so as to give priority thereto as provided in G.S. 45-70, if:

(1) Such security instrument shows:

a. That it is given wholly or partly to secure future obligations which may be incurred thereunder;

b. The amount of present obligations secured, and the maximum amount, including present and future obligations, which may be secured thereby at any one time;

c. The period within which such future obligations may be incurred, which period shall not extend more than ten years beyond the date of the security instrument; and

(2) At the time of incurring any such future obligations, each obligation is evidenced by a written instrument or notation, signed by the obligor and stipulating that such obligation is secured by such security instrument; and

(3) At any time a security instrument securing future advances is transferred or assigned by the owner thereof that the amount, date and due date of each note, bond, or other undertaking for the payment of money representing a future obligation secured by such security instrument be noted in writing thereon. (1969, c. 736, s. 1.)

§ 45-69. Fluctuation of obligations within maximum amount.—Unless the security instrument provides to the contrary, if the maximum amount has not been advanced or if any obligation secured thereby is paid or is reduced by partial payment, further obligation may be incurred from time to time within the time limit fixed by the security instrument, provided the unpaid balance of principal outstanding shall never exceed the maximum amount authorized pursuant to G.S. 45-68 (1) b. Such further obligations shall be secured to the same extent as original obligations thereunder, if the provisions of G.S. 45-68 (2) and (3) are complied with. (1969, c. 736, s. 1.)

§ 45-70. Priority of security instrument. — (a) Any security instrument which conforms to the requirements of this Article and which on its face shows that the making of future advances is obligatory, shall, from the time and date of registration thereof, have the same priority to the extent of all obligatory future advances secured by it, as if all the advances had been made at the time of the execution of the instrument.

(b) Any security instrument which conforms to the requirements of this Article, which on its face does not show that the making of future advances is obligatory, shall, from the time and date of registration thereof, have the same priority to the extent of all obligations secured by it, as if all the advances had been made at the time of the execution of the instrument, except that when an intervening lienor or encumbrancer gives actual notice as hereinafter provided that an intervening lien or encumbrance has been perfected on the property covered by the security instrument, or is being incurred and when perfected will relate back to the time when incurred, any future advances made subsequent to the receipt of such notice shall not take priority over such intervening perfected lien or encumbrance. Such notice shall be in writing and shall be given to the secured creditor named in the security instrument; but if the security instrument is registered and if any assignment of the security instrument has been noted on the margin of the record showing the name and address of the assignee, such notice shall be given to the last assignee so noted at the address so shown.

(c) Payments made by the secured creditor for fire and extended coverage insurance, taxes, assessments, or other necessary expenditures for the preservation of the security shall be secured by the security instrument and shall have the same priority as if such payments had been made at the time of the execution of the instrument, whether or not notice has been given as provided in subsection (b) of this section. The provisions of G.S. 45-68(2) and (3) shall not be applicable to such payments, nor shall such payments be considered in computing the maximum amount which may be secured by the instrument.

(d) Notwithstanding any other provision of this Article, any security instrument hereafter executed which secures an obligation or obligations of an electric

or telephone membership corporation incorporated or domesticated in North Carolina to the United States of America or any of its agencies, or to any other financing institution, shall from the time and date of registration of said security instrument have the same priority to the extent of all future advances secured by it as if all the advances had been made at the time of the execution of the instrument, regardless of whether the making of such advances is obligatory or whether the security instrument meets the requirements of G.S. 45-68. (1969, c. 736, s. 1; 1971, c. 565.)

Editor's Note. — The 1971 amendment added subsection (d).

Cited in State v. Brown, 9 N.C. App. 498, 176 S.E.2d 881 (1970).

§ 45-71. Satisfaction of the security instrument.—Upon payment of all the obligations secured by a security instrument which conforms to the requirements of this article and upon termination of all obligation to make advances, and upon written demand made by the maker of the security instrument, his successor in interest, or anyone claiming under him, the holder of the security instrument is hereby authorized to and shall make a written entry upon the security instrument showing payment and satisfaction of the instrument, which entry he shall date and sign. When the security instrument secures notes, bonds, or other undertakings for the payment of money which have not already been entered on the security instrument as paid, the holder of the security instrument, unless payment was made to him, may require the exhibition of all such evidences of indebtedness secured by the instrument marked paid before making his entry showing payment and satisfaction. (1969, c. 736, s. 1.)

§ 45-72. Termination of future optional advances.—(a) The holder of a security instrument conforming to the provisions of this article, which on its face does not show that the making of future advances is obligatory, shall, at the request of the maker of the security instrument or his successor in title promptly furnish to him a statement duly executed and acknowledged in such form as to meet the requirements for the execution and acknowledgment of deeds, setting forth in substance the following:

> "This is to certify that the total outstanding balance of all obligations, the payment of which is secured by that certain instrument executed by ....., dated ....., recorded in book ..... at page ..... in the office of the Register of Deeds of ..... County, North Carolina, is $....., of which amount $..... represents principal.
>
> "No future advances will be made under the aforesaid instrument, except such expense as it may become necessary to advance to preserve the security now held.
>
> "This ..... day of ....., 19.....
>
> .....
>
> (Signature and Acknowledgment)"

(b) Such statement, when duly executed and acknowledged, shall be entitled to probate and registration, and upon filing for registration shall be effective from the date of the statement. It shall have the effect of limiting the lien or encumbrance of the holder of the security instrument to the amount therein stated, plus any necessary advances made to preserve the security, and interest on the unpaid principal. It shall bar any further advances under the security instrument therein referred to except such as may be necessary to preserve the security then held as provided in G.S. 45-70 (c). (1969, c. 736, s. 1.)

§ 45-73. Cancellation of record; presentation of notes described in security instrument sufficient.—The provisions of G.S. 45-37 apply to discharge of record of instruments executed under this article except that in cases

of cancellation by exhibition or presentation under G.S. 45-37 (a) (2) or G.S. 45-37 (a) (3), only notes or bonds described in the body of the instrument or noted in writing thereon as provided in G.S. 45-68 (3) need be exhibited or presented. (1969, c. 736, s. 1.)

§ 45-74. Article not exclusive.—The provisions of this article shall not be deemed exclusive, and no security instrument securing future advances or future obligations which is otherwise valid shall be invalidated by failure to comply with the provisions of this article. (1969, c. 736, s. 1.)

Chapter 46.
Partition.

Article 1.
Partition of Real Property.

ARTICLE 1.
Partition of Real Property.

§ 46-1. Partition is a special proceeding.

What Petition Should Allege.—A petition under this section is in the ordinary form of a complaint in a civil action, and should allege that the plaintiffs and defendants are tenants in common of the land, which should be described, and the interest of each party should be stated; that the plaintiffs desire to hold their interests in severalty, and that they are entitled to partition for that purpose. Pearson v. McKenney, 5 N.C. App. 544, 169 S.E.2d 46 (1969).

Demurrers.—The same rules respecting demurrers are applicable to pleadings in partitioning proceedings as are applicable to pleadings in any other civil action. Pearson v. McKenney, 5 N.C. App. 544, 169 S.E.2d 46 (1969).

Applied in Couch v. Couch, 18 N.C. App. 108, 196 S.E.2d 64 (1973).

§ 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).

The life tenant of a one-half interest in realty may maintain a partition proceeding against the fee simple owner of the other one-half interest in the property. First-Citizens Bank & Trust Co. v. Carr, 279 N.C. 539, 184 S.E.2d 268 (1971).

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).

§ 46-7. Commissioners appointed.

Cited in Pearson v. McKenney, 5 N.C. App. 544, 169 S.E.2d 46 (1969).

§ **46-8. Oath of commissioners.**—The commissioners shall be sworn by a magistrate, the sheriff or any deputy sheriff of the county, or any other person authorized to administer oaths, to do justice among the tenants in common in respect to such partition, according to their best skill and ability. (1868-9, c. 122, s. 2; Code, s. 1893; Rev., s. 2492; C. S., s. 3220; 1945, c. 472; 1971, c. 1185, s. 8.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "magistrate" for "justice of the peace."

§ 46-10. Commissioners to meet and make partition; equalizing shares.

Applied in Pearson v. McKenney, 5 N.C. App. 544, 169 S.E.2d 46 (1969).

§ **46-12. Owelty from infant's share due at majority.**—When a minor to whom a more valuable dividend shall fall is charged with the payment of any sum, the money shall not be payable until such minor arrives at the age of 18 years, but the general guardian, if there be one, must pay such sum whenever assets shall come into his hands, and in case the general guardian has assets which he did not so apply, he shall pay out of his own proper estate any interest that may have accrued in consequence of such failure. (1868-9, c. 122, s. 9; Code, s. 1900; Rev., s. 2497; C. S., s. 3224; 1971, c. 1231, s. 1.)

Editor's Note. — The 1971 amendment substituted "18" for "twenty-one."

§ **46-17.1. Dedication of streets.**—Upon motion of any party or the commissioners appointed to make division, the clerk may authorize the commissioners to propose and report the dedication of such portions of the land as are necessary as a means of access to any share, or is otherwise advisable for public or private highways, streets or alleys, and such proposal shall be acted upon by the clerk as a part of the report and, if approved, shall constitute a dedication. No interest of a minor or other person under disability shall be affected thereby until such dedication is approved by a judge of the superior court. (1969, c. 45.)

§ 46-18. Map embodying survey to accompany report.

Cited in Pearson v. McKenney, 5 N.C. App. 544, 169 S.E.2d 46 (1969).

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).

§ 46-24. Life tenant as party; valuation of life estate.

Life Tenant May Proceed against Owner of Other One-Half Interest. — The life tenant of a one-half interest in realty may maintain a partition proceeding against the fee simple owner of the other one-half interest in the property. First-Citizens Bank & Trust Co. v. Carr, 279 N.C. 539, 184 S.E.2d 268 (1971).

§ 46-30. Deed to purchaser; effect of deed.

Power of Clerk of Superior Court to Authorize Commission to Impose Restrictive Covenants.—Clerk of superior court may not authorize commissioners in proceeding to partition land among tenants in common to impose legally binding restrictive covenants when there are no restrictions prior to partition and some of the cotenants do not consent to the imposition of such covenants. Opinion of Attorney General to Honorable M.L. Huggins, 42 N.C.A.G. 1 (1972).

§ 46-34. Shares to persons unknown or not sui juris secured.

Cited in In re Estate of Nixon. 2 N.C. App. 422, 163 S.E.2d 274 (1968).

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.

§ 47-1. Officials of State authorized to take probate.—The execution of all deeds of conveyance, contracts to buy, sell or convey lands, mortgages, deeds of trust, instruments modifying or extending the terms of mortgages or deeds of trust, assignments, powers of attorney, covenants to stand seized to the use of another, leases for more than three years, releases, affidavits concerning land titles or family history, any instruments pertaining to real property, and any and all instruments and writings of whatever nature and kind which are required or allowed by law to be registered in the office of the register of deeds or which may hereafter be required or allowed by law to be so registered, may be proved or acknowledged before any one of the following officials of this State: The justices, judges, magistrates, clerks, assistant clerks, and deputy clerks of the General Court of Justice, and notaries public. (Code, s. 1246; 1895, c. 161, ss. 1, 3; 1897, c. 87; 1899, c. 235; Rev., s. 989; C. S., s. 3293; 1951, c. 772; 1969, c. 44, s. 52; 1971, c. 1185, s. 9.)

Editor's Note.—The 1969 amendment rewrote the portion of the section which follows the colon.

The 1971 amendment, effective Oct. 1, 1971, substituted "and notaries public" for "the judges and clerks of courts inferior to the superior court, commissioners of affidavits appointed by the Governor of this State, notaries public, and the several justices of the peace" at the end of the section.

For article, "Toward Greater Marketability of Land Titles—Remedying the Defective Acknowledgment Syndrome," see 46 N.C.L. Rev. 56 (1967).

§ 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.

§ 47-4: Repealed by Session Laws 1971, c. 1185, s. 10, effective October 1, 1971.

§ 47-5. When seal of officer necessary to probate.—When proof or acknowledgment of the execution of any instrument by any maker of such instrument, whether a married woman or other person or corporation, is had before any official authorized by law to take such proof and acknowledgment, and such official has an official seal, he shall set his official seal to his certificate. If the official before whom the instrument is proved or acknowledged has no official seal he shall certify under his hand, and his private seal shall not be essential. When the in-

strument is proved or acknowledged before the register of deeds of the county in which the instrument is to be registered, the official seal shall not be necessary. (1899, c. 235, s. 8; Rev., s. 993; C. S., s. 3297; 1969, c. 664, s. 3.)

Editor's Note.—The 1969 amendment, effective July 1, 1969, substituted "register of deeds" for "clerk or deputy clerk of the superior court" in the last sentence.

§ 47-7. Probate where clerk is a party. — All instruments required or permitted by law to be registered to which clerks of the superior court are parties, or in which such clerks are interested, may be proved or acknowledged and the acknowledgment of any married woman may be taken before any magistrate or notary public of the county of said clerk which clerk may then under his hand and official seal certify to the genuineness thereof. Such proofs and acknowledgments may also be taken before any justice or judge of the General Court of Justice, and the instruments may be probated and ordered to be registered by such judge or justice, in like manner as is provided by law for probates by clerks of the superior court in other cases. Provided, that nothing contained herein shall prevent the clerk of the superior court who is a party to any instrument, or who is a stockholder or officer of any bank or other corporation which is a party to any instrument, from adjudicating and ordering such instruments for registration as have been acknowledged or proved before some magistrate or notary public. All probates, adjudications and orders of registration made prior to January 1, 1930, by any such clerk of conveyances or other papers in which said clerk is an interested party, or other papers by any corporation in which such clerk also is an officer or stockholder, are hereby validated and declared sufficient for all such purposes. (1891, c. 102; 1893, c. 3; Rev., s. 995; 1913, c. 148, s. 1; C. S., s. 3299; 1921, c. 92; c. 106, s. 2; 1939, c. 210, s. 1; 1945, c. 73, s. 10; 1969, c. 44, s. 53; 1971, c. 1185, s. 11.)

Editor's Note.—The 1969 amendment substituted "justice or judge of the General Court of Justice" for "judge of the superior court or justice of the Supreme Court" in the second sentence.

The 1971 amendment, effective Oct. 1, 1971, substituted "magistrate" for "justice of the peace" in the first and third sentences.

§ 47-14. Register of deeds to pass on certificate and register instruments; order by judge; instruments to which register of deeds is a party. —(a) When the proof or acknowledgment of the execution of any instrument, required or permitted by law to be registered, is had before any other official than the register of deeds of the county in which the 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. No certification is required when the proof or acknowledgment is before the register of deeds of the county in which the instrument is offered for registration.

(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.

(e) Any instrument required or permitted by law to be registered in which the register of deeds of the county of registration is a party may be proved or acknowledged before any magistrate or any notary public. Any such instrument presented for registration shall be examined by the clerk of superior court of the county of registration and if it appears that the execution and acknowledgment are in due form he shall so certify and the instrument shall then be recorded in the office of the register of deeds. (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; 1969, c. 664, s. 2; 1973, c. 60.)

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

The 1969 amendment, effective July 1, 1969, rewrote subsection (a).

The 1973 amendment, effective Oct. 1, 1973, added subsection (e).

Opinions of Attorney General. — Miss Frances H. Burwell, Stokes County Register of Deeds, 40 N.C.A.G. 611 (1969).

To Be Probated, Instrument's Notarization Must Show Expiration Date of Notary's Commission.—See opinion of Attorney General to Mr. Alex T. Wood, Register of Deeds, Franklin County, 41 N.C.A.G. 225 (1971).

§ 47-14.1. Repeal of laws requiring private examination of married women.

Section Does Not Repeal § 52-6.—This section, which formerly appeared as § 47-116, does not repeal § 52-6. Honeycutt v. Citizens Nat'l Bank, 242 N.C. 734, 89 S.E.2d 598 (1955).

ARTICLE 2.

Registration.

§ 47-17.1. Documents registered or ordered to be registered in certain counties to designate draftsman; exceptions.—The register 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, Carteret, Catawba, Chatham, Cherokee, Craven, Cumberland, Davidson, Duplin, Durham, Forsyth, Gaston, Gates, Graham, Jackson, Johnston, Lincoln, McDowell, Madison, Mecklenburg, Montgomery, New Hanover, Orange, Pamlico, Pitt, 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; 1969, c. 10; 1971, c. 46; 1973, cc. 65, 283, 342.)

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.

The 1969 amendment made this section applicable to Pitt County.

The 1971 amendment deleted Perquimans from the list of counties to which this section applies.

The first 1973 amendment made this section applicable to Jackson County, and the second 1973 amendment made it applicable to Forsyth County. The third 1973 amendment deleted Buncombe from the list of counties to which this section applies.

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). For article "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

III. WHAT INSTRUMENTS AFFECTED.

An unexecuted verbal agreement, made by a mortgagee for a valuable consideration, to release a real estate mortgage does not come within the statute of frauds, and it logically follows, if such an agreement is not required to be in writing to be enforceable as between the parties, certainly it is not required to be recorded to be enforceable as between the parties. Nye v. University Dev. Co., 10 N.C. App. 676, 179 S.E.2d 795 (1971).

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 own-

ing 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.

For article "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

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).

VI. PLACE OF REGISTRATION.

The requirements of this section have no application to personal property in transit through or temporarily within North Carolina. National Bank v. Sprinkle, 3 N.C. App. 242, 164 S.E.2d 611 (1968).

Hence, the lien of a mortgage or conditional sale contract validly executed and legally registered according to the laws of the state wherein the property was and the mortgagor resided, will be recognized and enforced in this State against the claims of attaching creditors when the presence of such property in this State is of such a temporary or transient nature that it has not come to rest in the State so as to acquire a situs here. National Bank v. Sprinkle, 3 N.C. App. 242, 164 S.E.2d 611 (1968).

Property Embraced in Instruments Effective in Another State.—The legislature, in enacting this section, made no exception in favor of a conditional sale contract or chattel mortgage executed and effective in another state where the property embraced in such instrument is subsequently brought into this State. National Bank v. Sprinkle, 3 N.C. App. 242, 164 S.E.2d 611 (1968).

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

Mortgage or Other Lien on Vehicles Required to Be Registered under State Law.—It is no longer necessary to record the mortgage or other lien on vehicles required to be registered under the State motor vehicle laws in the county where the debtor resides. Ferguson v. Morgan, 282 N.C. 83, 191 S.E.2d 817 (1972).

U.C.C. Provisions as to Filing Financing Statements Not Applicable to Such Vehicles.—Provisions of the Uniform Commercial Code with reference to the place for filing financing statements have no application to vehicles subject to registration with the Department of Motor Vehicles. Ferguson v. Morgan, 282 N.C. 83, 191 S.E.2d 817 (1972).

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 between the parties to the instrument containing such clause, but shall not be effective to pass title to after-acquired property as against lien creditors or purchasers for a valuable consideration from the grantor of the instrument unless and until such instrument has been reregistered at or subsequent to the time such after-acquired property is acquired by such grantor.

(d) In lieu of reregistering the instrument containing the after-acquired property clause as specified in subsection (c), such instrument may be made effective to pass title to after-acquired property as against lien creditors and purchasers for a valuable consideration from the grantor of the instrument by registering a notice of extension as specified in subsection (e) at or subsequent to the time of acquisition of the after-acquired property by the grantor.

(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.

(g) Except as provided in subsection (h) of this section, no instrument which has been heretofore executed or registered and which contains an after-acquired property clause shall be effective to pass title to after-acquired property as against lien creditors or purchasers for a valuable consideration from the grantor of such instrument unless and until such instrument or a notice of extension thereof has been registered or reregistered as herein provided.

(h) Notwithstanding the provisions of this section with respect to registration, reregistration and registration of notice of extension, 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 a natural gas company as defined in section 2(6) of the Natural Gas Act, 15 U.S.C.A. 717a (6), or by an electric or telephone membership corporation incorporated or domesticated in North Carolina shall be effective to pass after-acquired property as against lien creditors or purchasers for a valuable consideration from the grantor of the instrument from the time of original registration of such instrument. (1967, c. 861, s. 1; 1969, c. 813, ss. 1-3.)

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.

The 1969 amendment, effective after midnight on Sept. 30, 1969, and applicable to all instruments registered after that date, rewrote subsections (c) and (d) and added subsections (g) and (h). Session Laws 1969, c. 813, s. 4, provides: "This

act shall not affect any case the litigation of which is pending upon its effective date."

For note on the effectiveness of after-acquired property clauses in N.C., see 6 Wake Forest Intra. L. Rev. 378 (1970).

§ 47-21. Blank or master forms of mortgages, etc.; embodiment by reference in instruments later filed.—It shall be lawful for any person, firm or corporation to have a blank or master form of mortgage, deed of trust, or other instrument conveying an interest in, or creating a lien on, real and/or personal property, filed, indexed and recorded in the office of the register of deeds. When any such blank or master form is filed with the register of deeds, he shall record the same, and shall index the same in the manner now provided by law for the indexing of instruments recorded in his office, except that the name of the person, firm or corporation whose name appears on such blank or master form shall be inserted in the indices as grantor and also as grantee. The fee for filing, recording and indexing such blank or master form shall be five ($5.00) dollars.

When any deed, mortgage, deed of trust, or other instrument conveying an interest in, or creating a lien on, real and/or personal property, refers to the provisions, terms, covenants, conditions, obligations, or powers set forth in any such blank or master form recorded as herein authorized, and states the office of recordation of such blank or master form, book and page where same is recorded such reference shall be equivalent to setting forth in extenso in such deed, mortgage, deed of trust, or other instrument conveying an interest in, or creating a lien on, real and/or personal property, the provisions, terms, covenants, conditions, obligations and powers set forth in such blank or master form. Provided this section shall not apply to Alleghany, Ashe, Avery, Beaufort, Bladen, Camden, Carteret, Chowan, Cleveland, Columbus, Dare, Gates, Granville, Guilford, Halifax, Iredell, Jackson, Martin, Moore, Perquimans, Sampson, Stanly, Swain, Transylvania, Vance, Washington and Watauga Counties. (1935, c. 153; 1971, c. 156.)

Editor's Note.—

The 1971 amendment deleted "Orange" following "Moore" in the last sentence.

For article on rules, ethics and reform in connection with transferring North Carolina real estate, see 49 N.C.L. Rev. 593 (1971).

§ 47-22. Counties may provide for photographic or photostatic registration.—The board of county commissioners of any county is hereby authorized and empowered to provide for photographic or photostatic recording of all instruments filed in the office of the register of deeds and in other offices of such county where said board may deem such recording feasible. The board of county commissioners may also provide for filing such copies of said instruments in loose-leaf binders. (1941, c. 286; 1971, c. 1185, s. 12.)

Editor's Note.—

The 1971 amendment, effective Oct. 1, 1971, deleted "and in the office of the clerk of the superior court" following "register of deeds" in the first sentence.

§ 47-26. Deeds of gift.

A recital of consideration in deeds conveying land is presumed to be correct.

Pelaez v. Pelaez, 16 N.C. App. 604, 192 S.E.2d 651 (1972).

§ 47-27. Deeds of easements.—All persons, firms, or corporations now owning or hereafter acquiring any deed or agreement for rights-of-way and easements of any character whatsoever shall record such deeds and agreements in the office of the register of deeds of the county where the land affected is situated. Where such deeds and agreements may have been acquired, but no use has been made thereof, the person, firm, or corporation holding such instrument, or any assignment thereof, shall not be required to record them until within 90 days after the beginning of the use of the easements granted thereby. If after 90 days from the beginning of the easement granted by such deeds and agreements the person, firm, or corporation holding such deeds or agreements has not recorded the same in the office of the register of deeds of the county where the land affected is situated,

then the grantor in the said deed or agreement may, after 10 days' notice in writing served and returned by the sheriff or other officer of the county upon the said person, firm, or corporation holding such lease or agreement, file a copy of the said lease or agreement for registration in the office of the register of deeds of the county where the original should have been recorded, but such copy of the lease or agreement shall have attached thereto the written notice above referred to, showing the service and return of the sheriff or other officer. The registration of such copy shall have the same force and effect as the original would have had if recorded: Provided, said copy shall be duly probated before being registered.

Nothing in this section shall require the registration of the following classes of instruments or conveyances, to wit:

(1) It shall not apply to any deed or instrument executed prior to January 1, 1910.

(2) It shall not apply to any deed or instrument so defectively executed or witnessed that it cannot by law be admitted to probate or registration, provided that such deed or instrument was executed prior to the ratification of this section.

(3) It shall not apply to decrees of a competent court awarding condemnation or confirming reports of commissioners, when such decrees are on record in such courts.

(4) It shall not apply to local telephone companies, operating exclusively within the State, or to agreements about alleyways.

The failure of electric companies or power companies operating exclusively within this State or electric membership corporations, organized pursuant to Chapter 291 of the Public Laws of 1935 [G.S. 117-6 to 117-27], to record any deeds or agreements for rights-of-way acquired subsequent to 1935, shall not constitute any violation of any criminal law of the State of North Carolina.

No deed, agreement for right-of-way, or easement of any character shall be valid as against any creditor or purchaser for a valuable consideration but from the registration thereof within the county where the land affected thereby lies.

From and after July 1, 1959, the provisions of this section shall apply to require the Board of Transportation to record as herein provided any deeds of easement, or any other agreements granting or conveying an interest in land which are executed on or after July 1, 1959, in the same manner and to the same extent that individuals, firms or corporations are required to record such easements. (1917, c. 148; 1919, c. 107; C. S., s. 3316; 1943, c. 750; 1959, c. 1244; 1973, c. 507, s. 5.)

Editor's Note.—The 1973 amendment, effective July 1, 1973, substituted "Board of Transportation" for "State Highway Commission" in the last paragraph.

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).

Facts Constituting Notice.—If the facts disclosed in an instrument appearing in a purchaser's chain of title would naturally lead an honest and prudent person to make inquiry concerning the rights of others, these facts constituted notice of everything which such inquiry, pursued in good faith and with reasonable diligence, would have disclosed. North Carolina State Highway Comm'n v. Wortman, 4 N.C. App. 546, 167 S.E.2d 462 (1969).

Map or Plat as Part of Deed.—A map or plat referred to in a deed becomes a part of the deed and need not be registered. North Carolina State Highway Comm'n v. Wortman, 4 N.C. App. 546, 167 S.E.2d 462 (1969).

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

(b) Maps to Be Reproducible.—Each map presented for recording shall be a reproducible map in cloth, linen, film or other permanent material and submitted in this form. Recorded maps shall be maintained in map files, unless the filing of-

ficer makes a permanent master copy thereof by a process from which a direct copy can be made, in which event the original map may be returned to the person offering it for recordation after it has been properly recorded and indexed. A direct or photographic copy of each recorded map shall be placed in the map book maintained for that purpose and properly indexed for use. All filing officers are authorized to make permanent master copies of maps that have been recorded and filed before July 1, 1971, and may return the originals to the person offering them for recordation.

(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, 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; 1971, c. 658; 1973, c. 76.)

Editor's Note.—

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

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

The 1971 amendment rewrote subsection (b).

The 1973 amendment, effective Oct. 1, 1973, deleted "Rockingham" in subsection (k).

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

§ 47-32. Photographic copies of plats, etc.—After January 1, 1960, in all special proceedings in which a map shall be filed as a part of the papers, such map shall meet the specifications required for recording of maps in the office of the register of deeds, and the clerk of superior court may certify a copy thereof to the register of deeds of the county in which said lands lie for recording in the Map Book provided for that purpose; and the clerk of superior court may have a photographic copy of said map made on a sheet of the same size as the leaves in the book in which the special proceeding is recorded, and when made, may place said photographic copy in said book at the end of the report of the commissioner or other document referring to said map.

The provisions of this section shall not apply to the following counties: Alexander, Alleghany, Ashe, Beaufort, Brunswick, Camden, Caswell, Cherokee, Clay, Franklin, Granville, Greene, Harnett, Hertford, Hoke, Hyde, Jackson, Jones, Lee, Lenoir, Lincoln, Madison, Martin, Northampton, Pamlico, Pasquotank, Pender, Person, Pitt, Richmond, Robeson, Rockingham, Sampson, Scotland, Surry, Swain, Tyrrell, Vance, Warren, Washington, Watauga and Yadkin. (1931, c. 171; 1959, c. 1235, ss. 2, 3A, 3.1; 1961, cc. 7, 111, 164, 252, 697, 932, 1122; 1963, c. 71, s. 3; c. 236; c. 361, s. 2; 1965, c. 139, s. 2; 1971, c. 1185, s. 13.)

Editor's Note.—

The 1971 amendment, effective Oct. 1, 1971, deleted a former last sentence in the first paragraph.

§ 47-32.1. Photostatic copies of plats, etc.; alternative provisions.—In a county to which the provisions of G.S. 47-32 do not apply, the following alternative provisions shall govern photostatic copies of plats filed in special proceedings:

In all special proceedings in which a plat, map or blueprint shall be filed as a part of the papers, the clerk of the superior court may have a photostatic copy of said plat, map or blueprint made on a sheet of the same size as the leaves in the

book in which the special proceeding is recorded, and when made, shall place said photostatic copy in said book at the end of the report of the commissioners or other document referring to said plat, map or blueprint. (1961, c. 535, s. 1; 1971, c. 1185, s. 14.)

Editor's Note.— The 1971 amendment, effective Oct. 1, 1971, deleted a former last sentence in the second paragraph.

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, 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.

When Wife's Deed Void.—

The deed of a wife, conveying land to her husband, is void unless the probating officer in his certificate of probate certify that, at the time of its execution and her privy examination, the deed is not unreasonable or injurious to her. Trammell v. Trammell, 2 N.C. App. 166, 162 S.E.2d 605 (1968).

Applied in Mitchell v. Mitchell, 270 N.C. 253, 154 S.E.2d 71 (1967); In re Brackett, 15 N.C. App. 601, 190 S.E.2d 302 (1972).

§ 47-41. Corporate conveyances.

A corporate seal is a necessary prerequisite to a valid conveyance of real estate by a corporation. Investors Corp. v. Field Financial Corp., 5 N.C. App. 156, 167 S.E.2d 852 (1969).

This section sets out the forms of probate for a deed and other conveyances executed by a corporation and reveals the necessity of having a corporate seal. Investors Corp. v. Field Financial Corp., 5 N.C. App. 156, 167 S.E.2d 852 (1969).

What Does Not, etc.—

In Withrell v. Murphy, 154 N.C. 82, 69 S.E. 748 (1910), where the corporate seal had been affixed to a deed of conveyance, but the acknowledgment by the corporate officers failed to acknowledge that the seal so affixed was the seal of the corporation, the Supreme Court held that this conveyance was, therefore, ineffectual as to the corporation's creditors. Investors Corp. v. Field Financial Corp., 5 N.C. App. 156, 167 S.E.2d 852 (1969).

§ 47-41.1. Corporate seal.—All documents, including but not limited to deeds, deeds of trust, and mortgages, required or permitted by law to be executed by corporations, shall be legally valid and binding when a legible corporate stamp which is a facsimile of its seal is used in lieu of an imprinted or embossed corporate seal. (1971, c. 340, s. 1.)

Editor's Note. — Session Laws 1971, c. 340, s. 2, makes the act effective July 1, 1971.

Session Laws 1971, c. 340, s. 3, provides that the act shall not apply to pending litigation.

§ 47-43. Form of certificate of acknowledgment of instrument executed by attorney in fact.

Cited in In re Sale of Land of Warrick, 1 N.C. App. 387, 161 S.E.2d 630 (1968).

§ 47-44. Clerk's certificate upon probate by justice of peace or magistrate.—When the proof or acknowledgment of any instrument is had before a justice of the peace of some other state or territory of the United States, or before a magistrate of this State, but of a county different from that in which the instrument is offered for registration, the form of certificate as to his official position and signature shall be substantially as follows:

North Carolina ..... County.

I, A. B. (here give name and official title of a clerk of a court of record), do hereby certify that C. D. (here give the name of the justice of the peace or magistrate taking the proof, etc.), was at the time of signing the foregoing (or annexed) certificate an acting justice of the peace or magistrate in and for the county of ..... and State (or territory) of ....., and that his signature thereto is in his own proper handwriting.

In witness whereof, I hereunto set my hand and official seal, this ..... day of ....., A. D. .....

(Official seal.)

.....

(Signature of officer.)

(1899, c. 235, s. 8; Rev., s. 1006; C. S., s. 3327; 1971, c. 1185, s. 15.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "magistrate" for "justice of the peace" in the introductory language, and inserted "or magistrate" in two places in the first paragraph of the certificate form.

ARTICLE 4.

Curative Statutes; Acknowledgments; Probates; Registration.

§ 47-47. Defective order of registration; "same" for "this instrument".

Editor's Note.—For article, "Toward Greater Marketability of Land Titles — Remedying the Defective Acknowledgment Syndrome," see 46 N.C.L. Rev. 56 (1967).

§ 47-48. Clerks' and registers of deeds' certificate failing to pass on all prior certificates.—When it appears that the clerk of the superior court, register of deeds, or other officer having the power to probate or certify deeds, in passing upon deeds or other instruments, and the certificates thereto, having more than one certificate of the same or a different date, by other officer or officers taking acknowledgment or probating the same, has in his certificate or order mentioned only one or more of the preceding or foregoing certificates or orders, but not all of them, but has admitted the same deed or other instrument to probate or recordation, it shall be conclusively presumed that all the certificates of said deed or instrument necessary to the admission of same to probate or recordation have been passed upon, and the certificate of said clerk, register of deeds, or other probating or certifying officer shall be deemed sufficient and the probate, certification and recordation of said deed or instrument is hereby made and declared valid for all intents and purposes. The provisions of this section shall apply to all instruments recorded in any county of this State prior to January 1, 1971. (1917, c. 237; C. S., s. 3330; 1945, c. 808, s. 1; 1965, c. 1001; 1971, c. 11.)

Editor's Note.—

The 1971 amendment rewrote the first sentence so as to make it applicable to registers of deeds as well as clerks and to certification and recordation, as well as probate, of deeds. The amendment also substituted "different" for "prior" preceding "date" in the first sentence and changed the date at the end of the second sentence from January 1, 1964, to January 1, 1971. The amendatory act provides that it shall not affect pending litigation.

§ 47-51. Official deeds omitting seals.—All deeds executed prior to February 1, 1971, by any sheriff, commissioner, receiver, executor, executrix, administrator, administratrix, or other officer authorized to execute a deed by virtue of his office or appointment, in which the officer has omitted to affix his seal after his signature, shall not be invalid on account of the omission of such seal. (1907, c. 807; 1917, c. 69, s. 1; C. S., s. 3333; Ex. Sess. 1924, c. 64; 1941, c. 13; 1955, c. 467, ss. 1, 2; 1959, c. 408; 1971, c. 14.)

Editor's Note. — The 1971 amendment substituted "February 1, 1971" for "April 1, 1959." The amendatory act provides that it shall not apply to pending litigation.

§ 47-63. Probates before officer of interested corporation. — In all cases when acknowledgment or proof of any conveyance has been taken before a clerk of superior court, magistrate or notary public, who was at the time a stockholder or officer in any corporation, bank or other institution which was a party

to such instrument, the certificates of such clerk, magistrate, or notary public shall be held valid, and are so declared. (Rev., s. 1015; 1907, c. 1003, s. 1; C. S., s. 3345; 1971, c. 1185, s. 16.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "magistrate" for "justice of the peace" twice in the section.

§ 47-71.1. Corporate seal omitted prior to January, 1973.—Any corporate deed, or conveyance of land in this State, made prior to January 1, 1973, which is defective only because the corporate seal is omitted therefrom is hereby declared to be a good and valid conveyance by such corporation for all purposes and shall be sufficient to pass title to the property therein conveyed as fully as if the said conveyance were executed according to the provisions and forms of law in force in this State at the date of the execution of such conveyance. (1957, c. 500, s. 1; 1963, c. 1015; 1969, c. 815; 1971, c. 61; 1973, c. 479.)

Editor's Note.—

The 1969 amendment substituted "1967" for "1963" near the beginning of the section. The amendatory act provides that it shall not apply to pending litigation.

The 1971 amendment substituted "1971" for "1967." The amendatory act provides that it shall not apply to pending litigation.

The 1973 amendment substituted "1973" for "1971."

This section only serves to accentuate the necessity of a corporate seal in order to make a corporate conveyance of real estate valid and effectual. Investors Corp. v. Field Financial Corp., 5 N.C. App. 156, 167 S.E.2d 852 (1969).

§ 47-72. Corporate name not affixed, but signed otherwise prior to January, 1973.—In all cases prior to the first day of January, 1973, where any deed conveying lands purported to be executed by a corporation, but the corporate name was in fact not affixed to said deed, but same was signed by the president and secretary of said corporation, or by the president and two members of the governing body of said corporation, and said deed has been registered in the county where the land conveyed by said deed is located, said defective execution above described shall be and the same is hereby declared to be in all respects valid, and such deed shall be deemed to be in all respects the deed of said corporation. (1919, c. 53, s. 1; C. S., s. 3354; 1927, c. 126; 1963, c. 1094; 1973, c. 118, s. 1.)

Editor's Note.—

The 1973 amendment substituted "1973" for "one thousand nine hundred and sixty-three."

Session Laws 1973, c. 118, s. 2, provides: "This act shall not affect pending litigation."

§ 47-95. Acknowledgments taken by notaries interested as trustee or holding other office.—In every case where deeds and other instruments have been acknowledged and privy examination of wives had before notaries public, or justices of the peace, prior to January 1, 1969, when the notary public or justice of the peace at the time was interested as trustee in said instrument or at the time was also holding some other office, and the deed or other instrument has been duly probated and recorded, such acknowledgment and privy examination taken by such notary public or justice of the peace is hereby declared to be sufficient and valid. (1923, c. 61; C. S., s. 3366(h); 1931, cc. 166, 438; 1939, c. 321; 1955, c. 696; 1957, c. 1270; 1959, c. 81; 1969, c. 639, s. 1.)

Editor's Note.—

The 1969 amendment substituted "January 1, 1969" for "January 1, 1959." The amendatory act states that it is "the purpose and intent of this act to validate those certain acknowledgments with which G.S. 47-95 deals and which were made before January 1, 1969." Section 2 of the amendatory act provides that the act does not apply to pending litigation.

§ 47-107. Validation of probate and registration of certain instruments where name of grantor omitted from record.—Whenever any deed, deed of trust, conveyance or other instrument permitted by law to be registered in this State has been registered for a period of 21 years or more and a clerk of the superior court or a register of deeds has adjudged the certificate of the officer

before whom the acknowledgment was taken to be in due form and correct and has ordered the instrument to be recorded, but the name of a grantor which appears in the body of the instrument and as a signer of the instrument has been omitted from the record of the certificate of the officer before whom the acknowledgment was taken, such deed, deed of trust, conveyance or other instrument shall be conclusively presumed to have been duly acknowledged, probated and recorded; provided this presumption shall not affect litigation instituted within 21 years after date of registration. (1941, c. 30; 1971, c. 825.)

Editor's Note. — The 1971 amendment substituted "Whenever any deed, deed of trust, conveyance or other instrument" for "All deeds, deeds of trust, conveyances or other instruments," substituted "has been registered for a period of 21 years or more and" for "which have been registered prior to January first, one thousand nine hundred and twenty-four, and in which," inserted "or a register of deeds" deleted "in which" preceding "the name," and substituted, at the end of the section, the language beginning "such deed, deed of trust, conveyance or other instrument" for "are hereby declared to have been duly proved, probated and recorded and to be valid."

§ 47-108.11. Validation of recorded instruments where seals have been omitted.—In all cases of any deed, deed of trust, mortgage, lien or other instrument authorized or required to be registered in the office of the register of deeds of any county in this State where it appears of record or it appears that from said instrument, as recorded in the office of the register of deeds of any county in the State, there has been omitted from said recorded or registered instrument the word "seal," "notarial seal" and that any of said recorded or registered instruments shows or recites that the grantor or grantors "have hereunto fixed or set their hands and seals" and the signature of the grantor or grantors appears without a seal thereafter or on the recorded or registered instrument or in all cases where it appears there is an attesting clause which recites "signed, sealed and delivered in the presence of," and the signature of the grantor or grantors appears on the recorded or registered instrument without any seal appearing thereafter or of record, then all such deeds, mortgages, deeds of trust, liens or other instruments, and the registration of same in the office of the register of deeds, are hereby declared to be in all respects valid and binding and are hereby made in all respects valid and binding to the same extent as if the word "seal" or "notarial seal" had not been omitted, and the registration and recording of such instruments in the office of the register of deeds in any county in this State are hereby declared to be valid, proper, legal and binding registrations.

This section shall not apply in any respect to any instrument recorded or registered subsequent to January 1, 1969, or to pending litigation or to any such instruments now directly or indirectly involved in pending litigation. (1953, c. 996; 1959, c. 1022; 1973, c. 519.)

Editor's Note. — The 1973 amendment substituted "1969" for "1959" in the second paragraph.

ARTICLE 5.

Registration of Official Discharges from the Military and Naval Forces of the United States.

§ 47-113. Certified copy of registration.—Any person desiring a certified copy of any such discharge, or certificate of lost discharge, registered under the provisions of this article shall apply for the same to the register of deeds of the county in which such discharge or certificate of lost discharge is registered. The register of deeds shall furnish certified copies of instruments registered under this article without charge to any member or former member of the armed

forces of the United States who applies therefor. (1921, c. 198, s. 5; C. S., s. 3366(o); 1945, c. 659, s. 3; 1969, c. 80, s. 11.)

Editor's Note.—Prior to the 1969 amendment, effective July 1, 1969, the section provided for payment of a fee of fifty cents, except by members or former members of the armed forces.

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.—(a) Any person 18 years of age or more and mentally competent may as principal execute a power of attorney pursuant to the provisions of this section which shall continue in effect until revoked as hereinafter provided, notwithstanding any incapacity or mental incompetence of such principal which occurs after the date of the execution and acknowledgment of the power of attorney.

(d) No power of attorney executed pursuant to the provisions of this section shall be valid but from the time of registration thereof in the office of the register of deeds of that county in this State designated in the power of attorney, or if no place of registration is designated, in the office of the register of deeds of the county in which the principal has his legal residence at the time of such registration or, if the principal has no legal residence in this State at the time of registration or the attorney in fact is uncertain as to the principal's residence in this State, in some county in the State in which the principal owns property or the county in which one or more of the attorneys in fact reside. A power of attorney executed pursuant to the provisions of this section shall be valid from the time of registration thereof even though the time of such registration is subsequent to the mental incapacity or incompetence of the principal. Within 30 days after the registration of the power of attorney as above provided, the attorney in fact shall file with the clerk of the superior court in the county of such registration a copy of the power of attorney, but failure to file with the clerk shall not affect validity of the instrument.

(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; 1971, c. 197; c. 1231, s. 1.)

Editor's Note. – The 1967 amendment added subsection (k).

The first 1971 amendment added the second sentence in subsection (d).

The second 1971 amendment substituted "18" for "twenty-one (21)" in subsection (a).

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

Chapter 47A.

Unit Ownership Act.

Sec.
47A-18. Bylaws; annexed to declaration; amendments.

§ 47A-3. Definitions.—Unless it is plainly evident from the context that a different meaning is intended, as used herein:

(1a) "Building" means a building, or a group of buildings, each building containing one or more units, and comprising a part of the property; provided that the property shall contain not less than two units.

(12) "Unit" or "condominium unit" means an enclosed space consisting of one or more rooms occupying all or a part of a floor or floors in a building of one or more floors or stories regardless of whether it be designed for residence, for office, for the operation of any industry or business, or for any other type of independent use and shall include such accessory spaces and areas as may be described in the declaration, such as garage space, storage space, balcony, terrace or patio, provided it has a direct exit to a thoroughfare or to a given common space leading to a thoroughfare.

(1969, c. 848; 1971, c. 418.)

Editor's Note. — The 1969 amendment added subdivision (1a) and inserted "or floors" near the beginning of subdivision (12).

The 1971 amendment, in subdivision (1a), substituted "one" for "two" and added the proviso.

Only the opening paragraph of the section and the subdivisions changed by the amendments are set out.

§ 47A-7. Common areas and facilities not subject to partition or division.

Editor's Note.—For note on direct restraints on alienation, see 48 N.C.L. Rev. 173 (1969).

§ 47A-18. Bylaws; annexed to declaration; amendments.—The administration of every property shall be governed by bylaws, a true copy of which shall be annexed to the declaration. No modification of or amendment to the bylaws shall be valid, unless set forth in an amendment to the declaration and such amendment is duly recorded. (1963, c. 685, s. 18; 1973, c. 734.)

Editor's Note. — The 1973 amendment deleted "and to the first deed of each unit" at the end of the first sentence.

Chapter 47B.

Real Property Marketable Title Act.

Editor's Note. — Session Laws 1973, c. 255, s. 2, makes the act effective Oct. 1, 1973.

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§ 47B-1. Declaration of policy and statement of purpose.—It is hereby declared as a matter of public policy by the General Assembly of the State of North Carolina that:

(1) Land is a basic resource of the people of the State of North Carolina and should be made freely alienable and marketable so far as is practicable.

(2) Nonpossessory interests in real property, obsolete restrictions and technical defects in titles which have been placed on the real property records at remote times in the past often constitute unreasonable restraints on the alienation and marketability of real property.

(3) Such interests and defects are prolific producers of litigation to clear and quiet titles which cause delays in real property transactions and fetter the marketability of real property.

(4) Real property transfers should be possible with economy and expediency. The status and security of recorded real property titles should be determinable from an examination of recent records only.

It is the purpose of the General Assembly of the State of North Carolina to provide that if a person claims title to real property under a chain of record title for 30 years, and no other person has filed a notice of any claim of interest in the real property during the 30-year period, then all conflicting claims based upon any title transaction prior to the 30-year period shall be extinguished. (1973, c. 255, s. 1.)

§ 47B-2. Marketable record title to interest in real property; 30-year unbroken chain of title of record; effect of marketable title.—(a) Any person having the legal capacity to own real property in this State, who, alone or together with his predecessors in title, shall have been vested with any interest in real property of record for 30 years or more, shall have a marketable record title to such interest in real property.

(b) A person has an interest in real property of record for 30 years or more when the public records disclose a title transaction affecting the title to the real property which has been of record for not less than 30 years purporting to create such interest either in:

(1) The person claiming such interest; or

(2) Some other person from whom, by one or more title transactions, such interest has passed to the person claiming such interest with nothing

appearing of record, in either case, purporting to divest such claimant of the interest claimed.

(c) Subject to the matters stated in G.S. 47B-3, such marketable record title shall be free and clear of all rights, estates, interests, claims or charges whatsoever, the existence of which depends upon any act, title transaction, event or omission that occurred prior to such 30-year period. All such rights, estates, interests, claims or charges, however denominated, whether such rights, estates, interests, claims or charges are or appear to be held or asserted by a person sui juris or under a disability, whether such person is natural or corporate, or is private or governmental, are hereby declared to be null and void.

(d) In every action for the recovery of real property, to quiet title, or to recover damages for trespass, the establishment of a marketable record title in any person pursuant to this statute shall be prima facie evidence that such person owns title to the real property described in his record chain of title. (1973, c. 255, s. 1.)

§ **47B-3. Exceptions.**—Such marketable record title shall not affect or extinguish the following rights:

(1) Rights, estates, interests, claims or charges disclosed by and defects inherent in the muniments of title of which such 30-year chain of record title is formed, provided, however, that a general reference in any of such muniments to rights, estates, interests, claims or charges created prior to such 30-year period shall not be sufficient to preserve them unless specific identification by reference to book and page or record be made therein to a recorded title transaction which imposed, transferred or continued such rights, estates, interests, claims or charges.

(2) Rights, estates, interests, claims or charges preserved by the filing of a proper notice in accordance with the provisions of G.S. 47B-4.

(3) Rights, estates, interests, claims or charges of any person who is in present, actual and open possession of the real property so long as such person is in such possession.

(4) Rights of any person who likewise has a marketable record title as defined in G.S. 47B-2 and who is listed as the owner of such real property on the tax books of the county in which the real property is located at the time that marketability is to be established.

(5) Rights of any owners of mineral rights.

(6) Rights-of-way of any railroad company (irrespective of nature of its title or interest therein whether fee, easement, or other quality) and all real estate other than right-of-way property of a railroad company in actual use for railroad purposes or being held or retained for prospective future use for railroad operational purposes. The use by any railroad company or the holding for future use of any part of a particular tract or parcel of right-of-way or non-right-of-way property shall preserve the interest of the railway company in the whole of such particular tract or parcel. Operational use is defined as railroad use requiring proximity and access to railroad tracks. Nothing in this section shall be construed as repealing G.S. 1-44.1.

(7) Rights, interests, or servitudes in the nature of easements, rights-of-way or terminal facilities of any railroad (company or corporation) obtained by the terms of its charter or through any other congressional or legislative grant not otherwise extinguished.

(8) Rights of any person who has an easement or interest in the nature of an easement, whether recorded or unrecorded and whether possessory or nonpossessory, when such easement or interest in the nature of an easement is for the purpose of:

a. Flowage, flooding or impounding of water, provided that the

watercourse or body of water, which such easement or interest in the nature of an easement serves, continues to exist; or

b. Placing and maintaining lines, pipes, cables, conduits or other appurtenances which are either aboveground, underground or on the surface and which are useful in the operation of any water, gas, natural gas, petroleum products, or electric generation, transmission or distribution system, or any sewage collection or disposal system, or any telephone, telegraph or other communications system, or any surface water drainage or disposal system whether or not the existence of the same is clearly observable by physical evidence of its use.

(9) Rights, titles or interests of the United States to the extent that the extinguishment of such rights, titles or interest is prohibited by the laws of the United States.

(10) Rights, estates, interests, claims or charges created subsequent to the beginning of such 30-year period.

(11) Deeds of trust, mortgages and security instruments or security agreements duly recorded and not otherwise unenforceable.

(12) Rights, estates, interests, claims or charges with respect to any real property registered under the Torrens Law as provided by Chapter 43 of the General Statutes of North Carolina.

(13) Covenants applicable to a general or uniform scheme of development which restrict the property to residential use only, provided said covenants are otherwise enforceable. The excepted covenant may restrict the property to multi-family or single-family residential use or simply to residential use. Restrictive covenants other than those mentioned herein which limit the property to residential use only are not excepted from the provisions of Chapter 47-B. (1973, c. 255, s. 1.)

§ 47B-4. Preservation by notice; contents; recording; indexing. — (a) Any person claiming a right, estate, interest or charge which would be extinguished by this Chapter may preserve the same by registering within such 30-year period a notice in writing, duly acknowledged, in the office of the register of deeds for the county in which the real property is situated, setting forth the nature of such claim, which notice shall have the effect of preserving such claim for a period of not longer than 30 years after registering the same unless again registered as required herein. No disability or lack of knowledge of any kind on the part of any person shall delay the commencement of or suspend the running of said 30-year period. Such notice may be registered by the claimant or by any other person acting on behalf of any claimant who is

(1) Under a disability;

(2) Unable to assert a claim on his behalf; or

(3) One of a class, but whose identity cannot be established or is uncertain at the time of filing such notice of claim for record.

(b) To be effective and to be entitled to registration, such notice shall contain an accurate and full description of all real property affected by such notice, which description shall be set forth in particular terms and not be by general reference; but if such claim is founded upon a recorded instrument, then the description in such notice may be the same as that contained in the recorded instrument. Such notice shall also contain the name of any record owner of the real property at the time the notice is registered and a statement of the claim showing the nature, description and extent of such claim. The register of deeds of each county shall accept all such notices presented to him which are duly acknowledged and certified for recordation and shall enter and record full copies thereof in the same way that deeds and other instruments are recorded, and each register of deeds shall be entitled to charge the same fees for the recording thereof as are charged for the recording of deeds. In indexing such notices in his office each register of deeds shall

enter such notices under the grantee indexes of deeds under the names of persons on whose behalf such notices are executed and registered and under the grantor indexes of deeds under the names of the record owners of the possessory estates in the real property to be affected against whom the claim is to be preserved at the time of the registration. (1973, c. 255, s. 1.)

§ 47B-5. Extension of time for registering notice of claims which Chapter would otherwise bar.—If the 30-year period specified in this Chapter shall have expired prior to October 1, 1973, no right, estate, interest, claim or charge shall be barred by G.S. 47B-2 until October 1, 1976, and any right, estate, interest, claim or charge that would otherwise be barred by G.S. 47B-2 may be preserved and kept effective by the registration of a notice of claim as set forth in G.S. 47B-4 of this Chapter prior to October 1, 1976. (1973, c. 255, s. 1.)

§ 47B-6. Registering false claim.—No person shall use the privilege of registering notices hereunder for the purpose of asserting false or fictitious claims to real property; and in any action relating thereto if the court shall find that any person has intentionally registered a false or fictitious claim, the court may award to the prevailing party all costs incurred by him in such action, including a reasonable attorney's fee, and in addition thereto may award to the prevailing party treble the damages that he may have sustained as a result of the registration of such notice of claim. (1973, c. 255, s. 1.)

§ 47B-7. Limitations of actions and recording acts. — Nothing contained in this Chapter shall be construed to extend the period for the bringing of an action or for the doing of any other required act under any statutes of limitations, nor, except as herein specifically provided, to affect the operation of any statutes governing the effect of the registering or the failure to register any instrument affecting real property. (1973, c. 255, s. 1.)

§ 47B-8. Definitions.—As used in this Chapter:

(1) The term "person" denotes singular or plural, natural or corporate, private or governmental, including the State and any political subdivision or agency thereof, and a partnership, unincorporated association, or other entity capable of owning an interest in real property.

(2) The term "title transaction" means any transaction affecting title to any interest in real property, including but not limited to title by will or descent, title by tax deed, or by trustee's, referee's, commissioner's, guardian's, executor's, administrator's, or sheriff's deed, contract, lease or reservation, or judgment or order of any court, as well as warranty deed, quitclaim deed, or mortgage. (1973, c. 255, s. 1.)

§ 47B-9. Chapter to be liberally construed. — This Chapter shall be liberally construed to effect the legislative purpose of simplifying and facilitating real property title transactions by allowing persons to rely on a record chain of title of 30 years as described in G.S. 47B-2, subject only to such limitations as appear in G.S. 47B-3. (1973, c. 255, s. 1.)

Chapter 48.

Adoptions.

§ 48-1. Legislative intent; construction of chapter. — The General Assembly hereby declares as a matter of legislative policy with respect to adoption that—

(1) The primary purpose of this chapter is to protect children from unnecessary separation from parents who might give them good homes and loving care, to protect them from adoption by persons unfit to have the responsibility of their care and rearing, and to protect them from interference, long after they have become properly adjusted in their adoptive homes by natural parents who may have some legal claim because of a defect in the adoption procedure.

(2) The secondary purpose of this chapter is to protect the natural parents from hurried decisions, made under strain and anxiety, to give up a child, and to protect foster parents from assuming responsibility for a child about whose heredity or mental or physical condition they know nothing, and to prevent later disturbance of their relationship to the child by natural parents whose legal rights have not been fully protected.

(3) When the interests of a child and those of an adult are in conflict, such conflict should be resolved in favor of the child; and to that end this chapter should be liberally construed. (1949, c. 300.)

Editor's Note.— This section is set out above to correct an error appearing in the replacement volume.

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

§ 48-2. Definitions.—In this Chapter, unless the context or subject matter otherwise requires—

(1) "Adult person" means any person who has attained the age of 18 years.

(2) "Licensed child-placing agency" means any agency operating under a license to place children for adoption issued by the Department of Human Resources, or in the event that such agency is in another state or territory or in the District of Columbia, operating under a license to place children for adoption issued by a governmental authority of such state, territory, or the District of Columbia, empowered by law to issue such licenses.

(3a) For the purpose of this Chapter, an abandoned child shall be any child who has been willfully abandoned at least six consecutive months immediately preceding institution of an action or proceeding to declare the child to be an abandoned child. A child may be willfully abandoned by his or her legal or natural father, within the meaning of this section, if the mother of the child had been willfully abandoned by and was living separate and apart from the father at the time of the child's birth, although the father may not have known of such birth; but in any event said child must be over the age of three months at the time of institu-

tion of the action or proceeding to declare the child to be an abandoned child.

(3b) In addition to the definition of abandonment in (3a) above, an abandoned child, for purposes of this Chapter, shall be a child who has been placed in the care of a child-caring institution or foster home, and whose parent, parents, or guardian of the person has failed substantially and continuously for a period of more than one year to maintain contact with such child, and has willfully failed for such period to contribute adequate support to such child, although physically and financially able to do so. In order to find an abandonment under this subdivision, the court must find the foregoing and the court must also find that diligent but unsuccessful efforts have been made on the part of the institution or a child-placing agency to encourage the parent, parents, or guardian of the person of the child to strengthen the parental or custodial relationship to the child.

(4) "Readoption" means an adoption by any person of a child who has been previously legally adopted.

(5) "Stepchild" means the child of one spouse by a former union, whether or not such child was born in wedlock. (1949, c. 300; 1953, c. 880; 1957, c. 778, s. 1; 1961, c. 241; 1969, c. 982; 1971, c. 157, ss. 1, 2; c. 1231, s. 1; 1973, c. 476, s. 138.)

Editor's Note. — The first 1971 amendment, effective July 1, 1971, deleted "under the age of eighteen years" following "any child" in the first sentence of subdivision (3a), deleted "and under the age of eighteen years" following "three months" in the second sentence of that subdivision, and deleted "under eighteen years of age" following "a child" in the first sentence of subdivision (3b).

The second 1971 amendment substituted "18" for "twenty-one" in subdivision (1).

The 1973 amendment, effective July 1, 1973, substituted "Department of Human Resources" for "State Board of Public Welfare" in subdivision (2).

Abandonment Must Be Willful.—

In accord with 2nd paragraph in original. See Boring v. Mitchell, 5 N.C. App. 550, 169 S.E.2d 79 (1969).

It Is Not Necessary, etc. —

In accord with original. See Boring v. Mitchell, 5 N.C. App. 550, 169 S.E.2d 79 (1969).

If His Conduct Shows Intent, etc.—

In accord with original. See Boring v. Mitchell, 5 N.C. App. 550, 169 S.E.2d 79 (1969).

Parent May Not Dissipate Effects of Abandonment by Desire for Return of Child.—Abandonment is not an ambulatory thing, the legal effects of which a delinquent parent may dissipate at will by the expression of a desire for the return of the discarded child. Boring v. Mitchell, 5 N.C. App. 550, 169 S.E.2d 79 (1969).

§ 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 18 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.

(e) If the petitioner is the spouse of the natural parent of the minor child, such petitioner may adopt the child even though the petitioner is not 21 years of age. Such petitioner shall be competent to execute the petition without the appointment of a general or testamentary guardian, or by guardian ad litem. (1949, c. 300; 1963, c. 699; 1967, c. 619, ss. 1-3; c. 693; 1971, c. 395; c. 1231, s. 1.)

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).

The first 1971 amendment added subsection (e).

The second 1971 amendment substituted "18" for "twenty-one" in the first sentence of subsection (a).

§ 48-5. Parents, etc., not necessary parties to adoption proceedings upon finding of abandonment.—(a) In all cases where a court of competent jurisdiction has declared a child to be an abandoned child, the parent, parents, or guardian of the person, declared guilty of such abandonment shall not be necessary parties to any proceeding under this Chapter nor shall their consent be required.

(b) In the event that a court of competent jurisdiction has not heretofore declared the child to be an abandoned child, then on written notice of not less than 10 days to the parent, parents, or guardian of the person, the court in the adoption proceeding is hereby authorized to determine whether an abandonment has taken place.

(1971, c. 1185, s. 17.)

Editor's Note.—

The 1971 amendment, effective Oct. 1, 1971, deleted "including a juvenile court or a domestic relations court" following "competent jurisdiction" in subsection (a), and deleted a former proviso at the end of subsection (b).

Only the subsections affected by the amendment are set out.

Opinions of Attorney General. — Mr. Louis O'Conner, Jr., Director, Welfare Programs Division, State Department of Social Services, 40 N.C.A.G. 645 (1969).

Only finding of abandonment and termination of parental rights per § 7A-288 will negate requirement of finding abandonment per this section. Opinion of Attorney General to Robin L. Peacock, N.C. Department of Social Services, 42 N.C.A.G. 305 (1973).

§ 48-6. When consent of father not necessary.—(a) In the case of a child born out of wedlock and when said child has not been legitimated prior to the time of the signing of the consent, the written consent of the mother alone shall be sufficient under this chapter and the father need not be made a party to the proceeding. The legitimation of the child by any means subsequent to the signing of such consent of the mother shall not make such consent invalid nor

adversely affect the sufficiency of such consent nor make necessary the consent of the father or his joinder as a party to the proceeding.

(1969, c. 534, s. 1.)

Editor's Note.—The 1969 amendment added the second sentence of subsection (a). Section 4 of the amendatory act provides: "This act is intended to clarify and express in part the original, as well as the present, purpose and intent of § 48-6 (a) of the General Statutes of North Carolina as related to chapter 49, article 2."

As subsection (b) was not changed by the amendment, it is not set out.

Legitimation Proceeding Has No Effect upon Prior Consent to Adoption.—A legitimation proceeding brought under § 49-10 by the putative father of a child born out of wedlock, wherein the child is declared legitimate, has no effect upon the prior written consent to adoption given by the unwed mother under this section. In re Doe, 11 N.C. App. 560, 181 S.E.2d 760 (1971).

§ 48-6.1. When consent of mother of illegitimate child not necessary.—Whenever it has been judicially determined in a proceeding instituted pursuant to the provisions of North Carolina G.S. 130-58.1 that a child born out of wedlock is living under such conditions that the health or general welfare of such child is endangered by its living conditions and environment, then, the consent of the mother to the adoption of such child shall not be necessary as a prerequisite to the validity of the adoption of said child. (1963, c. 1258; 1969, c. 911, s. 8.)

Editor's Note. — The 1969 amendment substituted "G.S. 130-58.1" for "G.S. 110-25.1."

Session Laws 1969, c. 911, s. 11, provides: "This act shall be effective January 1, 1970, provided that in those districts where the district court is not yet established, the courts exercising juvenile jurisdiction on the effective date shall continue to exercise juvenile jurisdiction until the district court is established."

§ 48-7. When consent of parents or guardian necessary.—(a) Except as provided in G.S. 48-5, G.S. 48-6 or G.S. 7A-288, and if they are living and have not released all rights to the child and consented generally to adoption as provided in G.S. 48-9, the parents or surviving parent or guardian of the person of the child must be a party or parties of record to the proceeding and must give written consent to adoption, which must be filed with the petition.

(b) In any case where the parents or surviving parent or guardian of the person of the child whose adoption is sought are necessary parties and their address is known, or can by due and diligent search be ascertained, that fact must be made known to the court by proper allegation in the petition or by affidavit and service of process must be made upon such person as provided by law for service of process on residents of the State or by service of process on nonresidents as provided in G.S. 1A-1, Rule 4; provided, however, that service of process upon such person shall not be necessary if he or she has given written consent, duly acknowledged, to the adoption sought in the proceeding.

(c) If the address of such person cannot be ascertained for the purpose of service of process or service of process cannot be made as hereinbefore provided, that fact must be made known to the court by proper allegation in the petition or by affidavit to the effect that after due and diligent search such person cannot be found for the purpose of service of process. Service of process upon such person may then be made by publication of summons as provided by G.S. 1A-1, Rule 4, and as provided by law.

(d) When a stepparent petitions to adopt a stepchild, consent to the adoption must be given by the spouse of the petitioner, and this adoption shall not affect the relationship of parent and child between such spouse and the child. (1949, c. 300; 1957, c. 778, s. 5; 1969, c. 911, s. 6; 1971, c. 1093, s. 13.)

Editor's Note.—

The 1969 amendment inserted the reference to § 7A-288 near the beginning of subsection (a).

The 1971 amendment substituted "G.S. 1A-1, Rule 4" for "G.S. 1-104" in subsection (b) and substituted "G.S. 1A-1, Rule 4" for "G.S. § 1-98 et seq." in the second sentence of subsection (c).

Session Laws 1969, c. 911, s. 11, provides: "This act act shall be effective January 1, 1970, provided that in those districts where the district court is not yet established, the courts exercising juvenile jurisdiction on the effective date shall continue to exercise juvenile jurisdiction until the district court is established."

Legitimation Proceeding Has No Effect upon Prior Consent to Adoption.—A legitimation proceeding brought under § 49-10 by the putative father of a child born out of wedlock, wherein the child is declared legitimate, has no effect upon the prior written consent to adoption given by the unwed mother under § 48-6. In re Doe, 11 N.C. App. 560, 181 S.E.2d 760 (1971).

§ 48-8. Capacity of parents to consent.—A parent who has not reached the age of 18 years shall have legal capacity to give consent to adoption and to release such parent's rights in a child, and shall be as fully bound thereby as if said parents had attained 18 years of age. (1949, c. 300; 1971, c. 1231, s. 1.)

Editor's Note. — The 1971 amendment substituted "18" for "twenty-one" in two places.

§ 48-9. When consent may be given by persons other than parents.—(a) In the following instances written consent sufficient for the purposes of adoption filed with the petition shall be sufficient to make the person giving consent a party to the proceeding and no service of any process need be made upon such person.

(1) When the parent, parents, or guardian of the person of the child, has in writing surrendered the child to a director of public welfare of a county or to a licensed child-placing agency and at the same time in writing has consented generally to adoption of the child, the director of public welfare or the executive head of such agency may give consent to the adoption of the child by the petitioners. A county director of public welfare may accept the surrender of a child who was born in the county or whose parent or parents have established residence in the county.

(2) If the court finds as a fact that there is no person qualified to give consent, or that the child has been abandoned by one or both parents or by the guardian of the person of the child, the court shall appoint some suitable person or the county director of public welfare of the county in which the child resides to act in the proceeding as next friend of the child to give or withhold such consent. The court may make the appointment immediately upon such determination and forthwith may make such further orders as to the court may seem proper.

(3) When a district court has entered an order terminating parental rights as provided by G.S. 7A-288, and when the court has placed such child in the custody of the county department of social services or a licensed child-placing agency, then the director of such county department of social services or the executive director of such licensed child-placing agency shall have the right to give written consent to the adoption of such child without being appointed as next friend of the child.

(1969, c. 911, s. 7.)

Editor's Note. — The 1969 amendment added subdivision (3) of subsection (a).

Session Laws 1969, c. 911, s. 11, provides: "This act shall be effective January 1, 1970, provided that in those districts where the district court is not yet established, the courts exercising juvenile jurisdiction on the effective date shall continue to exercise juvenile jurisdiction until the district court is established."

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

Consent to Adoption by Person in

Charge of County.—See opinion of Attorney General to Miss Louise W. Creef, Steno II, In Charge, Dare County Department of Social Services, 40 N.C.A.G. 648 (1970).

§ 48-9.1. Additional effects of surrender and consent given to director of social services 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 social services or a licensed child-placing agency in accordance with G.S. 48-9(a)(1) shall be as follows:

(1) The county department of social services 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 social services 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 social services 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 social services 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 social services with the Department of Human Resources. Such transfer of custody of the child shall be accompanied by the surrender, release and consent and the county department of social services 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 social services shall be responsible for the care and custody of the child in accordance with the provisions of G.S. 7A-286(2)c. 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. 7A-286(2)c. If the court shall award custody of the child to a county department of social services, the court shall order the child-placing agency to deliver the surrender and consent in its possession to the county department of social services to which custody of the child has been given. The county department of social services, 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 social services. The agency or director of social services 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; 1969, c. 911, s. 9; c. 982; 1973, c. 476, s. 138.)

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

The 1969 amendment substituted "G.S. 7A-286 (2) c" for "G.S. 110-29 (3)" in two places in subdivision (2).

Session Laws 1969, c. 911, s. 11, provides: "This act shall be effective January 1, 1970, provided that in those districts where the district court is not yet established, the courts exercising juvenile jurisdiction on the effective date shall continue to exercise juvenile jurisdiction until the district court is established."

The 1973 amendment, effective July 1, 1973, substituted "Department of Human Resources" for "State Department of Public Welfare" in subdivision (2).

Legitimation Proceeding Has No Effect upon Prior Consent to Adoption.—A legitimation proceeding brought under § 49-10 by the putative father of a child born out of wedlock, wherein the child is declared legitimate, has no effect upon the prior written consent to adoption given by the unwed mother under § 48-6. In re Doe, 11 N.C. App. 560, 181 S.E.2d 760 (1971).

§ 48-12. Nature of proceeding; venue.—(a) Adoption shall be by a special proceeding before the clerk of the superior court. The petition may be filed in the county:

(1) Where the petitioners reside; or

(2) Where the child resides; or

(3) Where the child resided when it became a public charge; or

(4) In which is located any licensed child-placing agency or institution operating under the laws of this State and having custody of the child or to which the child shall have been surrendered as provided in G.S. 48-9.

(b) The petition may be filed and the proceeding may be completed in any other county unless a parent or guardian of the person or other person having actual or legal custody of the child to be adopted shall file a written objection with the clerk within 30 days after the filing of the petition for adoption or within 30 days after the completion of any notice required by this Chapter to be given to the person filing such objection.

(c) In the event of the filing of an objection in accordance with subsection (b), venue shall thenceforth be as described in subsection (a) and the clerk shall transmit forthwith all documents, reports and papers on file or thereafter filed with him concerning the proceeding to such clerk of court as shall be designated in writing by the petitioner or petitioners. The status of the proceeding then shall be for all purposes the same as if all things done in the proceeding had been done in the court of adoptions to which the proceeding has been removed in accordance with this subsection. (1949, c. 300; 1971, c. 233, s. 1.)

Editor's Note.—

The 1971 amendment designated the former section as subsection (a) and added subsections (b) and (c).

Section 2, c. 233, Session Laws 1971, provides: "This act shall apply to pending proceedings. Notwithstanding the time period provisions in G. S. 48-12 (b) as rewritten, written objections need not be filed earlier than 30 days after the date of ratification." The act was ratified on April 27, 1971.

Venue Provisions Are Mandatory; Venue Requirements May Not Be Waived.—See opinion of Attorney General to Mrs. Joan C. Holland, Supervisor of Adoptions, Department of Social Services, 41 N.C.A.G. 180 (1970).

Venue Provisions of Subsection (a) Are Not Mandatory Except When Objection Is Filed under Subsection (b).—See opinion of Attorney General to Mr. Robert M. Blackburn, 43 N.C.A.G. 122 (1973).

§ 48-15. Petition for adoption.—(a) The caption of the petition shall be substantially as follows:

STATE OF NORTH CAROLINA
IN THE SUPERIOR COURT
..... COUNTY
BEFORE THE CLERK

..... (Full name of adopting father) and ..... (Full name of adopting mother) FOR THE ADOPTION OF ..... (Full name of child as used in proceeding)	PETITION FOR ADOPTION

(b) The petition may be prepared on a standard form to be supplied by the Department of Human Resources, or may be typewritten, giving all the information hereinafter required.

(c) Such petition must state:

(1) The full names of the petitioners;
(2) The information necessary to show that the court to which the petition is addressed has jurisdiction;
(3) When the petitioners acquired custody of the child, and from what person or agency;
(4) The birth date and state or county of birth of the child, if known;
(5) The name used for the child in the proceeding;
(6) That it is the desire of the petitioners that the relationship of parent and child be established between them and said child;
(7) Their desire, if they have such, that the name of the child be changed together with the new name desired;
(8) The desire of the petitioners that the said child shall, upon adoption, inherit real and personal property in accordance with the statutes of descent and distribution;
(9) The value of the personal property and of the real estate owned by the child as far as can be ascertained;
(10) That the petitioners are fit persons to have the care and custody of the child;
(11) That they are financially able to provide for him; and
(12) That there has been full compliance with the law in regard to consent to adoption.

(d) The petition must be signed and verified by the petitioners and must be filed in triplicate. The original of the petition shall be held in the office of the clerk of the superior court, a copy sent to the Department of Human Resources, and a copy sent to the director of social services or to the licensed child-placing agency concerned with the order of reference.

(e) The names of the adopting parents must be indexed on the plaintiffs' or petitioners' side of the cross-index of special proceedings. The child's name as used in the proceeding must be indexed on the defendants' or respondents' side of such index. (1949, c. 300; 1961, c. 186; 1969, c. 982; 1973, c. 476, s. 138.)

Editor's Note.—The 1973 amendment, effective July 1, 1973, substituted "Department of Human Resources" for "State Board of Public Welfare" in subsections (b) and (d).

§ 48-16. Investigation of conditions and antecedents of child and of suitableness of foster home.—(a) Upon the filing of a petition for adoption

the court shall order the county director of social services, or a licensed child-placing agency through its authorized representative, to investigate the condition and antecedents of the child for the purpose of ascertaining whether he is a proper subject for adoption, to make appropriate inquiry to determine whether the proposed foster home is a suitable one for the child, and to investigate any other circumstances or conditions which may have a bearing on the adoption and of which the court should have knowledge.

(b) The court may order the director of social services of one county to make an investigation of the condition and antecedents of the child and the director of social services of another county or counties to make any other part of the necessary investigation.

(c) The county director or directors of social services of the authorized representative of such agency described hereinbefore must make a written report within sixty days of his or their findings, on a standard form or following an outline supplied by the Department of Human Resources for examination by the court of adoption. Such report shall be filed with the clerk as a part of the official papers in the adoption proceeding but shall not be retained permanently in the office of the clerk. The clerk shall in nowise be responsible for the permanent custody of the report and said report shall not be open to public inspection except upon order of the court as provided in G.S. 48-26. (1949, c. 300; 1961, c. 186; 1969, c. 982; 1973, c. 476, s. 138.)

Editor's Note. — The 1973 amendment, effective July 1, 1973, substituted "Department of Human Resources" for "State Board of Public Welfare" in subsection (c).

§ **48-19. Report on placement after interlocutory decree.**—When the court enters an interlocutory decree of adoption, it must order the county director of social services or a licensed child-placing agency through its duly authorized representative to supervise the child in its adoptive home and report to the court on the placement on a standard form or following an outline supplied by the Department of Human Resources, such report being for examination by the court before entering any final order. (1949, c. 300; 1961, c. 186; 1969, c. 982; 1973, c. 476, s. 138.)

Editor's Note.—The 1973 amendment, effective July 1, 1973, substituted "Department of Human Resources" for "State Board of Public Welfare."

§ **48-20. Dismissal of proceeding.**—(a) If at any time between the filing of a petition and the issuance of the final order completing the adoption it is made known to the court that circumstances are such that the child should not be given in adotion to the petitioners, the court may dismiss the proceeding.

(b) The court before entering an order to dismiss the proceeding must give notice of not less than five days of the motion to dismiss to the petitioners, to the county director of social services or licensed child-placing agency having made the investigation provided for in G.S. 48-16, and to the Department of Human Resources, and they shall be entitled to a hearing to admit or refute the facts upon which the impending action of the court is based.

(c) Upon dismissal of an adoption proceeding, the custody of the child shall revert to the county director of social services or licensed child-placing agency having custody immediately before the filing of the petition. If the placement of the child was made by its natural parents directly with the adoptive parents, the director of social services of the county in which the petition was filed shall be notified by the court of such dismissal and said director of social services shall be responsible for taking appropriate action for the protection of the child. (1949, c. 300; 1961, c. 186; 1969, c. 982; 1973, c. 476, s. 138.)

Editor's Note.—The 1973 amendment, effective July 1, 1973, substituted "Department of Human Resources" for "State Board of Public Welfare" in subsection (b).

§ 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.

§ 48-22. Contents of final order.

Editor's Note.—Session Laws 1973, c. 476, s. 138, effective July 1, 1973, amends this section by substituting "Department of Human Resources" for "State Board of Public Welfare" in subsection (a).

§ 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.

Adoption Terminates Rights of Natural Parents.—A final decree of adoption for life terminates the relationship between the natural parents and the child, and the natural parents are divested of all rights with respect to the child. Rhodes v. Henderson, 14 N.C. App. 404, 188 S.E.2d 565 (1972).

The right of the natural mother after she has permitted the child's adoption by others, is no greater than that of a stranger to the child. Rhodes v. Henderson, 14 N.C. App. 404, 188 S.E.2d 565 (1972).

Cited in De Lotbiniere v. Wachovia Bank & Trust Co., 2 N.C. App. 252, 163 S.E.2d 59 (1968).

§ 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 Department of Human Resources in the following order:

(1) Within 10 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 Department of Ruman Resources.

(2) Within 10 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 Department of Human Resources. 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 10 days after the final order of adoption is made the clerk must file with the Department of Human Resources the report on the supervision of the placement during the interlocutory period, and a copy of the final order.

(c) The said Department of Human Resources 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; 1969, c. 982; 1973, c. 476, s. 138.)

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).

The 1973 amendment, effective July 1, 1973, substituted "Department of Human Resources" for "State Board of Public Welfare" in four places and for "Board" in one place.

§ 48-25. Record and information not to be made public; violation a misdemeanor.—(a) Neither the original file of the proceeding in the office of the clerk nor the recording of the proceeding by the Department of Human Resources shall be open for general public inspection.

(b) With the exception of the information contained in the final order, it shall be a misdemeanor for any person having charge of the file or the record to disclose, except as provided in G.S. 48-26, and as may be required under the provisions of G.S. 48-27, any information concerning the contents of any papers in the proceeding.

(c) No director of social services or any employee of a social services department nor a duly licensed child-placing agency or any of its employees, officers, directors or trustees shall be required to disclose any information, written or verbal, relating to any child or to its natural, legal or adoptive parents, acquired in the contemplation of an adoption of the child, except by order of the clerk of the superior court of originial jurisdiction of the adoption, approved by order of a judge of that court, upon motion and after due notice of hearing thereupon given to the director of social services or child-placing agency; provided, however, that every director of social services and child-placing agency shall make to the court all reports required under the provisions of G.S. 48-16 and 48-19. (1949, c. 300; 1957, c. 778, s. 7; 1961, c. 186; 1969, c. 982; 1973, c. 476, s. 138.)

Editor's Note.—The 1973 amendment, effective July 1, 1973, substituted "Department of Human Resources" for "State Board of Public Welfare" in subsection (a).

§ 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, but in the case of any child who has reached the age of 18 years, the child's written consent to the change of name also must be filed with the clerk. When the name of any child is so changed, the court shall forthwith report such change to the Department of Human Resources. Upon receipt of the report, the State Registrar of

the Department of Human Resources 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.

(c) The State Registrar shall not issue to registers of deeds copies of birth certificates for adopted children. Certified copies of such record shall be issued by the Department of Human Resources only, and such copies shall be prepared in accordance with subsection (b). This section shall not be construed to prohibit issuance of copies of certificates now on file in the office of the register of deeds.

(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.

(e) The foregoing provisions to the contrary notwithstanding, the place of birth of any child adopted by a spouse of a natural parent of that child shall be the same on the new birth certificate as on the original certificate when the adoptive parent so requests. (1949, c. 300; 1951, c. 730, ss. 1-4; 1955, c. 951, s. 1; 1967, c. 1042, ss. 1-3; 1969, c. 21, s. 2; c. 977; 1971, c. 1231, s. 1; 1973, c. 476, s. 128.)

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" near the middle 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).

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."

The first 1969 amendment, effective July 1, 1969, added at the end of the first sentence in subsection (a) the provisions as to a child who has reached the age of 21.

The second 1969 amendment added subsection (e).

Session Laws 1969, c. 21, s. 1, effective July 1, 1969, provides that the act shall be known as the Adopted Persons' Change of Name Act of 1969.

The 1971 amendment substituted "18" for "twenty-one (21)" in the first sentence of subsection (a).

The 1973 amendment, effective July 1, 1973, substituted "Department of Human Resources" for "Office of Vital Statistics of the State Board of Health," and for "Office of Vital Statistics" in subsection (a), and for "State Board of Health" in subsection (c).

Only the subsections affected by the amendments are set out.

§ 48-30. Guardian appointed when custody granted of child with estate.

Opinions of Attorney General. — Mr. Louis O'Conner, Jr., Director, Welfare Programs Division, State Department of Social Services, 40 N.C.A.G. 650 (1969).

§ 48-36. Adoption of persons who are 18 or more years of age; change of name; clerk's certificate and record; notation on birth certificate; new birth certificate.—(a) Any person who is 18 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 18 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 18 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 subsections (b), (d) and (e) 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 18 years of age.

(d) Except in the case of a change of name in accordance with subsection (e) of this section, at the time of or subsequent to the entry of the order of adoption, the clerk may for proper cause shown and upon written application of the adoptive parents and the person adopted, issue an order changing the name of the person adopted from his true name to the name applied for. The order shall contain the true name, the county of birth, the date of birth, the full name of the person to be adopted, his county of birth, his date of birth, the full name of his parents as shown on his birth certificate, and the name sought to be adopted. The clerk shall issue to the person adopted a certificate under his hand and seal of office, stating the change made in the name, and shall record the applications and order on the docket of special proceedings in his court. He shall forward a copy of the change of name order to the State Registrar of Vital Statistics if the person adopted was born in North Carolina. Upon receipt of the order, the State Registrar shall note the change of name specified in the order on the birth certificate of the person adopted, and shall notify the register of deeds of the county of birth of the person adopted.

(e) If requested in the application for the change of name filed by the adoptive parents and the person adopted the clerk may, for good cause shown, before or after the entry of the order of adoption, decree a change of name in accordance with and subject to all the provisions of G.S. 48-29 except G.S. 48-29(d) relating to children born outside the State. (1967, c. 880, s. 3; 1969, c. 21, ss. 3-6; 1971, c. 1231, s. 1.)

Editor's Note.—Section 5, c. 880, Session Laws 1967, provides that the act shall be effective on and after July 1, 1967. The 1969 amendment, effective July 1,

1969, inserted "(d) and (e)" near the beginning of subsection (c) and added subsections (d) and (e).

The 1971 amendment substituted "18" for "21" in two places in the first sentence of subsection (a), and in subsections (b) and (c).

Session Laws 1969, c. 21, s. 1, effective July 1, 1969, provides that the act shall be known as the Adopted Persons' Change of Name Act of 1969.

Chapter 48A.

Minors.

Editor's Note.—Session Laws 1971, c. 1231, s. 4, provides:

"The effective date of Chapter 585 of the Session Laws of 1971, entitled "An Act to Amend the General Statutes so as to Lower the Age of Majority in North Carolina to 18 Years of Age" is hereby declared to be July 5, 1971, the date of the certification by the United States Administrator of General Services that the Twenty-Sixth Amendment to the United States Constitution had been ratified by the Legislatures of at least three-fourths of the states."

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§ 48A-1. Common-law definition of "minor" abrogated.—The common-law definition of minor insofar as it pertains to the age of the minor is hereby repealed and abrogated. (1971, c. 585, s. 1.)

"Minor" Now Refers to Age 18.—When this section, which repeals the common-law definition of minor, is construed with § 48A-2, the effect is that wherever the term "minor," "minor child" or "minor children" is used in a statute the statute now refers to age 18. Crouch v. Crouch, 14 N.C. 49, 187 S.E.2d 348 (1972).

Effect of Change from Minority to Majority.—Change from minority to majority in legal effect means that legal disabilities designed to protect the child are removed. Shoaf v. Shoaf, 282 N.C. 287, 192 S.E.2d 299 (1972).

A person who has reached his majority is entitled to the management of his own affairs and to the enjoyment of civic rights. Shoaf v. Shoaf, 282 N.C. 287, 192 S.E.2d 299 (1972).

Majority or minority is a status rather than a fixed or vested right. Shoaf v. v. Shoaf, 282 N.C. 287, 192 S.E.2d 299 (1972).

There is no vested property right in the personal privileges of infancy. Shoaf v. Shoaf, 282 N.C. 287, 192 S.E.2d 299 (1972).

Applied in Shoaf v. Shoaf, 14 N.C. App. 231, 188 S.E.2d 19 (1972); Choate v. Choate, 15 N.C. App. 89, 189 S.E.2d 647 (1972); Taylor v. Taylor, 17 N.C. App. 720, 195 S.E.2d 355 (1973).

Quoted in State v. Jackson, 280 N.C. 563, 187 S.E.2d 27 (1972).

Stated in Hall v. Wake County Bd. of Elections, 280 N.C. 600, 187 S.E.2d 52 (1972).

§ 48A-2. Age of minors.—A minor is any person who has not reached the age of 18 years. (1971, c. 585, s. 1.)

"Minor" Now Refers to Age 18.—When § 48A-1, which repeals the common-law definition of minor, is construed with this section, the effect is that wherever the term "minor," "minor child" or "minor children" is used in a statute, the statute now refers to age 18. Crouch v. Crouch, 14 N.C. App. 49, 187 S.E.2d 348 (1972).

Legal Obligation of Support.—After the enactment of this section, one's legal obligation to support his child ends at age 18, absent a showing that the child is insolvent, unmarried and physically or mentally incapable of earning a livelihood. Shoaf v. Shoaf, 14 N.C. App. 231, 188 S.E.2d 19 (1972).

A father's legal liability for the support of his son born on January 13, 1953, by reason of a consent judgment dated June 11, 1970, providing that payments for child support shall continue until such time as said minor child reaches his majority or is otherwise emancipated, does not continue until the son becomes 21 years of age. Shoaf v. Shoaf, 282 N.C. 287, 192 S.E.2d 299 (1972).

"Minor" Includes "Infant" within Context of Requirement That Guardianships Be Maintained for Infants (to Age 18).—See opinion of Attorney General to Mr. Fred P. Parker, Jr., 41 N.C.A.G. 450 (1971).

Person 18 Years Old May Be Deputy or Assistant Register of Deeds.—See opinion

of Attorney General to Christine William Davis, 41 N.C.A.G. 476 (1971).

The legislature alone has power to determine the age at which one reaches his majority, becomes emancipated, and acquires the right to manage his own affairs free from parental control. Shoaf v. Shoaf, 282 N.C. 287, 192 S.E.2d 299 (1972).

Quoted in State v. Jackson, 280 N.C. 563, 187 S.E.2d 27 (1972).

Stated in Hall v. Wake County Bd. of Elections, 280 N.C. 600, 187 S.E.2d 52 (1972).

§ 48A-3. Statute of limitations; applicability.—For purposes of determining the applicability of the statute of limitations which has been tolled because of minority or for purposes of determining the applicable period of time for disaffirmance of a contract of a minor upon reaching majority, because of a change in applicable law occasioned by enactment of this Chapter or Chapter 1231 of the 1971 Session Laws, the following rules shall apply:

(1) For those persons who were 21 on the effective date of applicable law, limitations shall apply as they would prior to amendment;

(2) For those persons 18 years of age but not 21 on the effective date of applicable law, any time periods for disaffirmance or application of the statute of limitations shall run from the effective date of this Chapter, to wit, July 5, 1971.

(3) For those persons not yet 18, any time periods for disaffirmance or application of the statute of limitations shall run from the person's reaching age 18. (1971, c. 1231, s. 3.)

Chapter 49.

Bastardy.

ARTICLE 1.

Support of Illegitimate Children.

§ 49-1. Title.

Editor's Note.—

For note on illegitimacy in North Carolina, see 46 N.C.L. Rev. 813 (1968).

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

Jurisdiction of District Court.—The district court has exclusive original jurisdiction of misdemeanors, including action to determine liability of persons for the support of dependents in any criminal proceeding. Cline v. Cline, 6 N.C. App. 523, 170 S.E.2d 645 (1969).

Purpose of Prosecution. — The primary purpose of prosecution under the provisions of this section is to insure that the parent does not willfully neglect or refuse to support his or her illegitimate child. State v. Green, 8 N.C. App. 234, 174 S.E.2d 8 (1970).

This Article does not require the continued life of the child as the basis for a prosecution under this section and the death of the child does not abate or prevent a prosecution against the father of an illegitimate for his willful failure to support and maintain the child prior to its death. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

When the death of the child makes a blood test impossible, the situation is analogous to that which occurs when an eyewitness to events constituting the basis for an indictment dies before the accused has interviewed him or taken his deposition and it would hardly be suggested that to try the defendant after the death of that witness would deprive him of due process and therefore the prosecution must be dismissed. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

To hold that a prosecution under this section must be dismissed when the death of the child deprives the defendant of a blood test would be to attach to the test a significance which the legislature failed to give it. Even when a blood grouping test demonstrates nonpaternity the law does not make the test conclusive of that issue. A fortiori, the absence of a test, which—if made—would provide one falsely accused only an even chance to prove his nonpaternity, should not result in a dismissal of the action. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

Elements.—For a defendant to be found guilty of the criminal offense created by this section, two facts must be established: First, that the defendant is a parent of the illegitimate child in question, who must be a person coming within the definition of a child as set forth in this section; and second, that the defendant has willfully neglected or refused to support and maintain such illegitimate child. In addition, if the defendant is the reputed father, it must be shown that the prosecution has been instituted within one of the time periods provided in § 49-4. State v. Coffey, 3 N.C. App. 133, 164 S.E.2d 39 (1968).

Under the provisions of this section the State must establish two facts in order for the defendant to be found guilty: (1) that the defendant is the parent of the illegitimate child in question and (2) that the defendant has willfully neglected or refused to support and maintain such illegitimate

child. State v. Green, 8 N.C. App. 234, 174 S.E.2d 8 (1970).

Violation of Statute, etc.—

The offense of nonsupport under this section is a continuing one. State v. Coffey, 3 N.C. App. 133, 164 S.E.2d 39 (1968).

Affidavit Supporting Warrant Must Name Defendant.—Where, in the affidavit upon which a warrant charging unlawful failure to support an illegitimate child is based, the name of the defendant does not appear, then the warrant does not charge the defendant with a crime, and judgment must be arrested. State v. Satterfield, 8 N.C. App. 597, 174 S.E.2d 640 (1970).

A new warrant may be filed charging defendant with nonsupport, if such has occurred after the issuance of the warrant on which he has been tried. State v. Coffey, 3 N.C. App. 133, 164 S.E.2d 39 (1968).

The begetting of, etc.—

Under this section the mere begetting of the child is not a crime. State v. Coffey, 3 N.C. App. 133, 164 S.E.2d 39 (1968).

The mere begetting of the child is not a crime. The question of paternity is incidental to the prosecution for the crime of nonsupport—a preliminary requisite to conviction. State v. Green, 8 N.C. App. 234, 174 S.E.2d 8 (1970).

Prosecution Is Grounded, etc.—

The crime recognized by this section is the willful neglect or refusal of a parent to support his or her illegitimate child. State v. Coffey, 3 N.C. App. 133, 164 S.E.2d 39 (1968).

The only prosecution authorized by this Chapter is grounded on the willful neglect or refusal of any parent to support and maintain his or her illegitimate child—the paternity itself is no crime. State v. Green, 277 N.C. 188, 176 S.E.2d 756 (1970).

The question of paternity, etc.—

The question of paternity is incidental to the prosecution for the crime of nonsupport—a preliminary requisite to conviction. State v. Coffey, 3 N.C. App. 133, 164 S.E.2d 39 (1968).

The question of paternity is merely incidental to the prosecution for nonsupport and involves no punishment. State v. Green, 277 N.C. 188, 176 S.E.2d 756 (1970).

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).

In order for the State to make out a case for a violation of this section, the State must establish two things: (1) that the defendant is the parent of the child in question, and (2) that the defendant willfully neglected or refused to support and maintain the illegitimate child. State v. Lynch, 11 N.C. App. 432, 181 S.E.2d 186 (1971).

But Paternity Need Not Be Relitigated, etc.—

Once the question of paternity has been determined, the accused is not entitled to have the question of paternity relitigated upon a subsequent prosecution for later willful neglect or refusal to support his illegitimate children. State v. Green, 8 N.C. App. 234, 174 S.E.2d 8 (1970).

Appointment of Counsel.—A charge of willful failure to support illegitimate children is not a "serious misdemeanor" requiring the appointment of counsel or an intelligent waiver thereof under the Sixth and Fourteenth Amendments to the United States Constitution. State v. Green, 8 N.C. App. 234, 174 S.E.2d 8 (1970); State v. Green, 277 N.C. 188, 176 S.E.2d 756 (1970).

One charged with a violation of this section is not charged with a "serious offense" requiring appointment of counsel for indigent defendants or intelligent waiver thereof. State v. Green, 277 N.C. 188, 176 S.E.2d 756 (1970).

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).

The practice of submitting written issues in cases charging violation of this section is strongly commended. State v. Lynch, 11 N.C. App. 432, 181 S.E.2d 186 (1971).

Punishment.—The only punishment authorized by law for the willful failure or neglect to support an illegitimate child is found in § 49-8 and is limited at most to six months in prison. State v. Green, 277 N.C. 188, 176 S.E.2d 756 (1970).

Support payments under this section are not part of the punishment. All men have

a moral duty to support their children—legitimate or illegitimate—and this section makes this moral obligation legal and enforceable with respect to illegitimate children. State v. Green, 277 N.C. 188, 176 S.E.2d 756 (1970).

Applied in State v. Cooke, 268 N.C. 201, 150 S.E.2d 226 (1966); State v. Fowler, 9 N.C. App. 64, 175 S.E.2d 331 (1970).

Cited in In re Custody of Owenby, 3 N.C. App. 53, 164 S.E.2d 55 (1968); Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

§ 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).

Cited in State v. Coffey, 3 N.C. App. 133, 164 S.E.2d 39 (1968).

§ 49-5. Prosecution; indictments; death of mother no bar; determination of fatherhood. — Proceedings under this Article may be brought by the mother or her personal representative, or, if the child is likely to become a public charge, the director of public welfare or such person as by law performs the duties of such official in said county where the mother resides or the child is found. Indictments under this Article may be returned in the county where the mother resides or is found, or in the county where putative father resides or is found, or in the county where the child is found. The fact that the child was born outside of the State of North Carolina shall not be a bar to indictment of the putative father in any county where he resides or is found, or in the county where the mother resides or the child is found. The death of the mother shall in nowise affect any proceedings under this Article. Preliminary proceedings under this Article to determine the paternity of the child may be instituted prior to the birth of the child but when the judge or court trying the issue of paternity deems it proper, he may continue the case until the woman is delivered of the child. When a continuance is granted, the courts shall recognize the person accused of being the father of the child with surety for his appearance, either at the next session of the court or at a time to be fixed by the judge or court granting a continuance, which shall be after the delivery of the child. (1933, c. 228, s. 4; 1961, c. 186; 1971, c. 1185, s. 18.)

Editor's Note.— The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term" in the last sentence.

§ 49-7. Issues and orders.—The court before which the matter may be brought shall determine whether or not the defendant is a parent of the child on whose behalf the proceeding is instituted. After this matter has been determined in the affirmative, the court shall proceed to determine the issue as to whether or not the defendant has neglected or refused to support and maintain the child who is the subject of the proceeding. After this matter shall have been determined in the affirmative, the court shall fix by order, subject to modification or increase from time to time, a specific sum of money necessary for the support and maintenance of the particular child who is the object of the proceedings. The court in fixing this sum shall take into account the circumstances of the case, the financial ability to pay and earning capacity of the defendant, and his or her willingness to cooperate for the welfare of the child. The order fixing the sum shall require the defendant to pay it either as a lump sum or in periodic payments as the circumstances of the case may appear to the court to require. Compliance by the defendant with any or all of the further provisions of this Article or the order or orders of the court requiring additional acts to be performed by the defendant shall not be construed to relieve the defendant of his or her responsibility to pay the sum fixed or any modification or increase thereof.

The court before whom the matter may be brought upon motion of the defendant, shall direct and order that the defendant, the mother and the child shall submit to a blood grouping test; provided, that the court in its discretion may require the person requesting a blood grouping test to pay the cost thereof; that the results of a blood grouping test shall be admitted in evidence when offered by a duly licensed practicing physician or other duly qualified person; provided, that from a finding of the issue of paternity against the defendant, the defendant shall have the same right to an appeal as though he had been found guilty of the crime of willful failure to support a bastard child. (1933, c. 228, s. 6; 1937, c. 432, s. 2; 1939, c. 217, ss. 1, 4; 1945, c. 40; 1947, c. 1014; 1971, c. 1185, s. 19.)

Editor's Note.—

The 1971 amendment, effective Oct. 1, 1971, deleted a former first paragraph.

The proviso in this section was not repealed either expressly or by implication by enactment of § 7A-288. The two statutes, when properly construed together, are not inconsistent. State v. Coffey, 3 N.C. App. 133, 164 S.E.2d 39 (1968).

Legislative Intent. — Since this section and § 8-50.1 do not make the blood test which establishes nonpaternity conclusive of that issue but merely provide that the results of such test when offered by a duly qualified person shall be admitted in evidence, it seems clear that the legislative intent was that the jury should consider the test results, whatever they might show, along with all the other evidence in determining the issue of paternity. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

A defendant's right to a blood test to determine parentage is a substantial right and, upon defendant's motion, the court must order the test when it is possible to do so. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

The value of serological blood tests, when made and interpreted by specifically qualified technicians, using approved testing procedures and reagents of standard strength, is now generally recognized. Such tests, however, can never prove the paternity of any individual, and they cannot always exclude the possibility. Nevertheless, in a significant number of cases, they can disprove it. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

The result of a blood test to determine parentage will be either "exclusion of paternity demonstrated" or "exclusion of paternity not possible." It has been estimated that by tests, based upon each of three blood-type classifications, A-B-O, M-N, and Rh-hr, a man falsely accused has a 50-55% chance of proving his nonpaternity. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

The blood grouping test results are conclusive only in excluding the putative father. The results might show him to have a blood type which the father of the child must have had; but this only indicates that of all the people of that blood type or group, he, as well as anyone else with that blood type or group, could have been the father of the child. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

Attacking Results of Blood Grouping Tests.—The only areas in which the results of blood grouping tests should be open to attack are in the method of testing or in the qualifications of the persons performing the tests. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

Weight to Be Given Blood Tests.—Both this section and § 8-50.1 are silent as to the weight to be given to blood tests to determine parentage. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

Death of Child Making Blood Test Impossible. — When the death of the child makes a blood test impossible the situation is analogous to that which occurs when an eyewitness to events constituting the basis for an indictment dies before the accused has interviewed him or taken his deposition. It would hardly be suggested that to try the defendant after the death of that witness would deprive him of due process and that therefore the prosecution must be dismissed. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

To hold that a prosecution under § 49-2 must be dismissed when the death of the child deprives the defendant of a blood test would be to attach to the test a significance which the legislature failed to give it. Even when a blood grouping test demonstrates nonpaternity, the law does not make the test conclusive of that issue. A fortiori, the absence of a test, which—if made—would provide one falsely accused only an even chance to prove his nonpaternity, should not result in a dismissal of the action. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

An infant's blood group cannot always be established immediately after birth but by the age of six months, an accurate determination can always be had. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

Applied in State v. Fowler, 9 N.C. App. 64, 175 S.E.2d 331 (1970).

Stated in State v. Green, 277 N.C. 188, 176 S.E.2d 756 (1970).

Cited in State v. Green, 8 N.C. App. 234, 174 S.E.2d 8 (1970).

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

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

Support Payments Are Not a Fine.—The support payments ordered by a court are to be paid for the support of the defendant's minor children and are not in the nature of a fine. State v. Green, 8 N.C. App. 234, 174 S.E.2d 8 (1970).

Appointment of Counsel Not Required. — A charge of willful failure to support illegitimate children is not a "serious misdemeanor" requiring the appointment of counsel or an intelligent waiver thereof under the Sixth and Fourteenth Amendments to the United States Constitution. State v. Green, 8 N.C. App. 234, 174 S.E.2d 8 (1970).

Punishment for Failure to Support. — The only punishment authorized by law for the willful failure or neglect to support an illegitimate child is found in this section and is limited at most to six months in prison. State v. Green, 277 N.C. 188, 176 S.E.2d 756 (1970).

Discharge of Past Due Obligations.— This section does not contemplate that money paid into court to discharge past due obligations should be paid to a person to whom it was not due. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

When, without compensation, doctors and hospitals have performed immediately necessary services incident to the birth of a child and its subsequent welfare, public policy and simple justice require that money paid into court for them be disbursed directly to them and in no other way can their interests be protected. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

ARTICLE 2.

Legitimation of Illegitimate Children.

§ 49-10. Legitimation.—The putative father of any child born out of wedlock, whether such father resides in North Carolina or not, may apply by a verified written petition, filed in a special proceeding in the superior court of the county in which the putative father resides or in the superior court of the county in which the child resides, praying that such child be declared legitimate. The mother, if living, and the child shall be necessary parties to the proceeding, and the full names of the father, mother and the child shall be set out in the petition. If it appears to the court that the petitioner is the father of the child, the court may thereupon declare and pronounce the child legitimated; and the full names of the father, mother and the child shall be set out in the court order decreeing legitimation of the child. The clerk of the court shall record the order in the record of orders and decrees and it shall be cross-indexed under the name of the father as plaintiff or petitioner on the plaintiff's side of the cross-index, and under the name of the mother, and the child as defendants or respondents on the defendants' side of the cross-index. (Code, s. 39; Rev., s. 263; C. S., s. 277; 1947, c. 663, s. 1; 1971, c. 154.)

Editor's Note.—

The 1971 amendment, effective on and after Oct. 1, 1971, rewrote the first sentence.

Effect of Legitimation on Prior Consent to Adoption.—A legitimation proceeding brought under this section by the putative father of a child born out of wedlock, wherein the child is declared legitimate, has no effect upon the prior written consent to adoption given by the unwed mother under § 48-6. In re Doe, 11 N.C. App. 560, 181 S.E.2d 760 (1971).

Applied in Gilliard v. Craig, 331 F. Supp. 587 (W.D.N.C. 1971).

§ 49-11. Effects of legitimation.

Effect of Legitimation on Prior Consent to Adoption.—A legitimation proceeding brought under § 49-10 by the putative father of a child born out of wedlock,

wherein the child is declared legitimate, has no effect upon the prior written consent to adoption given by the unwed mother under § 48-6. In re Doe, 11 N.C. App. 560, 181 S.E.2d 760 (1971).

§ 49-13.1. Effect of legitimation on adoption consent.—Legitimation of a child under the provisions of this article shall not invalidate or adversely affect the sufficiency of the consent to adoption given by the mother alone, nor make necessary the consent of the father or his joinder as a party to the adoption proceeding, when the provisions of G.S. 48-6 (a) and amendments thereto are applicable. (1969, c. 534, s. 2.)

Editor's Note.—Session Laws 1969, c. 534, s. 4, provides: "This act is intended to clarify and express in part the original, as well as the present, purpose and intent of § 48-6 (a) of the General Statutes of North Carolina as related to chapter 49, article 2."

Effect of Legitimation on Prior Consent to Adoption.—A legitimation proceeding brought under § 49-10 by the putative father of a child born out of wedlock, wherein the child is declared legitimate, has no effect upon the prior written consent to adoption given by the unwed mother under § 48-6. In re Doe, 11 N.C. App. 560, 181 S.E.2d 760 (1971).

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 49A.

Rights of Children.

Article 1.

Children Conceived by Artificial Insemination.

Sec.

ARTICLE 1.

Children Conceived by Artificial Insemination.

§ 49A-1. Status of child born as a result of artificial insemination.— Any child or children born as the result of heterologous artificial insemination shall be considered at law in all respects the same as a naturally conceived legitimate child of the husband and wife requesting and consenting in writing to the use of such technique. (1971, c. 260.)

Chapter 50.

Divorce and Alimony.

§ **50-1**: Repealed by Session Laws 1971, c. 1185, s. 20, effective October 1, 1971.

§ **50-4. What marriages may be declared void on application of either party.**—The district court, during a session of court, on application made as by law provided, by either party to a marriage contracted contrary to the prohibitions contained in the Chapter entitled Marriage, or declared void by said Chapter, may declare such marriage void from the beginning, subject, nevertheless, to the second proviso contained in G.S. 51-3. (1871-2, c. 193, s. 33; Code, s. 1283; Rev., s. 1560; C. S., s. 1658; 1945, c. 635; 1971, c. 1185, s. 21; 1973, c. 1.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "during a session of court" for "in term time."

The 1973 amendment substituted "district" for "superior" near the beginning of the section.

§ **50-5. Grounds for absolute divorce.**—Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony, on application of the party injured, made as by law provided, in the following cases:

Defense of Connivance Available to Charges of Sexual Misconduct.—Although connivance is most frequently asserted as a defense to a charge of adultery in divorce actions, there is no reason why the plea should not also be available as a defense to other charges of sexual misconduct. The plea is founded upon equitable principles. Greene v. Greene, 15 N.C. App. 314, 190 S.E.2d 258 (1972).

To say that the plea of connivance is a defense to allegations of adultery but not to allegations of abnormal sex acts, is to call the corrupt procurement of bad conduct inequitable which labeling the procurement of worse conduct acceptable. Greene v. Greene, 15 N.C. App. 314, 190 S.E.2d 258 (1972).

The foundation of equitable jurisdiction is justice, and one of its greatest landmarks is that "he who does iniquity shall not have equity," and connivance is iniquity. Nothing can be more basely infamous or more degrading, and it is certain that a court of equity will not lend its aid to one who has knowingly connived at his

wife's adultery since it regards his as unclean. Greene v. Greene, 15 N.C. App. 314, 190 S.E.2d 258 (1972).

Connivance in the law of divorce is the plaintiff's consent, express or implied, to the misconduct alleged as a ground for divorce. Greene v. Greene, 15 N.C. App. 314, 190 S.E.2d 258 (1972).

Connivance, or procurement, denotes direction, influence, personal exertion, or other action with knowledge and belief that such action would produce certain results and which results are produced. Greene v. Greene, 15 N.C. App. 314, 190 S.E.2d 258 (1972).

The basis of the defense of connivance is the maxim "volenti non fit injuria," or that one is not legally injured if he has consented to the act complained of or was willing that it should occur. It is also said that the basis of the defense of connivance is the doctrine of unclean hands. Greene v. Greene, 15 N.C. App. 314, 190 S.E.2d 258 (1972).

(4)

Cited in Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

(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.

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.

(6) In all cases where a husband and wife have lived separate and apart for three consecutive years, without cohabitation, and are still so living separate and apart by reason of the incurable insanity of one of them, the court may grant a decree of absolute divorce upon the petition of the same spouse: Provided, the evidence shall show that the insane spouse is suffering from incurable insanity, and has been confined or examined for three consecutive years next preceding the bringing of the action in an institution for the care and treatment of the mentally disordered or, if not so confined, has been examined at least three years preceding the institution of the action for divorce and then found to be incurably insane as hereinafter provided. Provided further, that proof of incurable insanity be supported by the testimony of two reputable physicians, one of whom shall be a staff member or the superintendent of the institution where the insane spouse is confined, and one regularly practicing physician in the community wherein such husband and wife reside, who has no connection with the institution in which said insane spouse is confined; and provided further that a sworn statement signed by said staff member or said superintendent of the institution wherein the insane spouse is confined or was examined shall be admissible as evidence of the facts and opinions therein stated as to the mental status of said insane spouse and as to whether or not said insane spouse is suffering from incurable insanity, or the parties according to the laws governing depositions may take the deposition of said staff member or superintendent of the institution wherein the insane spouse is confined; and provided further that incurable insanity may be proved by the testimony of one or more licensed physicians who are members of the staff of one of this State's accredited four-year medical schools or a state-supported mental institution, supported by the testimony of one or more other physicians licensed by the State of North Carolina, that each of them examined the allegedly incurable insane spouse at least three years preceding the institution of the action for divorce and then determined that said spouse was suffering from incurable insanity and that one or more of them examined the allegedly insane spouse subsequent to the institution of the action and that in his or their opinion the said allegedly insane spouse was continuously incurably insane throughout the full period of three years prior to the institution of the said action.

In lieu of proof of incurable insanity and confinement for three consecutive years next preceding the bringing of the action in an institution for the care and treatment of the mentally disordered prescribed in the preceding paragraph, it shall be sufficient if the evidence shall show that the allegedly insane spouse was adjudicated to be insane more than three years preceding the institution of the action for divorce, that such insanity has continued without interruption since such adjudication and that such person has not been adjudicated to be sane since such adjudication of insanity; provided, further, proof of incurable insanity existing after the institution of the action for divorce shall be furnished by the testimony of two reputable, regularly practicing physicians, one of whom shall be a psychiatrist.

In lieu of proof of incurable insanity and confinement for three consecutive years next preceding the bringing of the action in an institution for the care and treatment of the mentally disordered, or the adjudication of insanity, as prescribed in the preceding paragraphs, it shall be sufficient if the evidence shall show that the insane spouse was examined by two or more members of the staff of one of this State's accredited four-year medical schools, both of whom are medical doctors, at least three years preceding the institution of the action for divorce with a determination at that time by said staff members that said spouse is suffering from incurable insanity, that such insanity has continued without interruption since such determination; provided, further, that sworn statements signed by the staff members of the accredited medical school who examined the insane spouse at least three years preceding the commencement of the action shall be admissible as evidence of the facts and opinions therein stated as to the mental status of said insane spouse as to whether or not said insane spouse was suffering from incurable insanity; provided, further, that proof of incurable insanity under this section existing after the institution of the action for divorce shall be furnished by the testimony of two reputable physicians, one of whom shall be a psychiatrist on the staff of one of the State's accredited four-year medical schools, and one a physician practicing regularly in the community wherein such insane person resides.

In all decrees granted under this subdivision in actions in which the husband is the plaintiff the court shall require him to provide for the care and maintenance of the insane defendant as long as she may live, compatible with his financial standing and ability, and the trial court will retain jurisdiction of the parties and the cause, from term to term, for the purpose of making such orders as equity may require to enforce the provisions of the decree requiring the plaintiff to furnish the necessary funds for such care and maintenance. In the event of feme defendant's continued confinement in an institution for the mentally disordered, it shall be deemed sufficient support and maintenance if the plaintiff continue to pay and discharge the monthly payments required of him by the institution, such payments to be in amounts equal to those required of patients similarly situated. In all such actions wherein the wife is the plaintiff and the insane defendant has insufficient income and property to provide for his care and maintenance, then in the discretion of the court, the court may require her to provide for the care and maintenance of the insane defendant as long as he may live, compatible with her financial standing and ability, and the trial court will retain jurisdiction of the parties and the cause, from term to term, for the purpose of making such orders as equity may require to enforce the provisions of the decree requiring plaintiff to furnish the necessary funds for such care and maintenance.

Service of process shall be held upon the regular guardian for said defendant spouse, if any, and if no regular guardian, upon a duly appointed guardian ad litem and also upon the superintendent or physician in charge of the institution wherein the insane spouse is confined. Such guardian or guardian ad litem shall make an investigation of the circumstances and notify the next of kin of the insane spouse or the superintendent of the institution of the action and whenever practical confer with said next of kin before filing appropriate pleadings in behalf of the defendant.

In all actions brought under this subdivision, if the jury finds as a fact that the plaintiff has been guilty of such conduct as has conduced to the unsoundness of mind of the insane defendant, the relief prayed for shall be denied.

The plaintiff or defendant must have resided in this State for six months next preceding institution of any action under this section.

(1967, c. 1152, s. 8; 1971, c. 1173, ss. 1, 2.)

Editor's Note.—

The 1971 amendment, effective Jan. 1, 1972, in the first sentence of subdivision (6), substituted "three consecutive years" for "five consecutive years" in two places, inserted "or examined," and added the language following "treatment of the mentally disordered." In the second sentence of subdivision (6) the amendment inserted "or was examined" in the second proviso and added the last proviso. In the second paragraph of subdivision (6) the amendment substituted "three" for "five" and "five (5)." The amendment also added the third paragraph of subdivision (6).

Only the introductory paragraph of the section and the subdivisions changed by the amendments are set out.

This section is not ambiguous. Vaughan v. Vaughan, 4 N.C. App. 253, 166 S.E.2d 530 (1969).

"Confined". — By the use of the word "confined" in subdivision (6), the legislature did not contemplate such confinement as would require an inmate to be at all times under lock and key. Vaughan v. Vaughan, 4 N.C. App. 253, 166 S.E.2d 530 (1969).

The words "next preceding" in subdivision (6) have been held to mean the time nearest to the bringing of the action. Vaughan v. Vaughan, 4 N.C. App. 253, 166 S.E.2d 530 (1969).

It is not sufficient under subdivision (6) of this section that the insane spouse was confined to an institution for five (now three) consecutive years at some time prior to the commencement of the action, the statute requiring that confinement must be for five (now three) consecutive years "next preceding" the bringing of the action, which means the time nearest the bringing of the action. Vaughan v. Vaughan, 4 N.C. App. 253, 166 S.E.2d 530 (1969).

Periods of probation are permissible under subdivision (6) as well as under § 122-67, and may be deemed not to have constituted an interruption of the confinement or a discharge from the hospital within the meaning of these statutes. Vaughan v. Vaughan, 4 N.C. App. 253, 166 S.E.2d 530 (1969).

Releases from the State hospital on periods of probation did not defeat a party's right to a divorce under subdivision (6). Vaughan v. Vaughan, 4 N.C. App. 253, 166 S.E.2d 530 (1969).

Defendant's discharge under § 122-67 terminated his confinement and he was, therefore, not confined for five (now three) years next preceding the institution of the action as required by subdivision (6). Vaughan v. Vaughan, 4 N.C. App. 253, 166 S.E.2d 530 (1969).

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

Editor's Note.—

For note on testimony by one spouse against the other of adultery under North Carolina law, see 48 N.C.L. Rev. 131 (1969).

This section creates an independent cause of divorce.—

In accord with original. See Gray v. Gray, 16 N.C. App. 730, 193 S.E.2d 492 (1972).

Separate Domicile for Wife. — North Carolina divorce statutes recognize the legality of a separate domicile, or residence, for the wife. Rector v. Rector, 4 N.C. App. 240, 166 S.E.2d 492 (1969).

Physical Separation Must Be Accom-

panied by Intention, etc.—

In accord with 1st paragraph in original. See Beck v. Beck, 14 N.C. App. 163, 187 S.E.2d 355 (1972).

Necessity for Mutual Agreement.—

In order to be entitled to a divorce a plaintiff need not show that a marital separation for the statutory period was by mutual agreement or under a decree of court. Beck v. Beck, 14 N.C. App. 163, 187 S.E.2d 355 (1972).

To be valid a separation agreement must be untainted by fraud, must be in all respects fair, reasonable and just, and must have been entered into without coercion or the exercise of undue influence, and with full knowledge of all the circumstances, conditions, and rights of the contracting parties. Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968).

Until deed of separation is rescinded, defendant cannot attack legality of separation or obtain alimony from plaintiff. Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968).

Plaintiff Need Not Establish, etc.—

In accord with original. See Overby v. Overby, 272 N.C. 636, 158 S.E.2d 799 (1968).

Grounds for Attacking Deed of Separation.—A married woman may attack the certificate of her acknowledgment and privy examination respecting her execution of a deed of separation, inter alia, upon the grounds of her mental incapacity, infancy, or the fraud of the grantee. Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968).

Burden of Establishing, etc.—

In accord with 4th paragraph in original. See Overby v. Overby, 272 N.C. 636, 158 S.E.2d 799 (1968).

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).

Where the husband sues the wife under this section for an absolute divorce on the ground of one year's separation, she may defeat his action by alleging and proving that the separation was caused by his abandonment of her. Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968); Rupert v. Rupert, 15 N.C. App. 730, 190 S.E.2d 693 (1972).

The wife may defeat the husband's action for an absolute divorce under this section by showing as an affirmative defense that the separation of the parties has been occasioned by the act of the husband in wilfully abandoning her. McLeod v. McLeod, 1 N.C. App. 396, 161 S.E.2d 635 (1968).

If the husband alleges and establishes that he and his wife have lived separate and apart continuously for the required statutory period, one year or more next preceding the commencement of the action, her only defense is that the separation was caused by his act in willfully abandoning her. Overby v. Overby, 272 N.C. 636, 158 S.E.2d 799 (1968).

Abandonment requires that the separation or withdrawal be done wilfully and without just cause or provocation. Overby v. Overby, 272 N.C. 636, 158 S.E.2d 799 (1968).

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).

Misconduct of Spouse as Defense.—A spouse may defeat an action of the other spouse for divorce by establishing as an affirmative defense that such spouse was guilty of misconduct which, in itself, would be a ground for divorce. Gray v. Gray, 16 N.C. App. 730, 193 S.E.2d 492 (1972).

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).

Cases Must Be Determined on Own Circumstances. — Each case which presents the question of what conduct on the part of one spouse will justify the other in withdrawing from the marital relation must be determined upon its own circumstances. Rupert v. Rupert, 15 N.C. App. 730, 190 S.E.2d 693 (1972).

Cited in Hicks v. Hicks, 275 N.C. 370, 167 S.E.2d 761 (1969); Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

§ 50-7. Grounds for divorce from bed and board.—The court may grant divorces from bed and board on application of the party injured, made as by law provided, in the following cases:

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).

Cited in Richardson v. Richardson, 4 N.C. App. 99, 165 S.E.2d 678 (1969).

(1) If either party abandons his or her family.

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).

There is a distinction between criminal abandonment and the matrimonial offense of desertion. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

It is not necessary, etc.—

It is unnecessary for a husband to depart from his home and leave his wife in order to abandon her. By cruel treatment or failure to provide for her support, he may compel her to leave him. This would constitute abandonment by the husband. Somerset v. Somerset, 3 N.C. App. 473, 165 S.E.2d 33 (1969).

Withdrawal from Home Followed by Support.—A husband may be deemed to have abandoned his wife within the meaning of subdivision (1), and so be liable for alimony, notwithstanding the fact that, after cohabitation is brought to an end, he voluntarily provides her with adequate support. Whether his withdrawal from the home, followed by such support, constitutes an abandonment which is ground for suit by the wife for divorce from bed and board, and therefore ground for suit by her for alimony without divorce depends upon whether his withdrawal from the home was justified by the conduct of the wife. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968), decided under former § 50-16.

Willful Failure and Refusal to Provide Support. — Allegations that plaintiff was compelled to leave her husband because of his willful failure and refusal to provide her with support and that his failure was without provocation on her part are sufficient to state a cause of action for alimony without divorce on the ground of abandonment. Brady v. Brady, 273 N.C. 299, 160 S.E.2d 13 (1968).

Continued and Persistent Cruelty or Neglect.—If a husband, by continued and persistent cruelty or neglect, forces his wife to leave his home, he may himself be guilty of abandonment. Somerset v. Somerset, 3 N.C. App. 473, 165 S.E.2d 33 (1969).

Defendant May Not Defeat, etc.—

In accord with original. See Richardson v. Richardson, 268 N.C. 538, 151 S.E.2d 12 (1966).

Fact That Husband Does or Does Not Support Wife as Evidence.—

In accord with original. See Richardson v. Richardson, 268 N.C. 538, 151 S.E.2d 12 (1966); Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

Whether the mother abandoned the father within the meaning of this subdivision is not controlling on the question of custody. Kenney v. Kenney, 15 N.C. App. 665, 190 S.E.2d 650 (1972).

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); Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

Cited in Hicks v. Hicks, 275 N.C. 370, 167 S.E.2d 761 (1969); Williams v. Williams, 13 N.C. App. 468, 186 S.E.2d 210 (1972).

(2) Maliciously turns the other out of doors.

(3) By cruel or barbarous treatment endangers the life of the other.

(4) Offers such indignities to the person of the other as to render his or her condition intolerable and life burdensome.

Conduct of Defendant, etc.—

If a wife alleges cruel treatment or indignities, she not only must set out with particularity the acts which her husband has committed and upon which she relies, but also must allege, and consequently offer proof, that such acts were without adequate provocation on her part. Butler v. Butler, 1 N.C. App. 356, 161 S.E.2d 618 (1968).

(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; 1971, c. 1185, s. 22.)

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.

The 1971 amendment, effective Oct. 1, 1971, deleted "superior" preceding "court," in the introductory language.

§ 50-8. Contents of complaint; verification; venue and service in action by nonresident; certain divorces validated.—In all actions for divorce the complaint shall be verified in accordance with the provisions of Rule 11 of the Rules of Civil Procedure 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. Notwithstanding any other provision of this section, any suit or action for divorce heretofore instituted by a nonresident of this State in which the defendant was personally served with summons and the case was tried and final judgment entered in a court of this State in a county other than the county of the defendant's residence, is hereby validated and declared to be legal and proper, the same as if the suit or action for divorce had been brought in the county of the defendant's residence.

In all divorce actions the complaint shall set forth the name and age of any minor child or children of the marriage, and in the event there are no such minor children of the marriage, the complaint shall so state.

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 Rule 11 of the Rules of Civil Procedure, 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 Rule 11 of the Rules of Civil Procedure and G.S. 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 variation in language, said allegations, statements and averments in said verifications as contained in or attached to said complaint shall be deemed to be, and are hereby made, a substantial compliance as to the allegations, averments or statements required by this section to be set forth in any such verifications; and all such suits or actions for divorce, as well as the judgments or de-

crees 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; c. 954, s. 3; 1971, c. 415; 1973, c. 39.)

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."

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

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

Session Laws 1971, c. 415, effective Jan. 1, 1972, added the second paragraph.

Session Laws 1971, c. 1065 provides:

"Section 1. All divorces granted between January 1, 1969 and the date of the ratification of this act [July 21, 1971] are hereby validated as to the complaint being certified by the attorney rather than verified by the plaintiff.

"Sec. 2. It is the intent of the General Assembly to validate divorces which were based on complaints relying on G.S. 50-8 which, due to a typographical error, indicated that complaints for divorce should be certified rather than verified."

The 1973 amendment added the last sentence of the first paragraph.

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

The common-law rule is that a woman, upon marriage, loses her own domicile and by operation of law acquires that of her husband; and that when the husband changes his domicile, hers follows and is drawn to his. Exceptions are made to the rule where a situation arises in which the interests of the spouses are not identical. Obviously, the interests of the spouses are not identical for the purposes of the dissolution of the marriage. This rule has been very generally applied in allowing the wife to acquire a separate domicile for the purpose of her maintaining an action for divorce or custody where there is no fault on her part. In view of this rule, there is no logical, legal or equitable reason for allowing the wife, whose misconduct has brought about the separation, to insist upon the legal fiction that her domicile follows that of her husband, and thereby to defeat his action for divorce brought in the jurisdiction in which she actually resides. Rector v. Rector, 4 N.C. App. 240, 166 S.E.2d 492 (1969).

Separate Domicile for Wife. — North Carolina divorce statutes recognize the legality of a separate domicile, or residence, for the wife. Rector v. Rector, 4 N.C. App. 240, 166 S.E.2d 492 (1969).

A bona fide "residence," necessary under statutes in order to confer jurisdiction in divorce proceedings, is within the legal meaning of the word "domicile," that is, an abode animo manendi, a place where a person lives or has his home, to which, when absent, he intends to return, and from which he has no present purpose to depart. Rector v. Rector, 4 N.C. App. 240, 166 S.E.2d 492 (1969).

One need not be a citizen of the United States in order to establish residence or domicile within the State for purposes of divorce actions. Rector v. Rector, 4 N.C. App. 240, 166 S.E.2d 492 (1969).

Stated in Johnson v. Johnson, 14 N.C. App. 378, 188 S.E.2d 711 (1972).

Cited in Butler v. Butler, 1 N.C. App. 356, 161 S.E.2d 618 (1968).

§ 50-10. Material facts found by judge or jury in divorce or annulment proceedings; parties cannot testify to adultery; procedure same as ordinary civil actions.—The material facts in every complaint asking for a divorce or for an annulment shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a judge or jury. The determination of whether there is to be a jury trial or a trial before the judge without a jury shall be made in accordance with G.S. 1A-1, Rules 38 and 39. On such trial neither the husband nor wife shall be a competent witness to prove the adultery of the other, nor shall the admissions of either party be received as evidence to prove such fact. (1868-9, c. 93, s. 47; Code, s. 1288; Rev., s.

1564; C. S., s. 1662; 1963, c. 540, ss. 1, 2; 1965, c. 105; c. 636, s. 4; 1971, c. 17; 1973, cc. 2, 460.)

Editor's Note.—

The 1971 amendment, in the second sentence of the first paragraph, inserted "or when service has been made upon the defendant by registered mail as provided in the Rules of Civil Procedure," substituted "demand" for "request" and added "as provided in the Rules of Civil Procedure." The amendment also substituted "as provided in this section" for "as in this section provided" in the second paragraph.

The first 1973 amendment, effective Oct. 1, 1973, deleted the former second paragraph, which provided: "In all divorce actions tried without a jury as provided in this section the presiding judge shall answer the issues and render judgment thereon."

The second 1973 amendment rewrote this section.

For case law survey on trial practice, see 43 N.C.L. Rev. 938 (1965). For note on testimony by one spouse against the other of adultery under North Carolina law, see 48 N.C.L. Rev. 131 (1969).

Purpose of Section.—

This legislation is based upon the gravest reasons of public policy and is designed, not only to prevent collusion where the same exists, but to remove the opportunity for it. Hicks v. Hicks, 4 N.C. App. 28, 165 S.E.2d 681 (1969).

The primary purpose in restricting the husband's or wife's competency and in prohibiting the admissions of either party to prove the fact of his or her adultery was to obviate the risk of and opportunity for collusive divorces. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

Public policy demands that the wife be protected against the absolute defense of adultery which the husband seeks to prove by his own testimony. Hicks v. Hicks, 275 N.C. 370, 167 S.E.2d 761 (1969).

The procedure in a divorce action is not the same as the procedure in other civil actions in that the material facts in the complaint are deemed denied, whether actually denied by pleading or not, and in that no judgment shall be given in favor of the plaintiff until such facts have been found by a jury. Williams v. Williams, 13 N.C. App. 468, 186 S.E.2d 210 (1972), decided prior to the 1973 amendment to this section.

Procedure in Actions for Alimony without Divorce.—Issues of fact in an action for alimony without divorce may be determined by the judge if a jury trial is waived by failing to make timely demand pursuant to § 1A-1, Rule 38(b), since § 50-16.8 changes the procedure to be followed in actions for alimony without divorce from the divorce procedure set forth in this section to the procedure applicable to other civil actions. Williams v. Williams, 13 N.C. App. 468, 186 S.E.2d 210 (1972), decided prior to the 1973 amendment to this section.

Suits for alimony without divorce are within the analogy of divorce laws and within the purview of that portion of this section which controverts all material facts in every divorce action. Koob v. Koob, 283 N.C. 129, 195 S.E.2d 552 (1973).

Neither Husband Nor Wife Is Competent Witness.—Construing § 8-56 and this section together, the Supreme Court held that neither a husband nor a wife is a competent witness in any action inter se to give evidence for or against the other in any action or proceeding in consequence of adultery, or in any action or proceeding for divorce on account of adultery, and may not be compelled to give such evidence. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972); Greene v. Greene, 15 N.C. App. 314, 190 S.E.2d 258 (1972).

This Prohibition Applies to Interrogatories.—The provisions of § 8-56 and this section which render a husband or wife an incompetent witness apply to answers to interrogatories as well as to testimony at trial. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

Provision on Evidence of Adultery Is Plain.—

In accord with original. See Hicks v. Hicks, 275 N.C. 370, 167 S.E.2d 761 (1969).

In a husband's action for absolute divorce, a trial court commits prejudicial error if it allows the husband to testify on cross-examination as to the adulterous conduct of his wife. Phillips v. Phillips, 9 N.C. App. 438, 176 S.E.2d 379 (1970).

And It Applies to All Divorce Actions.—The declaration of this section that the husband and wife are incompetent witnesses to prove the adultery of the other refers to all divorce actions. Hicks v. Hicks, 275 N.C. 370, 167 S.E.2d 761 (1969).

The husband and wife are incompetent witnesses to prove the adultery of the other in all divorce actions, including actions for alimony without divorce. Gordon v. Gordon, 7 N.C. App. 206, 171 S.E.2d 805 (1970).

The provisions of this section are not limited to "any action or proceeding for divorce on account of adultery" or "actions

or proceedings in consequence of adultery," but includes "every complaint asking for a divorce." Thus, its declaration that the husband and wife are incompetent witnesses to prove the adultery of the other refers to all divorce actions, including actions for alimony without divorce. Phillips v. Phillips, 9 N.C. App. 438, 176 S.E.2d 379 (1970).

Adultery as Explanation of Separation.—Where the wife sets up abandonment as a defense in the husband's action for divorce on the ground of two years' separation, the husband may testify as to the adultery of his wife in order to explain his separation from the wife and to establish his defense of recrimination, the husband's testimony being neither for nor against the wife on the issue of adultery, and therefore does not come within the purview of § 8-56 or this section. Hicks v. Hicks, 4 N.C. App. 28, 165 S.E.2d 681 (1969).

Rule 26 Distinguished.—Section 8-56 and this section are distinguishable from Rule 26(b) in that they relate to the disqualification of husband or wife as a witness with reference to specific matters, not to the admissibility or inadmissibility of the testimony of a qualified witness. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

1971 Amendment Did Not Nullify Right Conferred Prior to Amendment.—Where the last pleading was filed nearly six months prior to the 1971 amendment of this section, the amendment did not nullify the right to request a jury trial "prior to the call of the action for trial" conferred by this section at the time defendant filed the last pleading. Branch v. Branch, 282 N.C. 133, 191 S.E.2d 671 (1972).

A party may waive the right to a jury trial in civil actions by failure to follow the statutory procedure to preserve such right. Laws v. Laws, 1 N.C. App. 243, 161 S.E.2d 40 (1968), decided prior to the 1973 amendment to this section.

Service of Process by Publication Does Not Prohibit Waiver of Right to Trial by Jury.—See opinion of Attorney General to Mr. Tom H. Matthews, 43 N.C.A.G. 48 (1973), decided prior to the 1973 amendment to this section.

Service of Process upon Defendant in Divorce Action by Leaving Copies with Defendant's Mother at the Defendant's Address Is Sufficient Service and Is Sufficient for Nonjury Trial.—See opinion of Attorney General to Honorable John S. Gardner, District Court Judge, Sixteenth Judicial District, 41 N.C.A.G. 473 (1971), decided prior to the 1973 amendment to this section.

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) decided prior to the 1973 amendment to this section.

Applied in Hinson v. Hinson, 17 N.C. App. 505, 195 S.E.2d 98 (1973).

Cited in Anthony v. Anthony, 8 N.C. App. 20, 173 S.E.2d 617 (1970); Whitaker v. Whitaker, 16 N.C. App. 432, 192 S.E.2d 80 (1972).

§ 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.

For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

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).

It Terminates Alimony Pendente Lite.—A dependent spouse's action for alimony without divorce was properly dismissed and the other awarding alimony pendente lite was properly terminated on motion of the supporting spouse where he had been granted an absolute divorce in an action instituted by him after the order for alimony pendente lite was entered in her action. Smith v. Smith, 12 N.C. App. 378, 183 S.E.2d 283 (1971).

Absolute Divorce Did Not Bar Alimony Pendente Lite.—Where a judgment awarding the wife alimony pendente lite to be continued until the award of permanent alimony was rendered before rendering of judgment for absolute divorce, the rights provided for the wife by the prior judgment could not be impaired or destroyed by the subsequently rendered decree of absolute divorce, and defendant remained liable to continue to make the payments under the alimony pendente lite order. Johnson v. Johnson, 17 N.C. App. 398, 194 S.E.2d 562 (1973), decided under this section as it stood before the 1967 amendment.

Divorce Does Not Annul or Revoke Insurance Beneficiary Designation.—Neither this section which provides that "all rights arising out of the marriage shall cease and determine," nor § 31A-1 which bars rights to "any rights or interests in the property of the other spouse" discloses a legislative intent that divorce should annul or revoke the beneficiary designation in a garden-variety insurance certificate. DeVane v. Travelers Ins. Co., 8 N.C. App. 247, 174 S.E.2d 146 (1970).

Counsel Fees May Be Awarded Subsequent to Absolute Divorce.—Unless the case falls within one of the two exceptions made by subsection (c), counsel fees may be awarded for services rendered to a dependent spouse subsequent to an absolute divorce in seeking to obtain or in resisting a motion for a revision of alimony or other rights provided under any judgment or decree of a court rendered before or at the time of the rendering of the judgment for absolute divorce. Shore v. Shore, 15 N.C. App. 629, 190 S.E.2d 666 (1972).

Exceptions to Allowance of Counsel Fees.—Plaintiff-wife is not entitled to an award of attorney's fees for services rendered to her subsequent to the absolute divorce, obtained in an action initiated by her on the ground of separation for the statutory period, which is a case directly within one of the exceptions specified in subsection (c). Shore v. Shore, 15 N.C. App. 629, 190 S.E.2d 666 (1972).

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

Cited in Becker v. Becker, 273 N.C. 65, 159 S.E.2d 569 (1968).

§ 50-11.1. Children born of voidable marriage legitimate.

Quoted in Rehm v. Rehm, 2 N.C. App. 298, 163 S.E.2d 54 (1968).

§ 50-12. Resumption of maiden name or adoption of name of prior deceased husband. — Any woman at any time after the bonds of matrimony theretofore existing between herself and her husband have been dissolved by a decree of absolute divorce, may resume the use of her maiden name or the name of a prior deceased husband, or a name composed of her given name and the surname of a prior deceased husband upon application to the clerk of the court of the county in which she resides, setting forth her intention so to do. Said application shall be addressed to the clerk of the court of the county in which such divorced woman resides, and shall set forth the full name of the former husband of the applicant, the name of the county in which said divorce was granted, and the term or session of court at which such divorce was granted, and shall be signed by the applicant in her full maiden name. The clerks of court of the several counties of the State shall record and index such applications in such manner as

shall be required by the Administrative Office of the Courts. The provisions of this section shall apply only in those cases in which the divorce decree is rendered by a court of competent jurisdiction of this State. In every case where a married woman has heretofore been granted a divorce and has, since the divorce, adopted the name of a prior deceased husband, or a name composed of her given name and the surname of a prior deceased husband, the adoption by her of such name is hereby validated. Provided that in the complaint or crossbill for divorce filed by any woman, she may petition the court for a resumption of her maiden name or the adoption by her of the name of a prior deceased husband, or of a name composed of her given name and the surname of a prior deceased husband, and upon the granting of the divorce in her favor, the court is authorized to incorporate in the divorce decree an order authorizing her to resume her maiden name or to adopt the name of a prior deceased husband or a name composed of her given name and the name of a prior deceased husband. (1937, c. 53; 1941, c. 9; 1951, c. 780; 1957, c. 394; 1971, c. 1185, s. 23.)

Editor's Note.—The 1971 amendment, effective Oct. 1, 1971, inserted "or session" in the second sentence, rewrote the third sentence, and deleted a former fourth sentence.

§ 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).

Object of Legislature. — By the enactment of § 50-13.1 et seq., the legislature has sought to eliminate conflicting and inconsistent statutes which have caused pitfalls for litigants, and to bring all of the statutes relating to child custody and support together into one act. In re Holt, 1 N.C. App. 108, 160 S.E.2d 90 (1968); In re King, 3 N.C. App. 466, 165 S.E.2d 60 (1969); Johnson v. Johnson, 14 N.C. App. 378, 188 S.E.2d 711 (1972).

Jurisdiction.—Where there is no question raised about the court having jurisdiction over a child, the matter of his custody is left open and this section applies. Brooks v. Brooks, 12 N.C. App. 626, 184 S.E.2d 417 (1971).

"Minor Child" under Prior Law.—Before the enactment of Chapter 48A, it was evident that the meaning of "minor child" within the purview of the custody and support statutes, § 50-13.1 et seq., contemplated the common-law age of majority, 21. Crouch v. Crouch, 14 N.C. App. 49, 187 S.E.2d 348 (1972).

This section et seq. does not alter basic legal principles concerning custody. In re Moore, 8 N.C. App. 251, 174 S.E.2d 135 (1970).

Sections Relating to Custody and Support of Children Are Not Retroactive.— Sections 50-13.1 through 50-13.8, relating to the custody and support of minor children, do not apply to litigation pending on 1 October 1967, the effective date of the statutes. Speck v. Speck, 5 N.C. App. 296, 168 S.E.2d 672 (1969).

This section et seq., as amended, does not apply retroactively. Hopkins v. Hopkins, 8 N.C. App. 162, 174 S.E.2d 103 (1970).

Applied in Mauney v. Mauney, 12 N.C. App. 269, 182 S.E.2d 861 (1971); In re Custody of Branch, 16 N.C. App. 413, 192 S.E.2d 43 (1972).

Cited in Blake v. Blake, 6 N.C. App. 410, 170 S.E.2d 87 (1969); Collins v. Collins, 18 N.C. App. 45, 196 S.E.2d 282 (1973).

§ 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, organi-

zation 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.—A number of cases in the following note were decided under former § 50-13, which dealt with custody and maintenance of children in actions for divorce.

Jurisdiction.—When a divorce action is instituted, the court acquires jurisdiction over the children born to the marriage and may hear and determine questions as to the custody and maintenance of the children, both before and after final decree of divorce. Crosby v. Crosby, 272 N.C. 235, 158 S.E.2d 77 (1967).

The welfare of the child is the paramount consideration. Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966); Crosby v. Crosby, 272 N.C. 235, 158 S.E.2d 77 (1967).

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); In re Moore, 8 N.C. App. 251, 174 S.E.2d 135 (1970).

The child's welfare is the paramount consideration, and a parent's love must yield to another if, after judicial investigation, it is found that the best interest of the child is subserved thereby. Greer v. Greer, 5 N.C. App. 160, 167 S.E.2d 782 (1969).

This section merely codified the rule which had been many times announced by the North Carolina Supreme Court to the effect that in custody cases the welfare of the child is the polar star by which the court's decision must ever be guided. Greer v. Greer, 5 N.C. App. 160, 167 S.E.2d 782 (1969); Jarman v. Jarman, 14 N.C. App. 531, 188 S.E.2d 647 (1972).

The guiding principle to be used by the court in a custody hearing is the welfare of the children involved. While this guiding principle is clear, decision in particular cases is often difficult and necessarily a wide discretion is vested in the trial judge. He has the opportunity to see the parties in person and to hear the witnesses, and his decision ought not to be upset on appeal absent a clear showing of abuse of discretion. Greer v. Greer, 5 N.C. App. 160, 167 S.E.2d 782 (1969); Brooks v. Brooks, 12 N.C. App. 626, 184 S.E.2d 417 (1971).

When parents separate and later are divorced, the children of the marriage become the wards of the court and their welfare is the determining factor in custody proceedings. Greer v. Greer, 5 N.C. App. 160, 167 S.E.2d 782 (1969).

This statutory directive merely codified the rule which had been many times announced by the North Carolina Supreme Court to the effect that in custody cases the welfare of the child is the polar star by which the court's decision must ever be guided. In re Custody of Pitts, 2 N.C. App. 211, 162 S.E.2d 524 (1968); In re Custody of Cox, 17 N.C. App. 687, 195 S.E.2d 132 (1973).

The child's welfare is the principal consideration in determining custody matters. In re Morrison, 6 N.C. App. 47, 169 S.E.2d 228 (1969).

The primary consideration in custody cases is the welfare of the child or children involved. Rothman v. Rothman, 6 N.C. App. 401, 170 S.E.2d 140 (1969).

The welfare of the children is the determining factor in the custody proceedings and the award of custody based on that factor will be upheld when supported by competent evidence. In re Custody of Poole, 8 N.C. App. 25, 173 S.E.2d 545 (1970).

This section expresses the policy of the State that the best interest and welfare of the child is the paramount and controlling factor to guide the judge in determining the custody of a child. In re Custody of

Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1971).

The best interest and welfare of the child is the paramount consideration in determining the visitation rights, as well as in determining the right to custody, and that neither of these rights should be permitted to jeopardize the best interest and welfare of the child. In re Custody of Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1971).

Although at one time under the common law the father was generally entitled to the custody of minor children, the courts at the present time almost invariably adhere to the principle that the welfare or best interest of the child is the paramount consideration. This was the rule adhered to by North Carolina courts for many years, and is now prescribed by this section. Brooks v. Brooks, 12 N.C. App. 626, 184 S.E2d 417 (1971).

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); In re Moore, 8 N.C. App. 251, 174 S.E.2d 135 (1970).

The decision to award custody of a minor is vested in the discretion of the trial judge who has the opportunity to see the parties in person and to hear the witnesses, and his decision ought not to be upset on appeal absent a clear showing of abuse of discretion. In re Custody of Pitts, 2 N.C. App. 211, 162 S.E.2d 524 (1968); In re Custody of Cox, 17 N.C. App. 687, 195 S.E.2d 132 (1973).

Since the trial judge has the opportunity to see the parties in person and to hear the witnesses, it is mandatory that the trial judge be given a wide discretion in making his determination, and it is clear that his decision ought not to be upset on appeal absent a clear showing of abuse of discretion. In re Custody of Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1971).

Parents Have Right to Custody.—Parents, including the mother of an illegitimate child, have the legal right to have the custody of their children unless clear and cogent reasons exist for denying them this right. This right is not absolute, and it may be interfered with or denied but only for the most substantial and sufficient reasons, and is subject to judicial control only when the interest and welfare of the children clearly require it. In re Jones, 14 N.C. App. 334, 188 S.E.2d 580 (1972).

Which Is Forfeitable Only by Misconduct.—The law presumes that the best interest of a child will be served by committing it to the custody of a parent, when the parent is a suitable person; this presumption is not overcome merely by showing that some third person can give the child better care and greater comforts and protection than the parent, a parent's right to custody of a child being forfeitable only by misconduct or by other facts which substantially affect the child's welfare. In re Jones, 14 N.C. App. 334, 188 S.E.2d 580 (1972).

Award of Custody to Grandparents or Others.—Where there are unusual circumstances and the best interests of the child justifies such action, a court may refuse to award custody to either the mother or father and instead award the custody of the child to grandparents or others. In re Custody of Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1971).

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); In re Custody of Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1971).

A child has a right to have his testimony heard. It is still, however, within the discretion of the trial judge as to the weight to be attached to such testimony. Kearns v. Kearns, 6 N.C. App. 319, 170 S.E.2d 132 (1969).

A child may be a competent witness, and ought to be examined in that character. Indeed, being the party mainly concerned, he has a right to make a statement to the court as to his feelings and wishes upon the matter, and this ought to be allowed serious consideration by the court, in the exercise of its discretion, as to the person to whose control he is to be subjected. Kearns v. Kearns, 6 N.C. App. 319, 170 S.E.2d 132 (1969).

The child's wishes will be one factor considered by the court in determining his custody, usually not because of any legal right in the child to have his wishes granted, but because the consideration of such wishes will aid the court in making a custodial decree which is for the best interests and welfare of the child. Brooks v. Brooks, 12 N.C. App. 626, 184 S.E.2d 417 (1971).

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).

A child's preference as to who shall have his custody is not controlling; however, the trial judge should consider the wishes of a ten-year-old child in making his determination. In re Custody of Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1971).

Where the contest is between a parent and one not connected by blood to the child, the desire of the child will not ordinarily prevail over the natural right of the parent, unless essential to the child's welfare. In re Custody of Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1971).

Although the preference of a child of discretion would seem to have its greatest weight when the controversy is between the parents and both are fit persons, the child's wishes are only entitled to consideration and are not controlling. Brooks v. Brooks, 12 N.C. App. 626, 184 S.E.2d 417 (1971).

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).

If the court finds that the parent has by conduct forfeited the right of visitation or if the court finds that the exercise of the right would be detrimental to the best interest and welfare of the child, the court may, in its discretion, deny a parent the right of visitation with, or access to, his or her child; but the court may not delegate this authority to the custodian. In re Custody of Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1971).

When the question of visitation rights of a parent arises, the court should determine from the evidence presented whether the parent by some conduct has forfeited the right or whether the exercise of the right would be detrimental to the best interest and welfare of the child. In re Custody of Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1971).

When visitation rights are awarded, it is the exercise of a judicial function, and the exercise of this judicial function may not be properly delegated by the court to the custodian of the child. In re Custody of Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1971).

A parent's right of visitation with his or her child is a natural and legal right and when awarding custody of a child to another, the court should not deny a parent's right of visitation at appropriate times unless the parent has by conduct forfeited the right or unless the exercise of the right would be detrimental to the best interest and welfare of the child. In re Custody of Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1971).

The court should not assign the granting of the privilege of visitation to the discretion of the party awarded custody of the child. In re Custody of Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1971).

Court Should Safeguard Visitation Rights by Provision in Order.—If the court does not find that the parent has by conduct forfeited the right of visitation and does not find that the exercise of the right would be detrimental to the best interest and welfare of the child, the court should safeguard the parent's visitation rights by a provision in the order defining and establishing the time, place and conditions under which such visitation rights may be exercised. In re Custody of Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1971).

Right of Surviving Parent to Custody.—Where one parent is dead, the surviving parent has a natural and legal right to the custody and control of their minor children. This right is not absolute, and it may be interfered with or denied but only for the most substantial and sufficient reasons, and is subject to judicial control only when the interests and welfare of the children clearly require it. In re Custody of Griffin, 6 N.C. App. 375, 170 S.E.2d 84 (1969); In re

Custody of Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1971); Vaughn v. Tyson, 14 N.C. App. 548, 188 S.E.2d 614 (1972).

Father's Right to Custody When Mother Abandons Claim to Child. — Where the mother abandons any claim she may have to the custody of her daughter, the father alone has the natural and legal right to the custody of the child unless for substantial and sufficient reasons the interest and welfare of the child require that he be denied that right. Roberts v. Short, 6 N.C. App. 419, 169 S.E.2d 910 (1969).

Custody May Be Granted to Third Person.—The welfare of the infants themselves is the polar star by which the courts are to be guided to a right conclusion, and, therefore, they may, within certain limits, exercise a sound discretion for the benefit of the child, and in some cases will order it into the custody of a third person for good and sufficient reasons. Roberts v. Short, 6 N.C. App. 419, 169 S.E.2d 910 (1969).

If the mother and the father are both fit and proper persons to have custody of children, under ordinary circumstances the court would then proceed to determine whether the best interest, health and welfare of the children would be served by awarding custody to the mother or father. If not, then the court must deal with someone or an agency over whom the court has control. But an order awarding custody, in effect, to third persons who are not parties to the proceeding, not a public institution, and not bound by the court's order, must be reversed. Boone v. Boone, 8 N.C. App. 524, 174 S.E.2d 833 (1970).

Appellate Review. — The decision to award custody of a child is vested in the discretion of the trial judge who has the opportunity to see the parties in person and to hear the witnesses, and his decision ought not to be upset on appeal absent a clear showing of abuse of discretion. In re Moore, 8 N.C. App. 251, 174 S.E.2d 135 (1970).

Custody cases generally involve difficult decisions. The trial judge has the opportunity to see the parties in person and to hear the witnesses. It is mandatory, in such a situation, that the trial judge be given a wide discretion in making his determination, and it is clear that his decision ought not to be upset on appeal absent a clear showing of an abuse of discretion. In re Morrison, 6 N.C. App. 47, 169 S.E.2d 228 (1969).

The trial judge is vested with a wide discretion for he has an opportunity to observe the parties and the witnesses, and his decision ought not to be upset on appeal absent a clear showing of abuse of discretion. Jarman v. Jarman, 14 N.C. App. 531, 188 S.E.2d 647 (1972).

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).

When the trial court fails to find facts so that the Supreme Court can determine that the order is adequately supported by competent evidence and the welfare of the child subserved, then the order entered thereon must be vacated and the case remanded for detailed findings of fact. Crosby v. Crosby, 272 N.C. 235, 158 S.E.2d 77 (1967); In re Moore, 8 N.C. App. 251, 174 S.E.2d 135 (1970); Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

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); In re Moore, 8 N.C. App. 251, 174 S.E.2d 135 (1970).

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); Boone v. Boone, 8 N.C. App. 524, 174 S.E.2d 833 (1970).

The court's findings of fact as to the care and custody of children will not be disturbed when supported by competent evidence, even though the evidence be con-

flicting. Crosby v. Crosby, 272 N.C. 235, 158 S.E.2d 77 (1967); In re Custody of Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1971).

The trial judge is not required to find all the facts shown by the evidence. It is sufficient if enough material facts are found to support the judgment. In re Custody of Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1971).

When there has been a finding that both parents are fit and suitable to have custody, the judge's order is conclusive when supported by evidence. Kearns v. Kearns, 6 N.C. App. 319, 170 S.E.2d 132 (1969).

The question of custody is one addressed to the trial court and its decision will be upheld if supported by competent evidence. Roberts v. Short, 6 N.C. App. 419, 169 S.E.2d 910 (1969).

Lack of Finding as to Child's Preferences Insufficient to Upset Award. — The failure of the court to include a finding as to the preferences of the minor child is insufficient to upset its order of award of custody. Brooks v. Brooks, 12 N.C. App. 626, 184 S.E.2d 417 (1971).

Evidence Afforded by Affidavits. — An order for custody should be entered only after the most careful consideration and only after the court has had the benefit of more reliable evidence than is usually afforded by affidavits. In re Custody of Griffin, 6 N.C. App. 375, 170 S.E.2d 84 (1969).

Applied in State v. Wrenn, 16 N.C. App. 411, 191 S.E.2d 913 (1972).

§ 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 and G.S. 1A-1, Rule 65. (1967, c. 1153, s. 2; 1969, c. 895, s. 16.)

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

Editor's Note. — The 1969 amendment added "and G.S. 1A-1, Rule 65" at the end of subsection (b).

Session Laws 1969, c. 895, s. 21, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act, no significance shall be attached to the fact that this act was enacted at a later date."

"Wilful" Imports Knowledge and Stubborn Resistance. — A failure to obey an order of a court cannot be punished by contempt proceedings unless the disobedience is wilful, which imports knowledge and a stubborn resistance. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

Trial Court Must Find Defendant Possessed Means to Comply. — In order to punish by contempt proceedings, the trial court must find as a fact that the defendant possessed the means to comply with orders of the court during the period when he was in default. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

Where the court enters judgment as for civil contempt, the court must find not only failure to comply with the order but that the defendant presently possesses the means to comply. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

One does not act wilfully in failing to comply with a judgment if it has not been within his power to do so since the judgment was rendered. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

Facts Not Reviewable Except upon Their Sufficiency. — In proceedings for contempt the facts found by the judge are not reviewable except for the purpose of passing upon their sufficiency to warrant the judgment. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

Person in Contempt May Be Required to Pay Counsel Fees.—The court is vested with broad power when it is authorized to punish "as for contempt." This power includes the authority for a district court judge to require one whom he has found in wilful contempt of court for failure to comply with a child support order entered pursuant to § 50-13.1 et seq., to pay reasonable counsel fees to opposing counsel as a condition to being purged of contempt. Blair v. Blair, 8 N.C. App. 61, 173 S.E.2d 513 (1970).

Cited in Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969); Johnson v. Johnson, 14 N.C. App. 378, 188 S.E.2d 711 (1972).

§ 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. 1A-1, Rule 70 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 and G.S. 1A-1, Rule 65, 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 constitue 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; 1969, c. 895, s. 17.)

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

Cross Reference.—See note to § 50-13.1

Editor's Note. — The 1969 amendment substituted "G.S. 1A-1, Rule 70" for "G.S. 1-227" in subdivision (2) of subsection (f) and inserted "and G.S. 1A-1, Rule 65" in subdivision (5) of subsection (f).

Session Laws 1969, c. 895, s. 21, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act, no significance shall be attached to the fact that this act was enacted at a later date."

"Minor Child" under Prior Law.—Before the enactment of Chapter 48A, it was evident that the meaning of "minor child" within the purview of the custody and support statutes, § 50-13.4 et seq., contemplated the common-law age of majority, 21. Shoaf v. Shoaf, 14 N.C. App. 231, 188 S.E.2d 19 (1972).

Legal Obligation to Support Minor.—After the enactment of § 48A-2, one's legal obligation to support his child ends at age 18, absent a showing that the child is insolvent, unmarried and physically or mentally incapable of earning a livelihood. Shoaf v. Shoaf, 14 N.C. App. 231, 188 S.E.2d 19 (1972).

The statutes concerning child support, § 50-13.4 et seq., all use the term "minor," "minor child" or "minor children," never referring to age 21. Therefore, in substituting the new meaning of "minor" provided by Chapter 48A into the statutes, the legal obligation to support one's child ends at age 18, absent a showing that the child is insolvent, unmarried and physically or mentally incapable of earning a livelihood as contemplated by § 50-13.8. Crouch v. Crouch, 14 N.C. App. 49, 187 S.E.2d 348 (1972).

Parents May Contract for Support in Excess of Legal Obligation.—Contracts between parents providing for support and educational expenses of their children over and above their legal obligation to do so are binding and must be construed as any other contract. Shoaf v. Shoaf, 14 N.C. App. 231, 188 S.E.2d 19 (1972).

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 § 50-13).

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), decided under former § 50-13.

Allowances to Be Separated.—The al-

lowance to be separated in the order, as required by subsection (e), are the support payment for the minor child or children from the amount ordered for alimony or alimony pendente lite payments. Brooks v. Brooks, 12 N.C. App. 626, 184 S.E.2d 417 (1971).

Court Need Not Designate Amounts for Each Child.—Subsection (e) does not require the trial court to designate the amount of support payments for each child, although such designation may prove helpful to simplify any future adjustments or modifications. Brooks v. Brooks, 12 N.C. App. 626, 184 S.E.2d 417 (1971).

And Failure to Identify Purposes of Payments Is Not Error.—The better practice is for the court's order to relate that the payment ordered under this section is the amount necessary to meet the reasonable needs of the child for health, education, and maintenance, but the failure of the court to do so, does not constitute reversible error. Andrews v. Andrews, 12 N.C. App. 410, 183 S.E.2d 843 (1971).

"Wilful" Imports Knowledge and Stubborn Resistance. — A failure to obey an order of a court cannot be punished by contempt proceedings unless the disobedience is wilful, which imports knowledge and a stubborn resistance. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

Trial Court Must Find Defendant Possessed Means to Comply. — Where the lower court had not found as a fact that the defendant possessed the means to comply with the orders for payment of subsistence pendente lite at any time during the period when he was in default in such payments, the findings that the defendant's failure to make the payments of subsistence was deliberate and wilful was not supported by the record, and the decree committing him to imprisonment for contempt was set aside. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

One does not act wilfully in failing to comply with a judgment if it has not been within his power to do so since the judgment was rendered. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

Where the court enters judgment as for civil contempt, the court must find not only failure to comply with the order but that the defendant presently possesses the means to comply. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

In order to punish by contempt proceedings, the trial court must find as a fact that the defendant possessed the means to comply with orders of the court during the period when he was in default. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

Agreement of Parties Incorporated in Judgment Is Enforceable by Contempt Proceedings.—Where, in the wife's action for alimony and child support, the parties agreed to the terms of a judgment providing that the husband would make specified monthly support payments, and the judgment entered by the court ordered the husband to make the payments which he had agreed to make, the husband's obligation to make the support payments may be enforced by contempt proceedings. Parker v. Parker, 13 N.C. App. 616, 186 S.E.2d 607 (1972).

Facts Not Reviewable Except upon Their Sufficiency. — In proceedings for contempt the facts found by the judge are not reviewable except for the purpose of passing upon their sufficiency to warrant the judgment. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

Appellate Review of Amount Allowed by Court.—The amount allowed by the court for alimony and support of children of the marriage will be disturbed on appeal only where there is a gross abuse of discretion. Swink v. Swink, 6 N.C. App. 161, 169 S.E.2d 539 (1969).

Person in Contempt May Be Required to Pay Counsel Fees.—The court is vested with broad power when it is authorized to punish "as for contempt." This power includes the authority for a district court judge to require one whom he has found in wilful contempt of court for failure to comply with a child support order entered pursuant to § 50-13.1 et seq., to pay reasonable counsel fees to opposing counsel as a condition to being purged of contempt. Blair v. Blair, 8 N.C. App. 61, 173 S.E.2d 513 (1970).

Nonresident Defendant May Be Required to Post Bond. — Under subsection (f)(1) and § 50-16.7(b), the court properly required supporting spouse to post a security bond to secure his compliance with a judgment requiring him to make monthly payments for support of his wife and children, where the court found that defendant no longer resided within the State and that he had no attorney of record in the case. Parker v. Parker, 13 N.C. App. 616, 186 S.E.2d 607 (1972).

Income from Trust Administered in State Is Subject to Execution.—In a wife's action for divorce from bed and board and for permanent alimony, the husband's income from a trust created in another jurisdiction and administered by a trustee bank in this State is subject to execution to satisfy the judgment of the wife against the husband for alimony, child support

and counsel fees. Swink v. Swink, 6 N.C. App. 161, 169 S.E.2d 539 (1969).

Applied in Kearns v. Kearns, 6 N.C. App. 319, 170 S.E.2d 132 (1969); Little v. Little, 9 N.C. App. 361, 176 S.E.2d 521 (1970); Williams v. Williams, 12 N.C. App. 170, 182 S.E.2d 667 (1971); Williams v. Williams, 13 N.C. App. 468, 186 S.E.2d 210 (1972); Carter v. Carter, 13 N.C. App. 648, 186 S.E.2d 684 (1972).

Quoted in Robinson v. Robinson, 10 N.C. App. 463, 179 S.E.2d 144 (1971).

Cited in Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969); Hill v. Hill, 11 N.C. App. 1, 180 S.E.2d 424 (1971); Johnson v. Johnson, 14 N.C. App. 378, 188 S.E.2d 711 (1972); Koob v. Koob, 16 N.C. App. 326, 192 S.E.2d 40 (1972), aff'd, 283 N.C. 129, 195 S.E.2d 552 (1973).

§ 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.

(i) District Court; Denial of Parental Visitation Right; Written Finding of Fact.—In any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child. (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. 13; 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; 1971, c. 1185, s. 24; 1973, c. 751.)

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

Editor's Note.—The 1971 amendment, effective Oct. 1, 1971, in subsection (h), deleted the former second and third sentences concerning jurisdiction, in or out of session, of certain custody and support of minor children actions or proceedings until a district court having jurisdiction shall have been established, and deleted a former fourth sentence providing: "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)."

The 1973 amendment, effective June 1, 1973, added subsection (i).

A number of 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). For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

Time-tested methods for assuring an adequate and fair hearing must be applied in child custody proceedings. In re Custody of Griffin, 6 N.C. App. 375, 170 S.E.2d 84 (1969).

Function of Court in Custody Proceeding.—In a custody proceeding, it is not the function of the courts to punish or reward a parent by withholding or awarding custody of minor children; the function of the court in such a proceeding is to diligently seek to act for the best interests and welfare of the minor child. In re McCraw Children, 3 N.C. App. 390, 165 S.E.2d 1 (1969).

The custody and support issue may be determined in an independent action in another court after final judgment in a previously instituted action between the parents, where custody and support has not been brought to issue or determined. In re Holt, 1 N.C. App. 108, 160 S.E.2d 90 (1968).

Subsections (b) and (f), when considered together, permit questions of custody

and support to be determined in independent actions, rather than only through a motion in the cause, where a divorce judgment has been entered without a determination of custody and support in that judgment. Johnson v. Johnson, 14 N.C. App. 378, 188 S.E.2d 711 (1972).

If a final judgment has been rendered in an action for annulment, divorce, or alimony without divorce, wherein there has not been a determination of the custody and support of the minor child, those questions may be determined subsequently in a civil action or in a habeas corpus proceeding instituted for this purpose, or by a motion in the cause in the earlier action. Johnson v. Johnson, 14 N.C. App. 378, 188 S.E.2d 711 (1972).

Justice to all parties is best served when one judge is able to see the controversy whole. This section so provides. In re King, 3 N.C. App. 466, 165 S.E.2d 60 (1969).

Distinction between Divorce Actions and Habeas Corpus Proceedings. — In divorce actions, the marital rights and obligations of both husband and wife, as well as the custody and support of the children of the marriage, are before the court in a single action. In a habeas corpus proceeding the judge has jurisdiction of only one facet of the marital dispute, the custody and support of the children. In re King, 3 N.C. App. 466, 165 S.E.2d 60 (1969).

Appeal from Judgment Rendered on Return to Habeas Corpus Writ.—Except in cases involving the custody of minor children, no appeal lies from a judgment rendered on return to a writ of habeas corpus. In re Custody of Wright, 8 N.C. App. 330, 174 S.E.2d 27 (1970).

An independent action is not the exclusive procedure to be followed. Granting an alternative method for determining custody and support where a final judgment of divorce has been entered was intended to eliminate the often times inconvenient requirement that a parent living in another county go back to the county where a divorce was obtained in order to have custody and support of minor children initially determined. Johnson v. Johnson, 14 N.C. App. 378, 188 S.E.2d 711 (1972).

Joinder of Actions Permissible. — It is permissible under subsection (b)(3) of this section for the wife to join this action for custody and support of the minor children of the parties in her action for alimony without divorce. Little v. Little, 9 N.C. App. 361, 176 S.E.2d 521 (1970).

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).

A court in which a divorce action was tried has jurisdiction to determine custody and support of children of the marriage even though no custody or support questions were raised prior to, or determined in, the final judgment of divorce. Johnson v. Johnson, 14 N.C. App. 378, 188 S.E.2d 711 (1972).

Under subdivisions (2) and (3) of subsection (b) the court has jurisdiction to enter an order granting custody to either of the children's parents, both of whom are subject to the court's jurisdiction. Johnson v. Johnson, 14 N.C. App. 378, 188 S.E.2d 711 (1972).

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).

The custody and support issue may be determined in an independent action in another court, where custody and support has not been brought to issue or determined. Wilson v. Wilson, 11 N.C. App. 397, 181 S.E.2d 190 (1971).

Jurisdiction Is Acquired When Child Is "Physically Present".—Jurisdiction can be acquired under subsection (c)(2) a of this section when the child is "physically present" in this State. If the court had acquired jurisdiction the fact that the child subsequently left the State would not deprive the court of jurisdiction. Hopkins v. Hopkins, 8 N.C. App. 162, 174 S.E.2d 103 (1970).

By virtue of the physical presence of the child within the boundaries of this State, the district court has jurisdiction, upon a proper showing, to modify another state's decree as it pertains to the custody of the child. Rothman v. Rothman, 6 N.C. App. 401, 170 S.E.2d 140 (1969).

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 532 (1965).

A divorce action is pending for purposes of determining custody and support until the death of one of the parties or the youngest child born of the marriage reaches the age of maturity, whichever event shall first occur. Johnson v. Johnson, 14 N.C. App. 378, 188 S.E.2d 711 (1972).

A court in which a divorce action was tried has jurisdiction to determine a motion in the cause for custody and support of children of the marriage who now reside in another state and who were not present in this State when the motion was filed or at the time it was heard. Johnson v. Johnson, 14 N.C. App. 378, 188 S.E.2d 711 (1972).

Custody and Support in Fieri. — If the custody and support has been brought to issue or determined in the previously instituted action between the parents, there could be no final judgment in that case, because the issue of custody and support remains in fieri until the children have become emancipated. Wilson v. Wilson, 11 N.C. App. 397, 181 S.E.2d 190 (1971).

Modification of Order Establishing Custody and Support.—This section does not affect the situation where custody and support have already been determined and one of the parties seeks a modification. In such a case, the court first obtaining jurisdiction retains jurisdiction to the exclusion of all other courts and is the only proper court to bring an action for the modification of an order establishing custody and support. Tate v. Tate, 9 N.C. App. 681, 177 S.E.2d 455 (1970).

Decree Subject to Alteration.—It is generally recognized that decrees entered by courts in child custody and support matters are impermanent in character and are res judicata of the issue only so long as the facts and circumstances remain the same as when the decree was rendered. The decree is subject to alteration upon a change of circumstances affecting the welfare of the child. Tate v. Tate, 9 N.C. App. 681, 177 S.E.2d 455 (1970).

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).

First Court to Acquire Jurisdiction Retains Jurisdiction.—Except as provided in subsection (f), the ordinary rule of civil procedure applies to this section, namely, the first court to acquire jurisdiction of a cause retains jurisdiction to the exclusion of other courts. Thus, if a judgment involving the custody and the support of a minor child has been entered in this State (as in a habeas corpus proceeding, or in an action for divorce from bed and board, or in an action for alimony without divorce, or in a civil action), the judge trying a subsequent action for absolute divorce cannot interfere with the earlier judgment. Only the court of this State having entered the earlier judgment for custody and support of the minor child may modify or vacate it, upon a motion in the cause and a showing of a change of circumstances. Tate v. Tate, 9 N.C. App. 681, 177 S.E.2d 455 (1970).

Action to Determine Support Is in Personam.—Under subsection (c)(1) an action to determine the matter of support is in personam in nature. Johnson v. Johnson, 14 N.C. App. 378, 188 S.E.2d 711 (1972).

Other Parties May Be Subjected to Jurisdiction to Same Extent as Original Parties.—In an action to determine custody of a child, an order which was entered in the

Court of Appeals making the paternal grandparents parties, pursuant to their motion, thereby subjected them to the jurisdiction of the Court of Appeals and of the trial court to the same extent as if they had been original parties plaintiff. Brandon v. Brandon, 10 N.C. App. 457, 179 S.E.2d 177 (1971).

Five-Day Notice of Custody Hearing Not Absolute Right.—Ordinarily a parent is entitled to at least five days notice (an intervening Saturday or Sunday excluded) of a hearing involving the custody of a child, but this is not an absolute right and is subject to the rule relating to waiver of notice and to the rule that a new trial will not be granted for mere technical error which could not have affected the result, but only for error which is prejudicial amounting to the denial of a substantial right. Brandon v. Brandon, 10 N.C. App. 457, 179 S.E.2d 177 (1971).

A party entitled to notice of a motion may waive such notice. Brandon v. Brandon, 10 N.C. App. 457, 179 S.E.2d 177 (1971).

And ordinarily does this by attending the hearing of the motion and participating in it. Brandon v. Brandon, 10 N.C. App. 457, 179 S.E.2d 177 (1971).

Case Properly Removed from Trial Docket When Claim to Alimony Abandoned. — In a wife's action for alimony without divorce and for custody and support of the children, a trial court properly removed the case from the trial docket when the wife abandoned her claim to alimony, and the defendant was not entitled to a jury trial on the issue of abandonment of his children. Ferguson v. Ferguson, 9 N.C. App. 453, 176 S.E.2d 358 (1970).

Affidavits Are Not Admissible to Establish Material Facts in Custody Proceedings.—The question to be determined in child custody hearings is certainly as important as any presented in the usual contract or tort litigation. Affidavits are not, as a rule, admissible in the trial of contract and tort cases as independent evidence to establish facts material to the issues being tried and there is no more justification for resort to inferior evidence in child custody proceedings than in such other litigations. In re Custody of Griffin, 6 N.C. App. 375, 170 S.E.2d 84 (1969).

A party to a child custody proceeding must object when affidavits are offered or ask permission to cross-examine, else his silence gives consent. By implication, if timely objection is made, affidavits should not be received, at least not without affording an opportunity for cross-examination. In re Custody of Griffin, 6 N.C. App. 375, 170 S.E.2d 84 (1969).

But Affidavits May Be Used as Basis of Order for Temporary Custody.—If the circumstances of a particular case require, the court may enter an order for temporary custody, even pending service of process or notice under subsection (d)(1) of this section, and use of affidavits as a basis for finding necessary facts for such purpose may be appropriate. In re Custody of Griffin, 6 N.C. App. 375, 170 S.E.2d 84 (1969).

There may be occasions when there is considerable urgency for a temporary order for the custody of a child. In such instances the judge may reach a decision on the basis of affidavits and other evidence produced at a preliminary hearing. The persons who have signed the affidavits are, of course, not present and there is no opportunity to cross-examine them, but this is said not to be objectionable because the ultimate right of examination will be afforded the parties at the trial of the cause. The real reason is that the welfare and custody of a small child is an urgent matter in which substantial harm can be caused by unnecessary delay. Brandon v. Brandon, 10 N.C. App. 457, 179 S.E.2d 177 (1971).

An order of alimony without divorce and child support is temporary in nature, and if future circumstances justify a change, defendant is at liberty to seek relief in the trial court by motion in the cause. Fonvielle v. Fonvielle, 8 N.C. App. 337, 174 S.E.2d 67 (1970).

In a wife's action for alimony without divorce and for child support, the Court of Appeals will not disturb an order of the trial court requiring the husband to make substantial payments to the wife for alimony and for support of the minor children, notwithstanding the husband's contention that he anticipates a substantial decrease in earning, since the order is temporary in nature and is subject to modification upon change of circumstances. Fonvielle v. Fonvielle, 8 N.C. App. 337, 174 S.E.2d 67 (1970).

Temporary Custody Order.—Under subsection (d)(2), in appropriate cases the court may enter orders for the temporary custody of a child pending the service of process. Zajicek v. Zajicek, 12 N.C. App. 563, 183 S.E.2d 850 (1971).

All custody orders are from their very nature temporary and founded upon conditions and circumstances existing at the time of the hearing. Brandon v. Brandon, 10 N.C. App. 457, 179 S.E.2d 177 (1971).

Custody Decree of Another State Is Entitled to Full Faith and Credit in Absence of Change in Circumstances. — A decree awarding the custody of a child, entered by the court of another state in an action for divorce from bed and board, is entitled to full faith and credit in the courts of this State, unless a change of circumstances is shown which would justify a modification of the decree. Rothman v. Rothman, 6 N.C. App. 401, 170 S.E.2d 140 (1969).

Even if a child custody order entered in another state is entitled to full faith and credit, the courts of this State have jurisdiction to enter orders providing for the custody of children affected by such order when they are physically present in this State. Spence v. Durham, 16 N.C. App. 372, 191 S.E.2d 908 (1972).

Court Has Jurisdiction to Modify Foreign Decree Upon Showing of Change in Circumstances. — The trial court erred in refusing to hear evidence offered in a custody proceeding on the ground that full faith and credit prevented it from issuing any order other than one which would require compliance with the foreign decree, since the court has jurisdiction to modify the foreign decree upon a showing of changed circumstances, and it did not appear that the court was exercising the discretion to decline jurisdiction granted it by subsection (c)(5) of this section. In re Kluttz, 7 N.C. App. 383, 172 S.E.2d 95 (1970).

Modification of Order without Changed Circumstances Is Error.—The trial court errs in modifying a previous order as to custody of and support for the children in the absence of a motion for modification and absent any showing of changed circumstances. Smith v. Smith, 15 N.C. App. 180, 189 S.E.2d 525 (1972).

Adultery.—The establishment of adultery does not eo instanti juris et de jure render the guilty party unfit to have custody of minor children. In re McCraw Children, 3 N.C. App. 390, 165 S.E.2d 1 (1969).

A finding of adultery is sufficient to support a conclusion that the guilty party is unfit to have custody. There are many findings which would be sufficient to support a conclusion of unfitness, but it does not follow that they would always impel such a conclusion. In re McCraw Children, 3 N.C. App. 390, 165 S.E.2d 1 (1969).

Evidence of adulterous conduct, like evidence of other conduct, is relevant upon an inquiry of fitness of a person for the purpose of awarding custody of minor children to him or to her. In re McCraw Children, 3 N.C. App. 390, 165 S.E.2d 1 (1969).

Decision on Custody Conclusive.—The trial judge is present where he can observe and hear the parties and their witnesses, and ordinarily his decision on custody will be upheld if supported by competent evidence. In re McCraw Children, 3 N.C. App. 390, 165 S.E.2d 1 (1969).

The question of custody is addressed to the trial court, and its decision will be upheld if supported by competent evidence. Brandon v. Brandon, 10 N.C. App. 457, 179 S.E.2d 177 (1971).

Jury Trial on Custody and Support Issue. —Pursuant to subsection (h) of this section, a supporting spouse is not entitled to a jury trial on the matter of custody and support of minor children. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

Applied in Kearns v. Kearns, 6 N.C. App. 319, 170 S.E.2d 132 (1969); Bonavia v. Torreso, 7 N.C. App. 21, 171 S.E.2d 108 (1969); Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971); Williams v. Williams, 12 N.C. App. 170, 182 S.E.2d 667 (1971).

Quoted in Blair v. Blair, 8 N.C. App. 61, 173 S.E.2d 513 (1970).

Stated in Williams v. Williams, 13 N.C. App. 468, 186 S.E.2d 210 (1972).

Cited in Texas v. Rhoades, 7 N.C. App. 388, 172 S.E.2d 235 (1970); In re Hopper, 11 N. C. App. 611, 182 S.E.2d 228 (1971).

§ 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, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding; provided however, should the court find as a fact that the supporting party has initiated a frivolous action or proceeding the court may order payment of reasonable

attorney's fees to an interested party as deemed appropriate under the circumstances. (1967, c. 1153, s. 2; 1973, c. 323.)

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

Editor's Note. — The 1973 amendment, effective July 1, 1973, rewrote the first sentence and added the second sentence.

Substantial Dependence by Wife upon Husband Unnecessary.—In order to grant attorney fees on behalf of the wife, it is not necessary to find as a "matter of law" that she is substantially dependent upon her husband. Brandon v. Brandon, 10 N.C. App. 457, 179 S.E.2d 177 (1971), decided prior to the 1973 amendment to this section.

The amount awarded as counsel fees comes within the discretion of the trial judge and will not be disturbed in the absence of an abuse of discretion. Kearns v. Kearns, 6 N.C. App. 319, 170 S.E.2d 132 (1969).

This section provides the trial court with considerable discretion in allowing or disallowing attorney fees in child custody or support cases. Brandon v. Brandon, 10 N.C. App. 457, 179 S.E.2d 177 (1971).

But Discretion Is Limited.—The court's discretion in disallowing fees appears to be limited only by the abuse of discretion rule; but the court's discretion in allowing fees appears to be limited not only by the abuse of discretion rule but by this section as well as other statutes, particularly § 50-16.1. Brandon v. Brandon, 10 N.C. App. 457, 179 S.E.2d 177 (1971).

Findings of Fact Must Support Order.—Section 50-16.4 and this section permit the entering of a proper order for reasonable counsel fees for the benefit of a dependent spouse, but only where the record contains findings of fact, such as the nature and scope of the legal services rendered and the skill and time required, upon which a determination of the requisite reasonableness could be based. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

Fees May Not Be Disallowed As Matter of Law.—The trial court, in its discretion, was fully authorized to disallow attorney fees for defendant's counsel but to disallow such fees as a matter of law was error. Brandon v. Brandon, 10 N.C. App. 457, 179 S.E.2d 177 (1971).

Award of Fees Was Not Error.—The trial court did not err in requiring the father to pay reasonable attorney fees of the mother in a habeas corpus proceeding to determine custody of minor children, where custody of the children had been awarded to the mother by both North Carolina and South Carolina courts, and the father's failure to return the children to the mother in South Carolina after a visit in this State forced the mother to come to this State to secure their return, and the father was not providing support for the children as he had been ordered. In re Hopper, 11 N.C. App. 611, 182 S.E.2d 228 (1971).

Denial of Fees Was Not Error.—Respondent in a child custody proceeding was not entitled to an award of counsel fees or to have court costs taxed against petitioner father where respondent introduced no evidence with respect to her dependent status or inability to defray the expense of the suit and where she was not the party for whom judgment had been given. In re Custody of Cox, 17 N.C. App. 687, 195 S.E.2d 232 (1973).

Award of Fees Was Error in Absence of Showing of Dependency.—The trial court erred in requiring plaintiff father to pay counsel fees of defendant mother for a hearing upon defendant's motion for an increase in the amount of child support payments made by plaintiff, where there was no showing or finding that at the time of the hearing defendant was a dependent spouse. Crouch v. Crouch, 14 N.C. App. 49, 187 S.E.2d 348 (1972), decided prior to the 1973 amendment to this section.

Applied in Williams v. Williams, 12 N.C. App. 170, 182 S.E.2d 667 (1971); Collins v. Collins, 18 N.C. App. 45, 196 S.E.2d 282 (1973).

Stated in Andrews v. Andrews, 12 N.C. App. 410, 183 S.E.2d 843 (1971).

Cited in Fonvielle v. Fonvielle, 8 N.C. App. 337, 174 S.E.2d 67 (1970); Winters v. Winters, 11 N.C. App. 595, 181 S.E.2d 604 (1971).

§ 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 sup-

port. (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.—A number of 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.

For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

This section contemplates only the institution of an action for custody and support. Tate v. Tate, 9 N.C. App. 681, 177 S.E.2d 455 (1970).

Ultimate Object.—The welfare of the child is the "polar star" in the matters of custody and maintenance, yet common sense and common justice dictate that the ultimate object in such matters is to secure support commensurate with the needs of the child and the ability of the father to meet the needs. Crosby v. Crosby, 272 N.C. 235, 158 S.E.2d 77 (1967).

The welfare of the child is always open to inquiry by the court, and upon showing of a change of circumstances the order of custody may be modified. In re Mason, 13 N.C. App. 334, 185 S.E.2d 433 (1971).

Filing a motion in a cause in which the court has not acquired jurisdiction does not serve to confer jurisdiction under this section. Hopkins v. Hopkins, 8 N.C. App. 162, 174 S.E.2d 103 (1970).

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); In re Bowen, 7 N.C. App. 236, 172 S.E.2d 62 (1970).

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).

Decrees entered by North Carolina courts in child custody and support matters are impermanent in character and are res judicata of the issue only so long as the facts and circumstances remain the same as when the decree was rendered. The decree is subject to alteration upon a change of circumstances affecting the welfare of the child. Crosby v. Crosby, 272 N.C. 235, 158 S.E.2d 77 (1967); Tate v. Tate, 9 N.C. App. 681, 177 S.E.2d 455 (1970).

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).

A judgment awarding custody is based upon the conditions found to exist at the time it is entered. The judgment is subject to such change as is necessary to make it conform to changed conditions when they occur. In re Bowen, 7 N.C. App. 236, 172 S.E.2d 62 (1970).

The welfare of the child at the time the contest comes on for hearing is the controlling consideration. It may be well to observe that the law is realistic and takes cognizance of the ever changing conditions of fortune and society. While a decree making a judicial award of the custody of a child determines the present rights of the parties to the contest, it is not permanent in its nature, and may be modified by the court in the future as subsequent events and the welfare of the child may require. In re Bowen, 7 N.C. App. 236, 172 S.E.2d 62 (1970).

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).

Father's Duty.—In cases of child sup-

port, the father's duty does not end with the furnishing of bare necessities when he is able to offer more, nor should the court order an increase in payments absent evidence of changed conditions or the need of such increase. Crosby v. Crosby, 272 N.C. 235, 158 S.E.2d 77 (1967).

The wishes of a child of sufficient age to exercise discretion in choosing a custodian is entitled to considerable weight when the contest is between parents, but is not controlling. Elmore v. Elmore, 4 N.C. App. 192, 166 S.E.2d 506 (1969); In re Harrell, 11 N.C. App. 351, 181 S.E.2d 188 (1971).

A change in circumstances must be shown in order to modify an order relating to custody, support or alimony. Elmore v. Elmore, 4 N.C. App. 192, 166 S.E.2d 506 (1969); Rothman v. Rothman, 6 N.C. App. 401, 170 S.E.2d 140 (1969); McDowell v. McDowell, 13 N.C. App. 643, 186 S.E.2d 621 (1972).

While the order awarding custody is not final and may be subsequently modified, this may be done only upon a showing of changed circumstances. In re Custody of Griffin, 6 N.C. App. 375, 170 S.E.2d 84 (1969).

If the parent awarded custody of children were subsequently to become unfit, it would be possible for the trial court, upon proper findings, to grant custody to a fit person. Where there is no evidence that the fitness or unfitness of either party has changed, the trial court may not modify a prior order awarding custody unless some other sufficient change of condition is shown. In re Custody of Poole, 8 N.C. App. 25, 173 S.E.2d 545 (1970).

"Changed circumstances," as used in this section, means such a change as affects the welfare of the child. In re Harrell, 11 N.C. App. 351, 181 S.E.2d 188 (1971).

Where a provision for any reduction in support payments was omitted from the original order, that order could not thereafter be modified by inserting such provision without a showing and finding of change in circumstances. Rabon v. Ledbetter, 9 N.C. App. 376, 176 S.E.2d 372 (1970).

While orders in custody proceedings are never final, since with the passage of time both the needs of the children and the ability of the parents to supply those needs may change, a court is not warranted in modifying or changing a prior valid order absent a showing of change in conditions. Rabon v. Ledbetter, 9 N.C. App. 376, 176 S.E.2d 372 (1970); Register v. Register, 18 N.C. App. 333, 196 S.E.2d 550 (1973).

It is elementary that court decrees in child custody and support matters are not permanent in character and may be modified by the court in the future if subsequent events and the welfare of the child require. In re Rose, 9 N.C. App. 413, 176 S.E.2d 249 (1970).

A change of circumstances affecting the welfare of the child must be shown before an order relating to the child's custody may be modified. Kenney v. Kenney, 15 N.C. App. 665, 190 S.E.2d 650 (1972).

And Change Must Be Substantial. — There must generally be a substantial change of circumstances before an order of custody is changed. This indicates that more must be shown than a removal by one parent of a child from a jurisdiction which may enter an adverse decision to the removing parent. It must be shown that circumstances have so changed that the welfare of the child will be adversely affected unless the custody provision is modified. Rothman v. Rothman, 6 N.C. App. 401, 170 S.E.2d 140 (1969).

A finding that the mother "is now residing in Mecklenburg County, North Carolina" is not a finding of a substantial change of circumstances that will support the modification of a child custody order. Harrington v. Harrington, 16 N.C. App. 628, 192 S.E.2d 638 (1972).

Burden of Showing Changed Circumstances.—When plaintiff moved that the original order be vacated and either modified or eliminated, he assumed the burden of showing that circumstances had changed between the time of the order and the time of the hearing upon his motion. Crosby v. Crosby, 272 N.C. 235, 158 S.E.2d 77 (1967); In re Harrell, 11 N.C. App. 351, 181 S.E.2d 188 (1971).

The original decree ordering the payment of money is an adjudication of the court as to what was reasonable and proper at the time it was made. The burden of proving, by preponderance of the evidence, that a material change in the circumstances has occurred is upon the party requesting the modification. Allen v. Allen, 7 N.C. App. 555, 173 S.E.2d 10 (1970).

Where a person having custody under a prior order has become unfit or is no longer able or suited to retain custody, such a consideration is of utmost importance in inquiring into the matter of custody, but it is not alone determinative. In re Bowen, 7 N.C. App. 236, 172 S.E.2d 62 (1970).

Where Person Denied Custody under Prior Order Due to Unfitness Becomes Fit.—Where at the time of the first hearing the poor health and emotional instability of the mother rendered her unsuit-

able to have custody of the two oldest children of the parties, but where this had changed, the court was entitled, in view of these changed circumstances, to inquire again into the matter of custody and to determine whether the welfare of the children would be better served now by placing them in the custody of their mother. Kenney v. Kenney, 15 N.C. App. 655, 190 S.E.2d 650 (1972).

First Court to Acquire Jurisdiction Retains Jurisdiction.—Except as provided in § 50-13.5(f), the ordinary rule of civil procedure applies to this section, namely, the first court to acquire jurisdiction of a cause retains jurisdiction to the exclusion of other courts. Thus, if a judgment involving the custody and the support of a minor child has been entered in this State (as in a habeas corpus proceeding, or in an action for divorce from bed and board, or in an action for alimony without divorce, or in a civil action), the judge trying a subsequent action for absolute divorce cannot interfere with the earlier judgment. Only the court of this State having entered the earlier judgment for custody and support of the minor child may modify or vacate it, upon a motion in the cause and a showing of a change of circumstances. Tate v. Tate, 9 N.C. App. 681, 177 S.E.2d 455 (1970).

Modification of Order Establishing Custody and Support. — Section 50-13.5 contemplates only the institution of an action for custody and support. It does not affect the situation where custody and support have already been determined and one of the parties seeks a modification of the order establishing custody and support. In such a case, the court first obtaining jurisdiction retains jurisdiction to the exclusion of all other courts and is the only proper court to bring an action for the modification of an order establishing custody and support. Tate v. Tate, 9 N.C. App. 681, 177 S.E.2d 455 (1970).

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).

A decree awarding the custody of a child, entered by the court of another state in an action for divorce from bed and board, is entitled to full faith and credit in the courts of this State, unless a change of circumstances is shown which would justify a modification of the decree. Rothman v. Rothman, 6 N.C. App. 401, 170 S.E.2d 140 (1969).

What Plaintiff Must Show to Obtain Modification of Another State's Order.—In order to invoke the aid of subsection (b) of this section governing the entry of a new order for child custody or support which modifies or supersedes an order entered by a court of another state, a plaintiff must show (1) jurisdiction and (2) changed circumstances. Hopkins v. Hopkins, 8 N.C. App. 162, 174 S.E.2d 103 (1970).

Court Has Jurisdiction to Modify Foreign Custody Decree upon Showing of Changed Circumstances.—The trial court erred in refusing to hear evidence offered in a custody proceeding on the ground that full faith and credit prevented it from issuing any order other than one which would require compliance with the foreign decree, since the court has jurisdiction to modify the foreign decree upon a showing of changed circumstances, and it did not appear that the court was exercising the discretion to decline jurisdiction granted it by § 50-13.5(c)(5). In re Kluttz, 7 N.C. App. 383, 172 S.E.2d 95 (1970).

And by Virtue of Physical Presence of Child Within State. — By virtue of the physical presence of the child within the boundaries of this State, the district court has jurisdiction, upon a proper showing, to modify another state's decree as it pertains to the custody of the child. Rothman v. Rothman, 6 N.C. App. 401, 170 S.E.2d 140 (1969).

Even if a child custody order entered in another state is entitled to full faith and credit, the courts of this State have jurisdiction to enter orders providing for

the custody of children affected by such order when they are physically present in this State. Spence v. Durham, 16 N.C. App. 372, 191 S.E.2d 908 (1972).

Court's Findings of Fact Are Conclusive.—A court's findings of fact in modifying a child custody order are conclusive on appeal if supported by competent evidence. In re Bowen, 7 N.C. App. 236, 172 S.E.2d 62 (1970).

The judge's finding "that there was not a sufficient change of circumstances shown which would justify a change in the custody order previously entered" is conclusive and binding on review if supported by competent evidence. In re Harrell, 11 N.C. App. 351, 181 S.E.2d 188 (1971).

Appellate Review.—In determining child custody wide discretion is necessarily vested in the trial judge who has the opportunity to see the parties and hear the witnesses, and his decision ought not to be upset on appeal absent a clear showing of abuse of discretion. In re Mason, 13 N.C. App. 334, 185 S.E.2d 433 (1971).

Applied in Ferguson v. Ferguson, 9 N.C. App. 453, 176 S.E.2d 358 (1970).

Cited in In re Custody of Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1971); Brooks v. Brooks, 12 N.C. App. 626, 184 S.E.2d 417 (1971); Moore v. Moore, 14 N.C. App. 165, 187 S.E.2d 371 (1972).

§ 50-13.8. Custody and support of persons 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, provided that no parent may be held liable for the charges made by a facility owned or operated by the Department of Human Resources for the care, maintenance and treatment of such person who is a long-term patient. (1967, c. 1153, s. 2; 1971, c. 218, s. 3; 1973, c. 476, s. 133.)

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

Editor's Note. — The 1971 amendment added the proviso.

Session Laws 1971, c. 218, s. 4, as amended by Session Laws 1971, c. 1142, provides: "This act is intended to relieve and shall be construed to relieve, any parent of any liability for charges accrued prior to the ratification of this act for treatment, care and maintenance of a natural or adoptive child at facilities owned or operated by the State Department of Mental Health. It is the intent of this act to limit the existing liability of all parents, in the manner set out in the previous sections of this act, in regard to charges made prior to the date of the ratification of this act, or to be made subsequent to such date, for treatment, care and maintenance of a natural or adopted child at facilities owned or operated by the State Department of Mental Health."

The 1973 amendment, effective July 1, 1973, substituted "Department of Human Resources" for "State Department of Mental Health."

Obligation of Father to Provide Support for Twenty-One Year Old Person.—Ordinarily the law presumes that when a child reaches the age of twenty-one years he will be capable of maintaining himself, and in such case the obligation of the father to provide support terminates. But where this presumption is rebutted by the fact of mental or physical incapacity, it no longer obtains, and the obligation of the father continues. Speck v. Speck, 5 N.C. App. 296, 168 S.E.2d 672 (1969).

Stated in Crouch v. Crouch, 14 N.C. App. 49, 187 S.E.2d 348 (1972).

§§ 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.

The right of a wife to subsistence pending trial and to attorney fees was derived from the common law. Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

Purpose of Pendente Lite Awards.—The remedy of subsistence and counsel fees pendente lite is intended to enable the wife to maintain herself according to her station in life and employ counsel to meet her husband at trial upon substantially equal terms. Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

"Dependent Spouse".—In order to be a "dependent spouse" for the purpose of receiving alimony pendente lite, one does not have to be unable to exist without the aid of the other spouse. Peeler v. Peeler, 7 N.C. App. 456, 172 S.E.2d 915 (1970); Sprinkle v. Sprinkle, 17 N.C. App. 175, 193 S.E.2d 468 (1972).

In order for a spouse to be entitled to alimony, alimony pendente lite, or counsel fees, that spouse must be a dependent spouse. Little v. Little, 18 N.C. App. 311, 196 S.E.2d 562 (1973).

This section keys all awards, in the nature of permanent alimony and alimony pendente lite, to a spouse who is a dependent spouse within the meaning of subdivision (3). Hinton v. Hinton, 17 N.C. App. 715, 195 S.E.2d 319 (1973).

Findings that plaintiff wife worked and had a separate income does not preclude the trial court from determining that plaintiff was a dependent spouse and that defendant was a supporting spouse, where there was plenary evidence to show that she was substantially dependent upon defendant and in substantial need of his support. Radford v. Radford, 7 N.C. App. 569, 172 S.E.2d 897 (1970).

To find that one is a "dependent spouse" within the meaning of subdivision (3) is a consequence of two or more related propositions taken as premises, one being the fact that the relationship of spouse exists, and the other consisting of at least the finding that one of the two alternatives in subdivision (3) is a fact. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971); Presson v. Presson, 13 N.C. App. 81, 185 S.E.2d 17 (1971).

This section provides two different factual situations from which the conclusion could be reached that a spouse is a "dependent spouse": (1) when a spouse is actually substantially dependent upon the other spouse for his or her maintenance and support; and (2) when a spouse is substantially in need of maintenance and support from the other spouse. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971); Sprinkle v. Sprinkle, 17 N.C. App. 175, 193 S.E.2d 468 (1972).

To find that one is a dependent spouse the trial court must make findings of fact sufficient to show (1) that a marital relationship between the parties exists; (2) either (a) that the spouse is actually substantially dependent upon the other spouse for his or her maintenance and support, or (b) that the spouse is substantially in need of maintenance and support from the other spouse; and (3) that the supporting spouse is capable of making the payments required. Little v. Little, 18 N.C. App. 311, 196 S.E.2d 562 (1973).

"Supporting Spouse". — A "supporting spouse" within the meaning of subdivision (4) is a consequence of two or more related propositions taken as premises, one being that the relationship of spouse exists, and the other consisting of the finding that one of three alternatives in subdivision (4) is a fact. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

There are three factual situations from

which the conclusion could be reached that a spouse is a supporting spouse: (1) when one spouse is actually substantially dependent upon the other; (2) when one spouse is substantially in need of maintenance and support from the other; and (3) unless the husband is incapable of supporting his wife, he is deemed to be the supporting spouse. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

The determination of what constitutes a "dependent spouse" and what constitutes a "supporting spouse" requires an application of principles of statutory law to facts and are therefore mixed questions of law and fact. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

Findings Supporting Award of Alimony. —Where the record reveals there is sufficient substantial evidence to permit a jury to find (1) that plaintiff is a "supporting spouse" and defendant is a "dependent spouse" as defined in this section, and (2) that plaintiff has abandoned defendant and has willfully failed to provide her with necessary subsistence according to his means and condition so as to render her condition intolerable and her life burdensome, these permissible findings would support an award of alimony. Garner v. Garner, 10 N.C. App. 286, 178 S.E.2d 94 (1970).

Allegations on Ground of Abandonment. —The plaintiff in an action for alimony without divorce on the ground of abandonment is not required to allege the acts and conduct relied upon as the basis of the action with that degree of particularity as is required when the cause of action is based on such indignities to the person as to render her condition intolerable and life burdensome. Richardson v. Richardson, 4 N.C. App. 99, 165 S.E.2d 678 (1969).

Where complaint otherwise contained sufficient allegations to support a cause of action for alimony without divorce on ground of abandonment, the fact that the complaint referred to the repealed § 50-16 rather than to this section is not fatal. Richardson v. Richardson, 4 N.C. App. 99, 165 S.E.2d 678 (1969).

Consent Judgment Valid and Enforceable.—In an action for alimony without divorce, a judgment, entered by consent of the parties, which orders defendant to make alimony payments to his wife, is valid and is enforceable against the husband by attachment for contempt, notwithstanding the absence of allegations or findings that the separation was caused by the misconduct of the husband. Whitesides v. Whitesides, 271 N.C. 560, 157 S.E.2d 82 (1967).

Assaults and Cruel Treatment.—A wife may establish a right to alimony by a showing that she was compelled to leave home in fear of her safety as a result of defendant's assaults and cruel treatment. Gaskins v. Gaskins, 273 N.C. 133, 159 S.E.2d 318 (1968).

The trial judge can award alimony in a lump payment or monthly payments. Austin v. Austin, 12 N.C. App. 390, 183 S.E.2d 428 (1971).

Or Combine Forms of Payment.—The fact that a trial judge used a combination of both a lump sum payment and a continuing monthly payment for alimony does not constitute an abuse of discretion. Austin v. Austin, 12 N.C. App. 390, 183 S.E.2d 428 (1971).

Amount of Pendente Lite Awards Is Discretionary.—The amount of subsistence and counsel fees pendente lite allowed is within the discretion of the court, but this discretion is limited by the factual conditions. Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

Applied in In re McCraw Children, 3 N.C. App. 390, 165 S.E.2d 1 (1969); Little v. Little, 9 N.C. App. 361, 176 S.E.2d 521 (1970); Mitchell v. Mitchell, 12 N.C. App. 54, 182 S.E.2d 627 (1971); Crouch v. Crouch, 14 N.C. App. 49, 187 S.E.2d 348 (1972); Rickert v. Rickert, 282 N.C. 373, 193 S.E.2d 79 (1972).

Quoted in In re Custody of Cox, 17 N.C. App. 687, 195 S.E.2d 132 (1973).

Cited in Blake v. Blake, 6 N.C. App. 410, 170 S.E.2d 87 (1969); Blair v. Blair, 8 N.C. App. 61, 173 S.E.2d 513 (1970); Brandon v. Brandon, 10 N.C. App. 457, 179 S.E.2d 177 (1971); McConnell v. McConnell, 11 N.C. App. 193, 180 S.E.2d 465 (1971); Hill v. Hill, 13 N.C. App. 641, 186 S.E.2d 665 (1972); Greene v. Greene, 15 N.C. App. 314, 190 S.E.2d 258 (1972); Collins v. Collins, 18 N.C. App. 45, 196 S.E.2d 282 (1973).

§ 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 sepa-

rate 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.

Allegation of Adultery in Defendant's Answer and Cross Action Is Sufficient to Withstand Demurrer. — An allegation in the further answer and defense and cross action of the wife that the plaintiff husband had committed adultery is sufficient to withstand a demurrer, in view of subsection (1) of this section. Anthony v. Anthony, 8 N.C. App. 20, 173 S.E.2d 617 (1970).

This section does not define abandonment. Panhorst v. Panhorst, 277 N.C. 664, 178 S.E.2d 387 (1971).

"Abandonment".—One spouse abandons the other, within the meaning of this section, where he or she brings their cohabitation to an end without justification, without the consent of the other spouse and without intent of renewing it. Panhorst v. Panhorst, 277 N.C. 664, 178 S.E.2d 387 (1971).

"Constructive Abandonment". — One spouse may abandon the other without physically leaving the home. In that event, the physical departure of the other spouse from the home is not an abandonment by that spouse. The constructive abandonment by the defaulting spouse may consist of either affirmative acts of cruelty or of a wilful failure, as by a wilful failure to provide adequate support. Panhorst v. Panhorst, 277 N.C. 664, 178 S.E.2d 387 (1971).

There is no wilful failure, and so no constructive abandonment, where the defect of which the departing spouse complains is due to the illness or physical disability of the remaining spouse and his or her consequent inability to act. Panhorst v. Panhorst, 277 N.C. 664, 178 S.E.2d 387 (1971).

If the failure of the wife, asserted by the husband as justification for his departure from the home, is not wilful but is due to her health and physical condition, such failure would not constitute a constructive abandonment of the husband by the wife and would not be justification for his departure from the home. Panhorst v. Panhorst, 277 N.C. 664, 178 S.E.2d 387 (1971).

Abandonment Requires That Separation Be Done Willfully. — A contention that abandonment imports willfulness is an exercise in semantics. To the contrary, abandonment requires that the separation or withdrawal be done willfully and without just cause or provocation. Mode v. Mode, 8 N.C. App. 209, 174 S.E.2d 30 (1970).

The causes leading to the abandonment are relevant and proper subjects for inquiry in an action for alimony without divorce based upon the husband's abandonment. Mode v. Mode, 8 N.C. App. 209, 174 S.E.2d 30 (1970).

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).

A husband may be deemed to have abandoned his wife within the meaning of § 50-7 (1), and so be liable for alimony, notwithstanding the fact that, after cohabitation is brought to an end, he voluntarily provides her with adequate support. Whether his withdrawal from the home, followed by such support, constitutes an abandonment which is ground for suit by the wife for divorce from bed and board, and therefore ground for suit by her for alimony without divorce, depends upon whether his withdrawal from the home was justified by the conduct of the wife. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968), decided under former § 50-16.

If it is determined that the husband's withdrawal from the home was without justification, notwithstanding his voluntary payments for the wife's subsistence thereafter, the court may award permanent alimony to the wife. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968), decided under former § 50-16.

Husband May Prove as Defense That Wife Separated Herself from Him.—In an action by a wife for alimony without divorce, this section does not preclude the husband, who has left the home, from proving as a defense that it was actually the wife who separated herself from him, though she did not leave the home. Panhorst v. Panhorst, 277 N.C. 664, 178 S.E.2d 387 (1971).

What Constitutes Indignities Depends upon Circumstances.—In cases involving alimony without divorce on the grounds that supporting spouse has offered such indignities to the dependent spouse as to render his or her condition intolerable and life burdensome, the Supreme Court has not set an undeviating rule as to what constitutes such indignities but leaves it to the courts to deal with each particular case and to determine it upon its own peculiar circumstances. Presson v. Presson, 12 N.C. App. 109, 182 S.E.2d 614 (1971).

Plaintiff May Rely on Cumulative Effect of Many Years of Mistreatment. — In an action for alimony without divorce the plaintiff has the right to rely on the cumulative effect of many years of mistreatment by the husband and her testimony cannot be limited to events which occurred immediately prior to the alleged abandonment. Mode v. Mode, 8 N.C. App. 209, 174 S.E.2d 30 (1970).

Findings Which Support an Award of Alimony.—Where the record reveals there is sufficient substantial evidence to permit a jury to find (1) that plaintiff is a "supporting spouse" and defendant is a "dependent spouse" as defined in G.S. 50-16.1, and (2) that plaintiff has abandoned defendant and has willfully failed to provide her with necessary subsistence according to his means and condition so as to render her condition intolerable and her life burdensome, these permissible findings would support an award of alimony. Garner v. Garner, 10 N.C. App. 286, 178 S.E.2d 94 (1970).

An order of alimony without divorce and child support is temporary in nature, and if future circumstances justify a change, defendant is at liberty to seek relief in the trial court by motion in the cause. Fonvielle v. Fonvielle, 8 N.C. App. 337, 174 S.E.2d 67 (1970).

In a wife's action for alimony without divorce and for child support, the Court of Appeals will not disturb an order of the trial court requiring the husband to make substantial payments to the wife for alimony and for support of the minor children, notwithstanding the husband's contention that he anticipates a substantial decrease in earning, since the order is temporary in nature and is subject to modification upon change of circumstances. Fonvielle v. Fonvielle, 8 N.C. App. 337, 174 S.E.2d 67 (1970).

The issues raised by the pleadings must be passed upon by a jury before permanent alimony may be awarded. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968), decided under former § 50-16.

Applied in Taylor v. Taylor, 9 N.C. App. 260, 175 S.E.2d 604 (1970); Sprinkle v. Sprinkle, 17 N.C. App. 175, 193 S.E.2d 468 (1972); Koob v. Koob, 283 N.C. 129, 195 S.E.2d 552 (1973); Medlin v. Medlin, 17 N.C. App. 582, 195 S.E.2d 65 (1973).

Cited in Richardson v. Richardson, 4 N.C. App. 99, 165 S.E.2d 678 (1969).

§ 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.—A number of 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).

The remedy of subsistence and counsel fees pendente lite is intended to enable the wife to maintain herself according to her station in life and to employ counsel to meet her husband at the trial upon substantially equal terms. Brady v. Brady, 273 N.C. 29, 160 S.E.2d 13 (1968); Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

The purpose of the award of support pendente lite is to provide for the reasonable and proper support of the wife in an emergency situation, pending the final determination of her rights. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968), decided under former § 50-16; Dixon v. Dixon, 6 N.C. App. 623, 170 S.E.2d 561 (1969).

The granting of alimony pendente lite is given by statute for the very purpose that the wife have immediate support and be able to maintain her action. It is a matter of urgency. Brady v. Brady, 273 N.C. 299, 160 S.E.2d 13 (1968).

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); Harper v. Harper, 9 N.C. App. 341, 176 S.E.2d 48 (1970).

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).

The amount of subsistence and counsel fees pendente lite to be allowed is within the discretion of the court, and the court's decision is not reviewable except for abuse of discretion or error of law. Brady v. Brady, 273 N.C. 299, 160 S.E.2d 13 (1968); Austin v. Austin, 12 N.C. App. 390, 183 S.E.2d 428 (1971).

Determination of what constitutes a "dependent spouse" and what constitutes a "supporting spouse" requires an application of principles of statutory law to facts

and are therefore mixed questions of law and fact. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

Prerequisites for Determination of Award of Counsel Fees.—The clear and unambiguous language of this section and § 50-16.4 provides as prerequisites for determination of an award of counsel fees the following: (1) The spouse is entitled to the relief demanded; (2) The spouse is a dependent spouse; and (3) The dependent spouse has not sufficient means whereon to subsist during the prosecution of the suit and to defray the necessary expenses thereof. Rickert v. Rickert, 282 N.C. 373, 193 S.E.2d 79 (1972).

Determination of Amount Is Made in Same Manner as Alimony.—The determination of the amount and the payment of alimony pendente lite is to be made in the same manner as alimony, except that alimony pendente lite shall be limited to the pendency of the suit in which the application is made. Blake v. Blake, 6 N.C. App. 410, 170 S.E.2d 87 (1969).

The amount of alimony pendente lite is to be determined in the discretion of the trial judge in the same manner as the amount of alimony is determined. Little v. Little, 9 N.C. App. 361, 176 S.E.2d 521 (1970).

Mandatory That Both Grounds Stated in Subsection (a) Exist before Making Award. — The two subdivisions of subsection (a) are connected by the word "and"; it is therefore mandatory that the grounds stated in both of these subdivisions shall be found to exist before an award of alimony pendente lite may be made. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971); Mitchell v. Mitchell, 12 N.C. App. 54, 182 S.E.2d 627 (1971); Presson v. Presson, 13 N.C. App. 81, 185 S.E.2d 17 (1971); Whitney v. Whitney, 15 N.C. App. 151, 189 S.E.2d 629 (1972).

To obtain alimony pendente lite the dependent spouse must show, among other things, that he or she is entitled to the relief demanded by such spouse in the action in which the application for alimony pendente lite is made, and that he or she has not sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof. Fore v. Fore, 15 N.C. App. 226, 189 S.E.2d 520 (1972).

Award Should Be Based on Defendant's Earnings at Time of Award.—If the husband is honestly and in good faith engaged in a business to which he is properly adapted, and is making a good faith effort to earn a reasonable income, the award should be based on the amount which defendant is earning when the award is made. Robinson v. Robinson, 10 N.C. App. 463, 179 S.E.2d 144 (1971).

To base an award on capacity to earn rather than actual earnings, there should be a finding based on evidence that the husband is failing to exercise his capacity to earn because of a disregard of his marital obligation to provide reasonable support for his wife and children. Robinson v. Robinson, 10 N.C. App. 463, 179 S.E.2d 144 (1971).

Burden upon Dependent Spouse.—Upon the application of dependent spouse for alimony pendente lite, the burden was upon her to establish (1) that she is entitled to relief in her action and, (2) that she does not have sufficient means whereon to subsist during the prosecution of her claim or to defray the necessary expenses thereof. In re Mason, 13 N.C. App. 334, 185 S.E.2d 433 (1971).

Amount of Allowance Is in Trial Judge's Discretion. — When subsistence pendente lite or counsel fees are allowed pursuant to the statutory requirements, the amount of the allowance is in the trial judge's discretion, and is reviewable only upon showing an abuse of his discretion. Rickert v. Rickert, 282 N.C. 373, 193 S.E.2d 79 (1972).

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).

The discretion of the court in making allowances pendente lite is not an absolute discretion to be exercised at the pleasure of the court. It is to be exercised within certain limits and with respect to factual conditions which are controlling. Brady v. Brady, 273 N.C. 299, 160 S.E.2d 13 (1968).

The order granting or denying an award of subsistence pendente lite, with or without counsel fees, whether or not containing findings of fact, is not a final determination of and does not affect the final rights of the parties. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968), decided under former § 50-16.

The amount of subsistence and counsel fees pendente lite allowed is within the discretion of the court, but that this discretion is limited by the factual conditions. Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

Discretion in making allowances pen-

dente lite is confined to consideration of the necessities of the wife on the one hand, and the means of the husband on the other. Brady v. Brady, 273 N.C. 299, 160 S.E.2d 13 (1968).

The facts required by the statutes must be alleged and proved to support an order for subsistence pendente lite. Rickert v. Rickert, 282 N.C. 373, 193 S.E.2d 79 (1972).

Setting Forth Findings of Fact.—An award pendente lite may be made by the judge, and he is not required to set forth in his order any findings of fact where there is no allegation of adultery by the wife, though it is better practice for such findings of fact to be made and set forth in the order. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968), decided under former § 50-16.

In making findings of fact under subsection (f) of § 50-16.8 it is not necessary that the trial judge make detailed findings as to each allegation and evidentiary fact presented. It is necessary that he find the ultimate facts sufficient to establish that the dependent spouse is entitled to an award of alimony pendente lite under the provisions of subsection (a) of this section. Blake v. Blake, 6 N.C. App. 410, 170 S.E.2d 87 (1969).

When effect is given to the finding that the plaintiff's motion for alimony pendente lite and for counsel fees should be allowed, together with all of the other findings, such is sufficient to comply with the provisions of this section relating to the requirements for an award of alimony pendente lite. Peeler v. Peeler, 7 N.C. App. 456, 172 S.E.2d 915 (1970).

Finding on Right to Relief Is Essential.—It is essential that a sufficient finding that the dependent spouse is entitled to the relief demanded in the action in which the application for alimony pendente lite is made. Whitney v. Whitney, 15 N.C. App. 151, 189 S.E.2d 629 (1972); Sprinkle v. Sprinkle, 17 N.C. App. 175, 193 S.E.2d 468 (1972).

The judge must find the ultimate facts sufficient to establish that the dependent spouse is entitled to an award of alimony pendente lite under the provisions of subsection (a). Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

It is necessary for the trial judge to make findings from which it can be determined, upon appellate review, that an award of alimony pendente lite is justified and appropriate in the case. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

The trial judge is not required to make negative findings justifying the denial of an application by dependent spouse for alimony pendente lite. In re Mason, 13 N.C. App. 334, 185 S.E.2d 433 (1971).

Lack of Findings as to Spouse's Means Is Reversible Error.—Failure to make specific findings as to the sufficiency of dependent spouse's means of subsistence during the prosecution of her action and of defraying the necessary expenses thereof constitutes reversible error. Mitchell v. Mitchell, 12 N.C. App. 54, 182 S.E.2d 627 (1971).

Court properly denied a wife's motion for an interim award of alimony pendente lite and counsel fees in her suit for alimony without divorce, where there were findings that (1) the plaintiff and her husband had separated by mutual agreement, (2) the husband did not abandon the wife, and (3) the husband was guilty of no misconduct that would support an award of alimony. Harper v. Harper, 9 N.C. App. 341, 176 S.E.2d 48 (1970).

Court Erred in Awarding Alimony Pendente Lite and Counsel Fees.—Where the finding that plaintiff-wife was a "dependent spouse" amounted to a mere conclusion unsupported by a finding of fact, and where there were no findings upon which to conclude she was entitled to the relief demanded under subsection (a)(1), the trial court erred in ordering alimony pendente lite and counsel fees. Kornegay v. Kornegay, 15 N.C. App. 751, 190 S.E.2d 646 (1972).

Where the wife has a monthly income substantially larger than her husband's the requirements of subsection (a)(2) are not made to appear, and it is error to award alimony pendente lite and counsel fees pendente lite. Davis v. Davis, 11 N.C. App. 115, 180 S.E.2d 374 (1971).

Amount of Support Allowance Not Necessarily Dependent upon Husband's Earnings.—The granting of a support allowance and the amount thereof does not necessarily depend upon the earnings of the husband. One who is able-bodied and capable of earning, may be ordered to pay subsistence. Robinson v. Robinson, 10 N.C. App. 463, 179 S.E.2d 144 (1971).

It was error in ordering the defendant to pay the monthly premiums on two life insurance policies in which the child was named as primary beneficiary because such payments provide nothing to meet the immediate needs of the child pending the hearing of the case on its merits. Davis v. Davis, 11 N.C. App. 115, 180 S.E.2d 374 (1971).

Pendente Lite Order Cannot Set Up Savings Account.—A pendente lite order is intended to go no further than provide

subsistence and counsel fees pending the litigation. It cannot set up a savings account in favor of the plaintiff. Such is not the purpose and cannot be made the effect of an order. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968), decided under former § 50-16.

Appeal as a Matter of Right.—An order requiring payment of alimony pendente lite and counsel fees affects a substantial right from which an appeal lies as a matter of right. Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

Scope of Review.—Proper exercise of the trial judge's authority in granting alimony, alimony pendente lite, or counsel fees is a question of law, reviewable on appeal. Rickert v. Rickert, 282 N.C. 373, 193 S.E.2d 79 (1972).

Termination of Order for Alimony Pendente Lite. — A final order in a case for alimony without divorce terminates an order for alimony pendente lite. Peeler v. Peeler, 7 N.C. App. 456, 172 S.E.2d 915 (1970).

Termination of Order for Subsistence Pendente Lite or Counsel Fees.—Ordinarily, the award of permanent alimony terminates an order for subsistence pendente lite or counsel fees. Rickert v. Rickert, 282 N.C. 373, 193 S.E.2d 79 (1972).

Applied in Williams v. Williams, 12 N.C. App. 170, 182 S.E.2d 667 (1971); Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971); Rickert v. Rickert, 14 N.C. App. 351, 188 S.E.2d 751 (1972); Medlin v. Medlin, 17 N.C. App. 582, 195 S.E.2d 65 (1973); Little v. Little, 18 N.C. App. 311, 196 S.E.2d 562 (1973).

Stated in Hatcher v. Hatcher, 7 N.C. App. 562, 173 S.E.2d 33 (1970).

Cited in Blair v. Blair, 8 N.C. App. 61, 173 S.E.2d 513 (1970); Fonvielle v. Fonvielle, 8 N.C. App. 337, 174 S.E.2d 67 (1970).

§ 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.—A number of 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 right of a wife to subsistence pending trial and to attorney fees was derived from the common law. Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

Apart from statute, there is no duty upon the husband, before or after separation, to furnish his wife with legal counsel, whether he or another be the adverse party to her controversy. Rickert v. Rickert, 282 N.C. 373, 193 S.E.2d 79 (1972).

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); Sprinkle v. Sprinkle, 17 N.C. App. 175, 193 S.E.2d 468 (1972).

The purpose of the allowance of counsel fees pendente lite is to enable the wife, as litigant, to meet the husband, as litigant, on substantially even terms by making it possible for her to employ adequate counsel. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968), decided under former § 50-16; Rickert v. Rickert, 282 N.C. 373, 193 S.E.2d 79 (1972).

The remedy of subsistence and counsel fees pendente lite is intended to enable the wife to maintain herself according to her station in life and employ counsel to meet her husband at trial upon substantially equal terms. Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

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); Harper v. Harper, 9 N.C. App. 341, 176 S.E.2d 48 (1970).

This section requires that the amount of the counsel fees shall be reasonable and the reasonable amount is to be determined by the trial judge in the exercise of his discretion. Little v. Little, 9 N.C. App. 361, 176 S.E.2d 521 (1970).

The determination of what are reasonable counsel fees is within the discretion of the judge. Peeler v. Peeler, 7 N.C. App. 456, 172 S.E.2d 915 (1970).

The amount of counsel fees is within the discretion of the trial court and is subject to review only for abuse. Rickert v. Rickert, 14 N.C. App. 351, 188 S.E.2d 751 (1972).

The amount of subsistence and counsel fees pendente lite allowed is within the

discretion of the court, but this discretion is limited by the factual conditions. Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

When subsistence pendente lite or counsel fees are allowed pursuant to the statutory requirements, the amount of the allowance is in the trial judge's discretion, and is reviewable only upon showing an abuse of his discretion. Rickert v. Rickert, 282 N.C. 373, 193 S.E.2d 79 (1972).

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); Rickert v. Rickert, 14 N.C. App. 351, 188 S.E.2d 751 (1972).

The clear and unambiguous language of this section and § 50-16.3 provides as prerequisites for determination of an award of counsel fees the following: (1) The spouse is entitled to the relief demanded; (2) the spouse is a dependent spouse; and (3) the dependent spouse has not sufficient means whereon to subsist during the prosecution of the suit and to defray the necessary expenses thereof. Rickert v. Rickert, 282 N.C. 373, 193 S.E.2d 79 (1972).

Findings of Fact Must Support Award.—This section and § 50-13.6 permit the entering of a proper order for reasonable counsel fees for the benefit of a dependent spouse, but only where the record contains findings of fact, such as the nature and scope of the legal services rendered and the skill and time required, upon which a determination of the requisite reasonableness could be based. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

And Absence of Sufficient Findings Is Reversible Error.—The trial court errs in ordering defendant to pay fees to plaintiff's attorneys, where the court does not make sufficient findings as to plaintiff being a dependent spouse and defendant being the supporting spouse. Smith v. Smith, 15 N.C. App. 180, 189 S.E.2d 525 (1972).

The lack of any evidence as to reasonable attorney's fees and the absence of any findings by the trial judge based upon such evidence as to the reasonable worth of attorney's fees are grounds for the reversal of a judgment awarding attorney's fees. Austin v. Austin, 12 N.C. App. 390, 183 S.E.2d 428 (1971).

Allowance of Fees Cannot Be Based on Findings Insufficient to Support Alimony Pendente Lite. — Whenever an order is deficient in findings to establish that a dependent spouse is entitled to alimony pendente lite pursuant to § 50-16.3, an award of counsel fees under this section is also unsupported. Presson v. Presson, 13 N.C. App. 81, 185 S.E.2d 17 (1971).

Because of the clear statutory mandate, a spouse who is not entitled to alimony pendente lite is also not entitled to an award of counsel fees. Sprinkle v. Sprinkle, 17 N.C. App. 175, 193 S.E.2d 468 (1972).

Income from Trust Administered in State Is Subject to Execution.—In a wife's action for divorce from bed and board and for permanent alimony, the husband's income from a trust created in another jurisdiction and administered by a trustee bank in this State is subject to execution to satisfy the judgment of the wife against the husband for alimony, child support and counsel fees. Swink v. Swink, 6 N.C. App. 161, 169 S.E.2d 539 (1969).

Appeal as a Matter of Right.—An order requiring payment of alimony pendente lite and counsel fees affects a substantial right from which an appeal lies as a matter of right. Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

Scope of Review.—Proper exercise of the trial judge's authority in granting alimony, alimony pendente lite, or counsel fees is a question of law, reviewable on appeal. Rickert v. Rickert, 282 N.C. 373, 193 S.E.2d 79 (1972).

Allowance of Fees Controlled by Stipulation on Alimony Pendente Lite.—A defendant, by stipulating that plaintiff was entitled to alimony pendente lite, conceded an ultimate fact and cannot object on appeal to the award of reasonable counsel fees. Rickert v. Rickert, 14 N.C. App. 351, 188 S.E.2d 751 (1972).

A court properly denied a wife's motion for an interim award of alimony pendente lite and counsel fees in her suit for alimony without divorce, where there were findings that (1) the plaintiff and her husband had separated by mutual agreement, (2) the husband did not abandon the wife, and (3) the husband was guilty of no misconduct that would support an award of alimony. Harper v. Harper, 9 N.C. App. 341, 176 S.E.2d 48 (1970).

Trial Court Erred in Ordering Alimony Pendente Lite and Counsel Fees.—Where the finding that plaintiff-wife was a "dependent spouse" amounted to a mere conclusion unsupported by a finding of fact, and where there were no findings upon which to conclude she was entitled to the relief demanded under § 50-16.3 (a)(1), the trial court erred in ordering alimony

pendente lite and counsel fees. Kornegay v. Kornegay, 15 N.C. App. 751, 190 S.E.2d 646 (1972).

Award of permanent alimony ordinarily terminates an order for subsistence pendente lite or counsel fees. Rickert v. Rickert, 282 N.C. 373, 193 S.E.2d 79 (1972).

Applied in Williams v. Williams, 12 N.C. App. 170, 182 S.E.2d 667 (1971); Collins v. Collins, 18 N.C. App. 45, 196 S.E.2d 282 (1973); Little v. Little, 18 N.C. App. 311, 196 S.E.2d 562 (1973).

Stated in Blair v. Blair, 8 N.C. App. 61, 173 S.E.2d 513 (1970).

Cited in Fonvielle v. Fonvielle, 8 N.C. App. 337, 174 S.E.2d 67 (1970).

§ 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.—A number of cases in the following note were decided under former § 50-16, which dealt with actions for alimony without divorce.

The purpose of the award is to provide for the reasonable support of the wife, not to punish the husband or to divide his estate. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968), decided under former § 50-16.

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. Sprinkle v. Sprinkle, 17 N.C. App. 175, 193 S.E.2d 468 (1972).

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).

The amount of alimony to be awarded is in the discretion of the court, but this is not an absolute discretion and unreviewable. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968), decided under former § 50-16.

The amount to be awarded for support pendente lite rests in the sound discretion of the hearing judge, and his determination will not be disturbed in the absence of a clear abuse of that discretion. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968), decided under former § 50-16.

The amount allowed by the court for alimony and support of children of the marriage will be disturbed only where there is a gross abuse of discretion. Swink v. Swink, 6 N.C. App. 161, 169 S.E.2d 539 (1969).

It is well settled that the amount to be awarded for alimony pendente lite and counsel fees rests in the sound discretion of the trial judge and his determination will not be disturbed in the absence of a clear abuse of that discretion. Dixon v. Dixon, 6 N.C. App. 623, 170 S.E.2d 561 (1969).

After consideration of all the elements enumerated in this section, the amount to be awarded for alimony pendente lite rests in the sound discretion of the judge, and his determination thereof will not be disturbed in the absence of an abuse of discretion. Peeler v. Peeler, 7 N.C. App. 456, 172 S.E.2d 915 (1970).

The amount of alimony pendente lite is to be determined in the discretion of the trial judge in the same manner as the amount of alimony is determined. Little v. Little, 9 N.C. App. 361, 176 S.E.2d 521 (1970).

Proper Exercise of Discretion Is Question of Law.—Proper exercise of the trial judge's authority in granting alimony, alimony pendente lite, or counsel fees is a question of law, reviewable on appeal. Rickert v. Rickert, 282 N.C. 373, 193 S.E.2d 79 (1972).

Discretion 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).

In determining the needs of a dependent spouse, all of the circumstances of the parties should be taken into consideration, including the property, earnings, earning capacity, condition and accustomed standard of living of the parties. Sprinkle v. Sprinkle, 17 N.C. App. 175, 193 S.E.2d 468 (1972).

Award Should Be Based on Defendent's Earnings at Time of Award.—If the husband is honestly and in good faith engaged in a business to which he is properly adapted, and is making a good faith effort to earn a reasonable income, the award should be based on the amount which defendant is earning when the award is made. Robinson v. Robinson, 10 N.C. App. 463, 179 S.E.2d 144 (1971).

One who has no income, but is able-bodied and capable of earning, may be ordered to pay subsistence. Brady v. Brady, 273 N.C. 299, 160 S.E.2d 13 (1968).

The granting of a support allowance and the amount thereof does not necessarily depend upon the earnings of the husband and one who is able-bodied and capable of earning, may be ordered to pay subsistence. Robinson v. Robinson, 10 N.C. App. 463, 179 S.E.2d 144 (1971).

To base an award on capacity to earn rather than actual earnings, there should be a finding based on evidence that the husband is failing to exercise his capacity to earn because of a disregard of his marital obligation to provide reasonable support for his wife and children. Robinson v. Robinson, 10 N.C. App. 463, 179 S.E.2d 144 (1971).

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).

Dependent Spouse Need Not Be Impoverished Before Award Can Be Made.—The law does not require that a dependent spouse should be impoverished before the court can make an award of alimony pendente lite. Peeler v. Peeler, 7 N.C. App. 456, 172 S.E.2d 915 (1970); Sprinkle v. Sprinkle, 17 N.C. App. 175, 193 S.E.2d 468 (1972).

The financial ability of the husband to pay is a major factor in the determination of the amount of subsistence to be awarded. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968), decided under former § 50-16.

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).

The fact that the wife has property of her own does not relieve the husband of the duty to support her following his unjustified abandonment of her. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968), decided under former § 50-16.

Alimony pendente lite is measured, among other things, by the needs of the dependent spouse and the ability of the supporting spouse. The mere fact that the wife has property or means of her own does not prohibit an award of alimony pendente lite. Peeler v. Peeler, 7 N.C. App. 456, 172 S.E.2d 915 (1970); Sprinkle v. Sprinkle, 17 N.C. App. 175, 193 S.E.2d 468 (1972).

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).

The wife of a wealthy man, who has abandoned her without justification, should be awarded an amount somewhat commensurate with the normal standard of living of a wife of a man of like financial resources. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968), decided under former § 50-16.

Husband May Be Required to Provide for Furnishing of Residence. — The court has authority to require defendant husband to provide for the furnishing of the residence where plaintiff and two children reside, but the court should fix a definite dollar amount for defendant husband to expend for this purpose. Kearns v. Kearns, 6 N.C. App. 319, 170 S.E.2d 132 (1969).

And He May Be Ordered to Pay Debts of Parties.—The trial court has authority to order that defendant husband pay all debts of the parties as of the date of the order, such payment being associated with defendant's duty to support his wife. Kearns v. Kearns, 6 N.C. App. 319, 170 S.E.2d 132 (1969).

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).

Applied in Blake v. Blake, 6 N.C. App. 410, 170 S.E.2d 87 (1969); Little v. Little, 18 N.C. App. 311, 196 S.E.2d 562 (1973).

Cited in Hatcher v. Hatcher, 7 N.C. App. 562, 173 S.E.2d 33 (1970).

§ 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.

Subsection (a) is similar in language and import to prior law. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

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).

Court Must Make Findings If Adultery Is Pleaded.—When adultery is pleaded in bar of a demand for alimony or alimony pendente lite, an award or allowance of alimony pendente lite will not be sustained in the absence of a finding of fact on the issue of adultery in favor of the party seeking such an award. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

Evidence of Adultery.—While authority for blood-grouping tests is limited to an issue of paternity, in a case in which the issue is raised the results of the tests, if they exclude defendant as the father of a child admittedly born during the subsistence of the marriage, would also be evidence of adultery. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

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).

Stated in Greene v. Greene, 15 N.C. App. 314, 190 S.E.2d 258 (1972).

§ 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 provided in subsection (a) or for the securing thereof, the court may also enter an order which shall transfer title, as provided in G.S. 1A-1, Rule 70 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 and G.S. 1A-1, Rule 65, 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; 1969, c. 541, s. 5; c. 895, s. 18.)

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

Cross Reference.—See note to § 50-16.1.

Editor's Note.—The first 1969 amendment substituted "of" for "or" between "assignment" and "wages" near the end of subsection (b).

The second 1969 amendment substituted "G.S. 1A-1, Rule 70" for "G.S. 1-227" in subsection (c) and inserted "and G.S. 1A-1, Rule 65" in subsection (f).

Session Laws 1969, c. 895, s. 21, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act, no significance shall be attached to the fact that this act was enacted at a later date."

The trial judge can award alimony in a lump payment or monthly payments. Austin v. Austin, 12 N.C. App. 390, 183 S.E.2d 428 (1971).

Or Combine Forms of Payment.—The fact that a trial judge used a combination of both a lump sum payment and a continuing monthly payment for alimony does not constitute an abuse of discretion. Austin v. Austin, 12 N.C. App. 390, 183 S.E.2d 428 (1971).

Agreement of Parties Incorporated in Judgment Is Enforceable by Contempt Proceedings.—Where, in the wife's action for alimony and child support, the parties agreed to the terms of a judgment providing that the husband would make specified monthly support payments, and the judgment entered by the court ordered the husband to make the payments which he had agreed to make, the husband's obligation to make the support payments may be enforced by contempt proceedings. Parker v. Parker, 13 N.C. App. 616, 186 S.E.2d 607 (1972).

Judgment May Be Enforced by Contempt Proceedings. — A judgment ordering the payment of alimony may be enforced by the contempt power as provided for in §§ 5-8 and 5-9. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

A district court judge may hold a party to a proceeding before him in civil contempt for failure to comply with court orders issued pursuant to a confession of judgment regarding payment of alimony which was entered in the superior court prior to the establishment of a district court for the district in which the order was entered. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

But the trial court must find as a fact that the defendant possessed the means to comply with orders of the court during the period when he was in default. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

An order for a defendant's arrest for wilful contempt of an earlier court order requiring him to make alimony payments must be remanded, where there was no evidence to support a finding that defendant presently possessed the means to comply with the alimony order. Earnhardt v. Earnhardt, 9 N.C. App. 213, 175 S.E.2d 744 (1970).

Where the court enters judgment as for civil contempt, the court must find not only failure to comply with the order but that the defendant presently possesses the means to comply. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

Where the lower court had not found as a fact that the defendant possessed the means to comply with the orders for payment of subsistence pendente lite at any time during the period when he was in default in such payments, the finding that the defendant's failure to make the payments of subsistence was deliberate and wilful was not supported by the record, and the decree committing him to imprisonment for contempt was set aside. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

Facts Found in Contempt Proceeding Not Reviewable Except upon Their Sufficiency. — In proceedings for contempt the facts found by the judge are not reviewable except for the purpose of passing upon their sufficiency to warrant the judgment. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

Nonresident Defendant May Be Required to Post Bond.—Under § 50-13.4(f)(1) and subsection (b) of this section, the court properly required supporting spouse to post a security bond to secure his compliance with a judgment requiring him to make monthly payments for support of his wife and children, where the court found that defendant no longer resided within the State and that he had no attorney of record in the case. Parker v. Parker, 13 N.C. App. 616, 186 S.E.2d 607 (1972).

Error to Imprison Where Party Can Pay Portion of Alimony.—Where the trial judge found that the party was a healthy and able-bodied man for his age, and further found that he could pay at least a portion of the alimony, it was error to imprison him until he should pay the whole amount. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

Punishment by Contempt Requires "Wilful" Disobedience. — Failure to obey an order of a court cannot be punished by contempt proceedings unless the disobedience is wilful. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

And "wilful" imports knowledge and a stubborn resistance. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

One does not act "wilfully" in failing to comply with a judgment if it has not been within his power to do so since the judgment was rendered. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

Income from Trust Administered in State Is Subject to Execution.—In a wife's action for divorce from bed and board and for permanent alimony, the husband's income from a trust created in another jurisdiction and administered by a trustee bank in this State is subject to execution to satisfy the judgment of the wife against the husband for alimony, child support and counsel fees. Swink v. Swink, 6 N.C. App. 161, 169 S.E.2d 539 (1969).

Court Cannot Order Sale of Land Owned by Husband and Wife as Tenants by Entirety.—Although the rents and profits therefrom and the actual possession thereof may be made available for the support of the wife, the court does not have the power to order the sale of land owned by husband and wife as tenants by the entirety in order to procure funds to pay alimony to the wife or to pay her counsel fees. Koob v. Koob, 283 N.C. 129, 195 S.E.2d 552 (1973).

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).

Applied in Kearns v. Kearns, 6 N.C. App. 319, 170 S.E.2d 132 (1969); Little v. Little, 9 N.C. App. 361, 176 S.E.2d 521 (1970); Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971); Williams v. Williams, 13 N.C. App. 468, 186 S.E.2d 210 (1972).

Quoted in Robinson v. Robinson, 10 N.C. App. 463, 179 S.E.2d 144 (1971).

Cited in Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969); Hinton v. Hinton, 17 N.C. App. 715, 195 S.E.2d 319 (1973).

§ 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.

(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; 1971, c. 1185, s. 25.)

Cross Reference.—See note to § 50-16.1.

Editor's Note.—The 1971 amendment, effective Oct. 1, 1971, in subsection (g), deleted the former second and third sentences dealing with applications for alimony pendente lite until a district court having jurisdiction shall have been established, and a former fourth sentence providing: "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)."

A number of cases in the following note were decided under former § 50-16, which dealt with actions for alimony without divorce.

"Dependent Spouse".—To find that one is a "dependent spouse" within the meaning of § 50-16.1(3) is a consequence of two or more related propositions taken as premises, one being the fact that the relationship

of spouse exists, and the other consisting of at least the finding that one of the two alternatives in § 50-16.1(3) is a fact. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

"Supporting Spouse".—To find that one is a "supporting spouse" within the meaning of § 50-16.1(4) is a consequence of two or more related propositions taken as premises, one being that the relationship of spouse exists, and the other consisting of the finding that one of three alternatives in § 50-16.1(4) is a fact. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

The determination of what constitutes a "dependent spouse" and what constitutes a "supporting spouse" requires an application of principles of statutory law to facts and are therefore mixed questions of law and fact. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

Jurisdiction over Alimony Proceedings. — The district court has jurisdiction over alimony proceedings and, indeed, the legislature has decreed that it is the only "proper" division for such a proceeding. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

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).

Procedure in Actions for Alimony without Divorce.—This section changes the procedure to be followed in actions for alimony without divorce from the divorce procedure set forth in § 50-10, to the procedure applicable to other civil actions. Williams v. Williams, 13 N.C. App. 468, 186 S.E.2d 210 (1972); Whitaker v. Whitaker, 16 N.C. App. 432, 192 S.E.2d 80 (1972).

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).

Pursuant to subsection (g) of this section, a supporting spouse is not entitled to a jury trial on the matter of alimony pendente lite. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

Parties May Waive Jury Trial.—Issues of fact in an action for alimony without divorce may be determined by the judge if a jury trial is waived by failing to make timely demand pursuant to § 1A-1, Rule 38(b), since this section changes the procedure to be followed in actions for alimony without divorce from the divorce procedure set forth in § 50-10 to the procedure applicable to other civil actions. Williams v. Williams, 13 N.C. App. 468, 186 S.E.2d 210 (1972); Whitaker v. Whitaker, 16 N.C. App. 432, 192 S.E.2d 80 (1972); Sprinkle v. Sprinkle, 17 N.C. App. 175, 193 S.E.2d 468 (1972).

Improper venue, in an action for alimony pendente lite and alimony without divorce, is subject to attack under § 1A-1, Rule 12(b)(3). Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

Court Lacked Authority to Rule While Change of Venue Motion Was Pending.— When supporting spouse in apt time made a proper motion for change of venue under § 1A-1, Rule 12(b)(3), it became a matter of right and the district court was without authority to proceed further in the cause until the motion to remove had been determined. Since the court lacked authority to make any ruling on the merits while the motion to change venue was pending, it was error to enter an order granting alimony pendente lite and counsel fees. Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

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" in former § 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).

Trial Judge Is Required to Make Findings of Fact. — The provision of Rule 52(a)(2) that the trial judge is not required to make findings of fact unless requested to do so by a party does not abrogate the specific requirement of subsection (f) of this section that the trial judge shall make findings of fact upon an application for alimony pendente lite, since the Rules of Civil Procedure are of general application and do not abrogate the requirements of

a statute of more specificity. Hatcher v. Hatcher, 7 N.C. App. 562, 173 S.E.2d 33 (1970).

Rule 52 of the Rules of Civil Procedure entitled "Findings by the Court" does not apply in awarding alimony pendente lite. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

While the precise factual findings which must be made under subsection (f) of this section will vary depending upon the pleadings, evidence and circumstances of each case, the trial judge must make sufficient findings of the controverted material facts at issue to show that the award of alimony pendente lite is justified and appropriate. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971); Presson v. Presson, 13 N.C. App. 81, 185 S.E.2d 17 (1971).

The requirement of subsection (f) that facts be found to support an award of alimony is a new one imposed by the 1967 Act, Session Laws 1967, c. 1153, s. 2. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

But Detailed Findings Are Not Required. — In making findings of fact under subsection (f) of this section it is not necessary that the trial judge make detailed findings as to each allegation and evidentiary fact presented. It is necessary that he find the ultimate facts sufficient to establish that the dependent spouse is entitled to an award of alimony pendente lite under the provisions of § 50-16.3(a). Blake v. Blake, 6 N.C. App. 410, 170 S.E.2d 87 (1969).

The Court of Appeals does not interpret subsection (f) to require the trial judge to make findings as to each allegation and evidentiary fact presented. However, it is necessary for the trial judge to make findings from which it can be determined, upon appellate review, that an award of alimony pendente lite is justified and appropriate in the case. Hatcher v. Hatcher, 7 N.C. App. 562, 173 S.E.2d 33 (1970); Sprinkle v. Sprinkle, 17 N.C. App. 175, 193 S.E.2d 468 (1972).

In making findings of fact, it is not necessary that the trial judge make detailed findings as to each allegation and evidentiary fact presented. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

Whether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

Evidentiary facts are those subsidiary facts required to prove the ultimate facts. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

The judge must find the ultimate facts sufficient to establish that the dependent spouse is entitled to an award of alimony pendente lite under the provisions of § 50-16.3(a). Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

Also specific factual findings as to each ultimate fact at issue upon which the rights of the litigants are predicated must be found. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971); Sprinkle v. Sprinkle, 17 N.C. App. 175, 193 S.E.2d 468 (1972).

It is necessary for the trial judge to make findings from which it can be determined, upon appellate review, that an award of alimony pendente lite is justified and appropriate in the case. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

Finding of Fact Is Narrative Statement of Ultimate Fact.—A finding of fact in an alimony pendente lite matter is a narrative statement by the trial judge of the ultimate fact at issue and need not include the evidentiary or subsidiary facts required to prove the ultimate facts. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971); Sprinkle v. Sprinkle, 17 N.C. App. 175, 193 S.E.2d 468 (1972).

Findings that the defendant left the home on July 21, 1970, had abandoned the plaintiff, and had failed to provide adequate support for her were a narrative statement of some of the ultimate facts at issue, and were not conclusions. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

The ultimate facts at issue in proceedings often differ, thus a necessary finding of facts in one case may not be necessary in another case. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

The findings of fact in any given case should be "tailor-made" to settle the matters at issue between the parties. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

Present Requirement for Findings of Fact Is Departure from Previous Practice. —The present statutory requirement for findings of fact by the trial judge in pendente lite awards of alimony is a departure

from the practice as it existed prior to 1 October 1967. Hatcher v. Hatcher, 7 N.C. App. 562, 173 S.E.2d 33 (1970).

The requirement that the judge shall find the facts is a departure from the practice as it existed prior to October 1, 1967. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

The statutory requirement for findings of fact changes the prior rule that no findings of fact were necessary in alimony pendente lite matters unless adultery was charged against the wife. Rickert v. Rickert, 282 N.C. 373, 193 S.E.2d 79 (1972).

The distinction between the "finding of facts" and the "stating of conclusions" by a trial judge after he has heard the evidence in an alimony pendente lite matter is somewhat analogous to the distinction between a witness testifying as to a "fact" and stating his "opinion." Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

Facts are the basis for conclusions, and to call a "conclusion" a "finding of fact" does not make it one. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

Facts found in an alimony pendente lite case must be determinative of all questions at issue. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971); Sprinkle v. Sprinkle, 17 N.C. App. 175, 193 S.E.2d 468 (1972).

A failure to make a proper finding of fact in a matter at issue between the parties will result in prejudicial error, especially where the evidence is conflicting. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971); Sprinkle v. Sprinkle, 17 N.C. App. 175, 193 S.E.2d 468 (1972).

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).

Award of permanent alimony ordinarily terminates an order for subsistence pendente lite or counsel fees. Rickert v. Rickert, 282 N.C. 373, 193 S.E.2d 79 (1972).

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).

Appellate Review.—The granting or denial of a motion for temporary alimony (pendente lite) is within the discretion of the trial judge and as such is normally not reviewable on appeal. However, the same may not be said about a dismissal of an action for alimony without divorce. Holcomb v. Holcomb, 7 N.C. App. 329, 172 S.E.2d 212 (1970).

Applied in Kearns v. Kearns, 6 N.C. App. 319, 170 S.E.2d 132 (1969); Peeler v. Peeler, 7 N.C. App. 456, 172 S.E.2d 915 (1970); Boone v. Boone, 8 N.C. App. 524, 174 S.E.2d 833 (1970).

Cited in Harper v. Harper, 9 N.C. App. 341, 176 S.E.2d 48 (1970); Mitchell v. Mitchell, 12 N.C. App. 54, 182 S.E.2d 627 (1971).

§ 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.—A number of cases in the following note were decided under former § 50-16, which dealt with actions for alimony without divorce.

An order for payment of alimony is not

a final judgment, since it may be modified upon application of either party; thus, an action for alimony would continue to be "pending" in the court of proper jurisdiction, which is now the district court. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

Judgment Presumed Correct.—The presumption is in favor of the correctness of the judgment of the lower court and the burden is upon appellant to show error. Shore v. Shore, 15 N.C. App. 629, 190 S.E.2d 666 (1972).

When the evidence is not in the record, it will be presumed that there was sufficient evidence to support the findings of fact necessary to support the judgment. Shore v. Shore, 15 N.C. App. 629, 190 S.E.2d 666 (1972).

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); Crosby v. Crosby, 272 N.C. 235, 158 S.E.2d 77 (1967).

A change in circumstances must be shown in order to modify an order relating to custody, support or alimony. Elmore v. Elmore, 4 N.C. App. 192, 166 S.E.2d 506 (1969); McDowell v. McDowell, 13 N.C. App. 643, 186 S.E.2d 621 (1972).

Movant for Modification Has Burden to Show Changed Circumstances. — Upon a motion for modification of an award of alimony and support pendente lite the movant has the burden of going forward with the evidence to show change of circumstances. Robinson v. Robinson, 10 N.C. App. 463, 179 S.E.2d 144 (1971); McDowell v. McDowell, 13 N.C. App. 643, 186 S.E.2d 621 (1972).

The burden of proving, by a preponderance of the evidence, that a material change in the circumstances has occurred is upon the party requesting the modification. Shore v. Shore, 15 N.C. App. 629, 190 S.E.2d 666 (1972).

A finding of a change of circumstances does not necessarily require or justify a modification of the previous order. Robinson v. Robinson, 10 N.C. App. 463, 179 S.E.2d 144 (1971).

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); Crosby v. Crosby, 272 N.C. 235, 158 S.E.2d 77 (1967).

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); Crosby v. Crosby, 272 N.C. 235, 158 S.E.2d 77 (1967).

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).

Award Should Be Based on Defendant's Earnings at Time of Award.—If the husband is honestly and in good faith engaged in a business to which he is properly adapted, and is making a good faith effort to earn a reasonable income, the award should be based on the amount which defendant is earning when the award is made. Robinson v. Robinson, 10 N.C. App. 463, 179 S.E.2d 144 (1971).

However, the granting of a support allowance and the amount thereof does not necessarily depend upon the earnings of the husband, and one who is able-bodied and capable of earning, may be ordered to pay subsistence. Robinson v. Robinson, 10 N.C. App. 463, 179 S.E.2d 144 (1971).

To base an award on capacity to earn rather than actual earnings, there should be a finding based on evidence that the husband is failing to exercise his capacity to earn because of a disregard of his marital obligation to provide reasonable support for his wife and children. Robinson v. Robinson, 10 N.C. App. 463, 179 S.E.2d 144 (1971).

Failure to Exercise Capacity to Earn.—Where an issue of whether the husband is failing to exercise his capacity to earn be-

cause of a disregard of his marital and parental obligations to provide adequate support is raised, the trial judge should make findings from the evidence to resolve that issue. Robinson v. Robinson, 10 N.C. App. 463, 179 S.E.2d 144 (1971).

If the evidence supports a finding, and the trial judge so finds, that the husband has voluntarily reduced his actual earnings, and is failing to exercise his capacity to earn because of a disregard of his marital or parental obligations to provide adequate support, then the award should not be modified to accommodate the reduced actual earnings. Robinson v. Robinson, 10 N.C. App. 463, 179 S.E.2d 144 (1971).

Section Does Not Expressly Authorize Award of Counsel Fees.—This section contains no express statutory authorization for an order directing payment of counsel fees for services rendered subsequent to an absolute divorce of the parties. Shore v. Shore, 15 N.C. App. 629, 190 S.E.2d 666 (1972).

But Such Fees May Be Awarded Subsequent to Absolute Divorce.—Unless the case falls within one of the two exceptions made by § 50-11(c), counsel fees may be awarded for services rendered to a dependent spouse subsequent to an absolute divorce in seeking to obtain or in resisting a motion for a revision of alimony or other rights provided under any judgment or decree of a court rendered before or at the time of the rendering of the judgment for absolute divorce. Shore v. Shore, 15 N.C. App. 629, 190 S.E.2d 666 (1972).

And Such Award Is Discretionary. — Whether any award of counsel fees for services subsequent to an absolute divorce should be made in a particular case, and the amount of such an award, must remain within the sound discretion of the trial court. Shore v. Shore, 15 N.C. App. 629, 190 S.E.2d 666 (1972).

Award of Counsel Fees Proper Where Former Husband Brought Suit. — The former husband, by his own action in seeking to terminate his obligation to make further payments to plaintiff, forced the plaintiff to incur expenses for attorney's fees simply to preserve rights which were already hers as result of a decree originally entered prior to the divorce. The trial court had authority, in its sound discretion, to order defendant to pay plaintiff's reasonable counsel fees. Shore v. Shore, 15 N.C. App. 629, 190 S.E.2d 666 (1972).

Applied in Brooks v. Brooks, 12 N.C. App. 626, 184 S.E.2d 417 (1971).

Quoted in Dunn v. Dunn, 1 N.C. App. 532, 162 S.E.2d 73 (1968).

Cited in Smith v. Smith, 17 N.C. App. 416, 194 S.E.2d 568 (1973).

§ 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.

Cited in Richardson v. Richardson, 4 N.C. App. 99, 165 S.E.2d 678 (1969).

§ 50-17. Alimony in real estate, writ of possession issued.

Editor's Note.—For note on tenancy by the entirety in real property during marriage, see 47 N.C.L. Rev. 963 (1969).

Stated in Hinton v. Hinton, 17 N.C. App. 715, 195 S.E.2d 319 (1973).

§ 50-18. Residence of military personnel; payment of defendant's travel expenses by plaintiff.

Editor's Note.—

For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

Chapter 51.

Marriage.

ARTICLE 1.

General Provisions.

§ 51-1. Requisites of marriage; solemnization.—The consent of a male and female person who may lawfully marry, presently to take each other as husband and wife, freely, seriously and plainly expressed by each in the presence of the other, and in the presence of an ordained minister of any religious denomination, minister authorized by his church, or of a magistrate, and the consequent declaration by such minister or officer that such persons are man and wife, shall be a valid and sufficient marriage: Provided, that the rite of marriage among the Society of Friends, according to a form and custom peculiar to themselves, shall not be interfered with by the provisions of this Chapter: Provided further, that marriages solemnized and witnessed by a local spiritual assembly of the Baha'is, according to the usage of their religious community, shall be valid; provided further, marriages solemnized before March 9, 1909, by ministers of the gospel licensed, but not ordained, are validated from their consummation. (1871-2, c. 193, s. 3; Code, s. 1812; Rev., s. 2081; 1908, c. 47; 1909, c. 704, s. 2; c. 897; C. S., s. 2493; 1945, c. 839; 1965, c. 152; 1971, c. 1185, s. 26.)

Local Modification. — Town of Sparta: 1969, c. 1020.

Editor's Note.—

The 1971 amendment, effective Oct. 1, 1971, substituted "magistrate" for "justice of the peace" in the first sentence, and deleted a former last sentence.

For comment on the enforceability of marital contracts, see 47 N.C.L. Rev. 815 (1969).

§ 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 in 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.

Stated in Gastonia Personnel Corp. v. Rogers, 276 N.C. 279, 172 S.E.2d 19 (1970).

§ 51-3. Want of capacity; void and voidable marriages.

Quoted in Swann v. Charlotte-Mecklenburg Bd. of Educ., 318 F. Supp. 786 (W.D.N.C. 1970).

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 30 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 Commission for Health Services 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 Department of Human Resources 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 Department of Human Resources. The Department of Human Resources 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; 1973, c. 476, s. 128.)

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.

The 1973 amendment, effective July 1, 1973, substituted "Commission for Health Services" for "State Board of Health" in one place and "Department of Human Resources" for "North Carolina State Board of Health" in three places in the first paragraph.

§ 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 physician licensed to practice medicine in the State of North Carolina, any other state or territory of the United States, the District of Columbia, or the Commonwealth of Puerto Rico, whose duty it shall be to examine such applicants and to issue such certificate in conformity with the requirements of G.S. 51-9 to 51-13. 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 Commission for Health Services and shall be obtained by the register of deeds from the Department of Human Resources upon request. (1939, c. 314, s. 3; 1957, c. 1357, s. 10; 1967, c. 957, s. 13; 1969, c. 759; 1973, c. 476, s. 128.)

Editor's Note. — The 1967 amendment deleted the former third paragraph providing for filing a copy of the certificate with the Department of Health.

The 1969 amendment, effective July 1, 1969, rewrote the first sentence.

The 1973 amendment, effective July 1, 1973, substituted "Commission for Health Services" and "Department of Human Resources" for "State Board of Health" in the second paragraph.

§ 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 magistrate 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 18 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 60 days from the date hereof, to celebrate the proposed marriage at any place within the said county. You are required, within 10 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 ($200.00) 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 magistrate, 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; 1971, c. 1072; c. 1185, s. 27.)

Editor's Note. — The 1967 amendment substituted "two" for "one or more" preceding "witnesses" in the second sentence of the paragraph following the form.

The first 1971 amendment substituted "10" for "thirty" in the last sentence of the form.

The second 1971 amendment, effective Oct. 1, 1971, substituted "magistrate" for "justice of the peace" in the first sentence of the first paragraph of the form, and substituted "magistrate" for "justice of the peace" in the last paragraph of the form.

Quoted in Swann v. Charlotte-Mecklenburg Bd. of Educ., 318 F. Supp. 786 (W.D.N.C. 1970).

§ 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.

§ 51-20: Repealed by Session Laws 1969, c. 80, s. 6, effective July 1, 1969.

§ 51-21. Issuance of delayed marriage certificates.—In all those cases where a minister or other person authorized by law to perform marriage ceremonies has failed to file his return thereof in the office of the register of deeds who issued the license for such marriage, the register of deeds of such county is authorized to issue a delayed marriage certificate upon being furnished with one or more of the following:

(1) The affidavit of at least two witnesses to the marriage ceremony;
(2) The affidavit of one or both parties to the marriage, accompanied by the affidavit of at least one witness to the marriage ceremony;
(3) The affidavit of the minister or other person authorized by law who performed the marriage ceremony, accompanied by the affidavit of one or more witnesses to the ceremony or one of the parties thereto.
(4) When proof as required by the three methods set forth in subdivisions (1), (2), and (3) above is not available with respect to any marriage alleged to have been performed prior to January 1, 1935, the register of deeds is authorized to accept the affidavit of any one of the persons named in subdivisions (1), (2), and (3) and in addition thereto such other proof in writing as he may deem sufficient to establish the marriage and any facts relating thereto; 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.

The certificate issued by the register of deeds under authority of this section shall contain the date of the delayed filing, the date the marriage ceremony was actually performed, and all such certificates issued pursuant to this section shall have the same evidentiary value as any other marriage certificates issued pursuant to law. (1951, c. 1224; 1955, c. 246; 1967, c. 957, s. 10; 1969, c. 80, s. 12.)

Editor's Note. — The 1967 amendment added the language following the semicolon in subdivision (4).

The 1969 amendment, effective July 1, 1969, eliminated the former last paragraph, providing for a fee of $1.50 for each certificate.

Chapter 52.

Powers and Liabilities of Married Persons.

§ 52-1. Property of married persons secured.

Editor's Note.—
For comment on the enforceability of marital contracts, see 47 N.C.L. Rev. 815 (1969).

Quoted in Heller v. Heller, 7 N.C. App. 120, 171 S.E.2d 335 (1969).

§ 52-2. Capacity to contract.

I. IN GENERAL.

Editor's Note.—
For comment on the enforceability of marital contracts, see 47 N.C.L. Rev. 815 (1969).

Quoted in Heller v. Heller, 7 N.C. App. 120, 171 S.E.2d 335 (1969).

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.

Editor's Note.—
For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

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).

Since this section provides that an injured wife has a cause of action against her husband for damages for personal injury, under the provisions of § 28-173 the administrator of her estate may maintain an action for wrongful death when she does not survive. Cummings v. Locklear, 12 N.C. App. 572, 183 S.E.2d 832 (1971).

§ 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.)

Editor's Note.—For article on "Conflict of Spousal Immunity Laws: The Legislature Takes a Hand," discussing this section, see 46 N.C.L. Rev. 506 (1968). For note on "greatest interest rule" as a choice-of-law conflicts rule, see 47 N.C.L. Rev. 407 (1969). For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

§ 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.

(c) Such certifying officer must be a justice, judge, magistrate, clerk, assistant clerk, or deputy clerk of the General Court of Justice, or judge of a court in-

ferior to the superior court, or justice of the peace or the equivalent or corresponding officers of the state, territory, or foreign country where the acknowledgment and examination is made.

(1969, c. 44, s. 54.)

Cross References.

For repeal of all laws requiring privy examination of married women, see § 47-14.1.

I. IN GENERAL.

Editor's Note.—

The 1969 amendment rewrote subsection (c).

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

For article on "Doubt Reduction Through Conveyancing Reform — More Suggestions in the Quest for Clear Land Titles," see 46 N.C.L. Rev. 284 (1968). For article, "Toward Greater Marketability of Land Titles—Remedying the Defective Acknowledgment Syndrome," see 46 N.C.L. Rev. 56 (1967). For comment on the enforceability of marital contracts, see 47 N.C.L. Rev. 815 (1969).

Davis v. Davis, 269 N.C. 120, 152 S.E.2d 306 (1967), cited in the note below, was commented on in 45 N.C.L. Rev. 850 (1967).

Common Law.—All transactions of the wife with her husband in regard to her separate property were held void at common law. Trammell v. Trammell, 2 N.C. App. 166, 162 S.E.2d 605 (1968).

Purpose.—

In accord with 2nd paragraph in original. See Kanoy v. Kanoy, 17 N.C. App. 344, 194 S.E.2d 201 (1973).

Strict Compliance.—Since a married woman's power to convey is wholly statutory, all the requirements of enabling statutes must be strictly complied with to render her deed valid, and her deed will be held invalid where there is a failure to comply with statutory requirements as to execution or acknowledgment. Where, however, there has been a substantial compliance with statutory requirements, her deed may be enforced, but there must be a substantial compliance with every requisite of the statute. Trammell v. Trammell, 2 N.C. App. 166, 162 S.E.2d 605 (1968); Kanoy v. Kanoy, 17 N.C. App. 344, 194 S.E.2d 201 (1973).

A wife cannot convey her real property to her husband, either directly or indirectly, without complying with the privy examination provisions of this section which requires the certifying officer who examines the wife to incorporate in his certificate a finding that the transaction is not unreasonable or injurious to her. Combs v. Combs, 273 N.C. 462, 160 S.E.2d 308 (1968).

This section is an enabling statute. Trammell v. Trammell, 2 N.C. App. 166, 162 S.E.2d 605 (1968); Kanoy v. Kanoy, 17 N.C. App. 344, 194 S.E.2d 201 (1973).

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).

"Such certifying officer" in subsection (c) refers directly to the certifying officer in subsection (b) and relates only to the officer taking the wife's acknowledgment to the deed of separation or other instrument covered by the statute. Kanoy v. Kanoy, 17 N.C. App. 344, 194 S.E.2d 201 (1973).

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).

Separation Agreement Not Bar to Action for Alienation of Affections or Criminal Conversation. — A valid separation agreement entered into between the spouses is not a bar to the cause of action for alienation of affections or criminal conversation accruing prior to the date of the separation agreement. Sebastian v. Kluttz, 6 N.C. App. 201, 170 S.E.2d 104 (1969).

Applied in Mitchell v. Mitchell, 270 N.C. 253, 154 S.E.2d 71 (1967); Calhoun v. Calhoun, 7 N.C. App. 509, 172 S.E.2d 894

(1970); In re Brackett, 15 N.C. App. 601, 190 S.E.2d 302 (1972).

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); Holcomb v. Holcomb, 7 N.C. App. 329, 172 S.E.2d 212 (1970); Hicks v. Hicks, 13 N.C. App. 347, 185 S.E.2d 430 (1971).

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).

The right of a married woman to support and maintenance is a property right which she may release by an agreement executed in accord with this section. Sebastian v. Kluttz, 6 N.C. App. 201, 170 S.E.2d 104 (1969).

Separation agreements must be executed in conformity with statutory requirements governing contracts between husband and wife. Trammell v. Trammell, 2 N.C. App. 166, 162 S.E.2d 605 (1968).

The ordinary rules governing the interpretation of contracts apply to separation agreements and the courts are without power to modify them. Sebastian v. Kluttz, 6 N.C. App. 201, 170 S.E.2d 104 (1969).

The intent of the parties as expressed in a separation agreement is controlling. Sebastian v. Kluttz, 6 N.C. App. 201, 170 S.E.2d 104 (1969).

Effect of Incorporating Paragraph of Separation Agreement in Divorce Decree.— See Williford v. Williford, 10 N.C. App. 451, 179 S.E.2d 114 (1971).

Inter Vivos Conveyances of Real Property.—Testamentary devises excepted, a married woman cannot convey her real property to her husband directly or by any form of indirection without complying with the provisions of this section. Greer v. United States, 448 F.2d 937 (4th Cir. 1971).

Indirect Conveyance Included. — This section is applicable when a conveyance to a third person and reconveyance to the husband is solely for the purpose of accomplishing an indirect conveyance of the wife's property to her husband. Greer v. United States, 448 F.2d 937 (4th Cir. 1971).

Contract Providing for Testamentary Disposition of Property.—Where husband and wife, pursuant to a contract, executed a joint will providing for the testamentary disposition of their properties, and the wife thereafter dies without revoking her will, the husband may not make a testamentary disposition of any property contrary to the contract, or revoke the joint will as his will, or make an inter vivos conveyance or transfer of any property which will prevent a court of equity from subjecting the property, so transferred in breach of the contract, to the rights of the beneficiaries thereof prior to the acquisition of such property by a bona fide purchaser for value. Olive v. Biggs, 276 N.C. 445, 173 S.E.2d 301 (1970).

A contract between husband and wife prescribing the testamentary disposition of their properties is not binding upon the wife unless the procedure prescribed by this section is followed. During the life of the wife, such a contract, not acknowledged as prescribed by this statute, is not binding upon the husband since, as to him, there is a failure of consideration. When, however, the wife dies, leaving the will for which her husband bargained with her, the contract is thereafter binding upon him. Olive v. Biggs, 276 N.C. 445, 173 S.E.2d 301 (1970).

A contract by which one binds himself to make a specified testamentary disposition of his real property is a contract affecting that property. Consequently, a contract between husband and wife prescribing the testamentary disposition of their properties is not binding upon the wife unless the procedure prescribed by this section is followed. Mansour v. Rabil, 277 N.C. 364, 177 S.E.2d 849 (1970).

A contract between a husband and wife to make a joint will was void as to the wife

because it was not executed by her in accordance with this section, and its invalidity was not affected by the curative statutes, § 52-8 and § 39-13.1(b), where both curative statutes were enacted after the rights of the parties under the contract vested upon the death of the husband, and the contract was not "in all other respects regular" except for the failure to privately examine the wife as required by the curative statutes. Mansour v. Rabil, 277 N.C. 364, 177 S.E.2d 849 (1970).

The mutual promises of husband and wife may be a consideration to support their agreement to execute jointly a will containing reciprocal provisions. Mansour v. Rabil, 277 N.C. 364, 177 S.E.2d 849 (1970).

A sufficient consideration for a contract between husband and wife to make wills containing reciprocal provisions and providing for the disposition to be made of their property on the death of the survivor may exist in the promises of the spouses to one another to execute such a will provided it appears that the consideration was mutual in the respect that each spouse promised in reliance upon the promise of the other. Mansour v. Rabil, 277 N.C. 364, 177 S.E.2d 849 (1970).

III. THE CERTIFICATE.

The certificate is conclusive except for fraud. Tripp v. Tripp, 266 N.C. 378, 146 S.E.2d 507 (1966).

A notary public is not one of the officials authorized by this section to make the required certificate. Boone v. Brown, 11 N.C. App. 355, 181 S.E.2d 157 (1971).

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).

Where plaintiff wife acknowledged execution of a deed of separation before a justice of the peace who certified that he privately examined plaintiff and found that the transaction was not unreasonable or injurious to her, the requirements of this section were met and the deed of separation was valid despite the fact that defendant husband did not acknowledge the deed before a proper certifying officer. Kanoy v. Kanoy, 17 N.C. App. 344, 194 S.E.2d 201 (1973).

IV. EFFECT OF NONCOMPLIANCE.

A separation agreement, etc.—

A separation agreement would void ab initio if not in compliance with this section. Rupert v. Rupert, 15 N.C. App. 730, 190 S.E.2d 693 (1972).

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).

Noncompliance Renders Deed Void.—

A deed by which a wife undertakes to convey an interest in her real estate to her husband during their coverture is a contract between them to which the provisions of this section apply, and the Supreme Court has uniformly held that unless the requirements of this statute are complied with, such a deed is void. Boone v. Brown, 11 N.C. App. 355, 181 S.E.2d 157 (1971).

But for this section the deed of a wife conveying land to her husband would be void. Such deed is valid only when this section has been strictly complied with. Trammell v. Trammell, 2 N.C. App. 166, 162 S.E.2d 605 (1968).

The deed of a wife conveying land to her husband is void unless the probating officer in his certificate of probate certifies that, at the time of its execution and her privy examination, the deed is not unreasonable or injurious to her. Trammell v. Trammell, 2 N.C. App. 166, 162 S.E.2d 605 (1968).

Contract Void ab Initio.—

In accord with original. See Trammell v. Trammell, 2 N.C. App. 166, 162 S.E.2d 605 (1968).

The husband does not have to comply with the requirements of this section to validate a transaction. A husband can by conveying land directly to himself and his wife create an estate by the entirety. Kanoy v. Kanoy, 17 N.C. App. 344, 194 S.E.2d 201 (1973).

Evidence with respect to the terms of a mutual agreement of separation was properly excluded in an action for absolute divorce where there was nothing to indicate that those terms had been reduced to writing and the wife's privy examination taken as required by the provisions of this section. Rupert v. Rupert, 15 N.C. App. 730, 190 S.E.2d 693 (1972).

§ 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, 1969, 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; 1971, c. 101.)

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.

The 1971 amendment substituted "1969" for "1963" in the first sentence. The amendatory act provides that it shall not affect pending litigation.

Applicability of Section.—This section is not applicable where not only was the private examination of the wife not taken, but there was no finding by the certifying officer of the officer's conclusions and findings of fact as to whether or not the deed was unreasonable or injurious to the wife as required by § 52-6(b) and the certifying officer was not one of those authorized by § 52-6(c) to make the required certificate. Boone v. Brown, 11 N.C. App. 355, 181 S.E.2d 157 (1971).

A contract between a husband and wife to make a joint will was void as to the wife because it was not executed by her in accordance with § 52-6, and its invalidity was not affected by this curative statute and § 39-13.1(b) where both curative statutes were enacted after the rights of the parties under the contract vested upon the death of the husband, and the contract was not "in all other respects regular" except for the failure to privately examine the wife as required by the curative statutes. Mansour v. Rabil, 277 N.C. 364, 177 S.E.2d 849 (1970).

§ 52-10. Contracts between husband and wife generally; releases.

Editor's Note.—

For comment on the enforceability of marital contracts, see 47 N.C.L. Rev. 815 (1969).

Section Inapplicable to Right of Wife, etc.—

In accord with original. See Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968).

To be valid a separation agreement must be untainted by fraud, must be in all respects fair, reasonable and just, and must have been entered into without coercion or the exercise of undue influence, and with full knowledge of all the circumstances, conditions, and rights of the contracting parties. Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968).

Attack on Deed of Separation.—A married woman may attack the certificate of her acknowledgment and privy examination respecting her execution of a deed of separation, inter alia, upon the grounds of her mental incapacity, infancy, or the fraud of the grantee. Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968).

Until deed of separation is rescinded, defendant cannot attack the legality of separation or obtain alimony from plaintiff. Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968).

Cited in Heller v. Heller, 7 N.C. App. 120, 171 S.E.2d 335 (1969).

§ 52-10.1. Separation agreements; execution by minors.

Editor's Note.—

For comment on the enforceability of marital contracts, see 47 N.C.L. Rev. 815 (1969).

To be valid a separation agreement must be untainted by fraud, must be in all respects fair, reasonable and just, and must have been entered into without coercion or the exercise of undue influence, and with full knowledge of all the circumstances, conditions, and rights of the contracting parties. Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968).

Attack on Deed of Separation.—A married woman may attack the certificate of her acknowledgment and privy examination respecting her execution of a deed of separation, inter alia, upon the grounds of her mental incapacity, infancy, or the fraud of the grantee. Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968).

Until deed of separation is rescinded, defendant cannot attack the legality of the separation or obtain alimony from plaintiff. Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968).

§ 52-11. Antenuptial contracts and torts.

Editor's Note.—

For case law survey on tort law, see 43 N.C.L. Rev. 906 (1965). For comment on the enforceability of marital contracts, see 47 N.C.L. Rev. 815 (1969).

Chapter 52A.

Uniform Reciprocal Enforcement of Support Act.

§ 52A-1. Short title.

Editor's Note.—

For note on survival of support and the Uniform Reciprocal Enforcement of Support Act, see 48 N.C.L. Rev. 100 (1969).

For comment on access of indigents into the civil courtroom, see 49 N.C.L. Rev. 683 (1971).

§ 52A-9. How duties of support are enforced.

Jurisdiction of District Court.—The district court had exclusive original jurisdiction to entertain a proceeding pursuant to the Uniform Reciprocal Enforcement of Support Act. Cline v. Cline, 6 N.C. App. 523, 170 S.E.2d 645 (1969).

§ 52A-10.2. Complaint by minor.

Opinions of Attorney General. — Mr. W. H. S. Burgwyn, Jr., Solicitor, 40 N.C.A.G. 718 (1969).

§ 52A-11.1. Fees and costs.

Editor's Note.—For comment on access of indigents into the civil courtroom, see 49 N.C.L. Rev. 683 (1971).

§ 52A-12. Duty of the court of this State as responding state.

Quoted in Cline v. Cline, 6 N.C. App. 523, 170 S.E.2d 645 (1969).

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

November 1, 1973

I, Robert Morgan, Attorney General of North Carolina, do hereby certify that the foregoing 1973 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.

ROBERT MORGAN
Attorney General of North Carolina