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is subject to criticism and should be criticized, but it should not be ignored by the law school. Competent criticism of and emphasis on statutes by law school teachers would aid materially in improving the body of statute law. At the same time it would send forth more effectively trained lawyers; and set in motion forces for statutory improvement in future generations.

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## CHANGES IN NORTH CAROLINA PROCEDURE

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THE CODE of Civil Procedure, adopted after the changes made by the Constitution of 1868, was intended to remove the technicalities of the old procedure in law and equity, and to provide a simple and speedy remedy upon the merits of the case. Soon after its adoption, some important changes were made in regard to the summons and pleadings, but with these exceptions it has been comparatively free from change, and has been given a fair trial for half a century. Within the last three years, however, several statutes have been enacted which have changed the former practice materially, and it is the purpose of this article to discuss some of these changes and their general effect upon the practice in North Carolina.

In 1919, the Legislature passed an act entitled, "An act to restore the provisions of the Code of Civil Procedure in regard to process and pleadings, and to expedite and reduce the cost of litigation." The provisions of this act are found in the public laws of 1919, ch. 304; and there is also a new provision in chapter 156. These changes were incorporated into the various sections affected by them, in the Consolidated Statutes. In the public laws of Extra Session 1920, ch. 96, the act of 1919, ch. 304, was amended and re-enacted, and this was again amended in public laws of 1921, ch. 96. In the Extra Session 1921, an act was passed entitled, "An act to amend chapter 156 of public laws of 1919, chapter 96 of public laws of Extra Session 1920, and chapter 96 of public laws 1921, relating to civil procedure in regard to process and pleadings, and to expedite and reduce the cost of litigation, and to consolidate the various acts relating thereto." This act went into effect on the first day of February, 1922, and includes the various changes made in procedure by recent legislation. The acts of the recent session of the Legislature have not yet been published, but copies of this act were sent to various members of the profession soon after the adjournment of the Legislature, and there has been some opportunity to become acquainted with the changes made. Very few of these changes have, as yet, received judicial construction by the Supreme Court, and until that is done their effect is more or less a matter of individual interpretation.

Under the original Code of Civil Procedure, the summons in a civil action was made returnable before the clerk of the Superior Court; the pleadings were filed before him; issues of law raised were sent to the judge for decision; and issues of fact were transferred to the court at term for a trial by jury. These are, in substance, the provisions of the original Code which are intended to be restored by the recent statutes. To understand clearly what is meant by "restoring the Code of Civil Procedure," it will be necessary to consider what were the provisions of the Code which are sought to be restored, in what respect had they been changed, and how far have they been restored.

The summons in a civil action, as originally provided, was issued by the clerk, and commanded the officer to whom it was directed to summon the defendant to appear at the office of the clerk of the Superior Court, "within a certain number of days after the service, exclusive of the day of service, to answer the complaint," and the number of days within which the defendant was summoned to appear should "in no case be less than twenty, exclusive of the day of service," with an additional day for every twenty-five miles of travel required. The defendant's answer was to be filed within ten days after the time limited for his appearance. The date of the service of the summons, and not a return day named in the summons, fixed the time when the defendant should appear and answer. This was necessarily indefinite, so far as the plaintiff was concerned, since he could not know when the officer could serve the summons, nor when he could expect an answer or demand a judgment. Under this provision, it was held by the Supreme Court that if the summons were made returnable at term, and not before the clerk, it was an irregularity which would cause the action to be dismissed.<sup>1</sup> But this was remedied by a statute in 1869, which authorized an amendment of the summons.

The Code of Civil Procedure went into effect on the 24th day of August, 1868; and soon thereafter the Legislature, deeming it inexpedient and unsuited to the condition of the people in some respects, passed an act suspending the Code in certain cases, and providing that civil actions should be brought to the court at term instead of before the clerk. As to this change in the practice, the Supreme Court says, in *Campbell v. Campbell*,<sup>2</sup> (Clark, C. J.): "In this State, at that time, our people were much embarrassed by the results of the war, and instead of desiring expedition in the determination of actions there was a desire to put off as long as possible the rendition of judgments for debts. Accordingly, what was commonly known as the 'Batchelor Act,' ratified 22 March, 1869, was enacted, which provided that summons should be made returnable to the term instead of before the clerk. This act provided, that the suspending act should be temporary and in force only 'until 1 January, 1871'. But owing to the financial conditions of the time, it was later continued indefinitely, and then by oversight, though contradictory to the concept and intent of the Code of Civil Proce-

<sup>1</sup> *Smith v. McIlwaine*, 63 N. C. 95 (1869); *Johnson v. Judd*, 63 N. C. 498 (1869).

<sup>2</sup> 179 N. C. 413, 102 S. E. 737 (1920).

ture . . . it has endured to this time though such anomaly has not obtained, it is believed, in any other State." This act was considered and sustained by the court in *McAdoo v. Benbow*,<sup>3</sup> which also held that it was an irregularity and a cause for dismissal, if the summons should be made returnable before the clerk, instead of at term. Later, however, in *Thomas v. Womack*,<sup>4</sup> it was held to be subject to amendment so as to make the summons returnable at term. This change in the practice, as to the return of the summons and filing pleadings at term, continued in force until 1919, about fifty years.

The act of Extra Session 1921, which amends and consolidates the different acts of 1919, 1920, and 1921, in the beginning provides as follows:

"Sec. 1. That chapter 156 of the Public Laws 1919, chapter 96 of the Public Laws, Extra Session 1920, and chapter 96 of the Public Laws 1921, be and the same are hereby amended so as hereafter to read as follows:

Subsec. 1. The summons in all civil actions in the Superior Court shall be made returnable before the clerk at a date named therein not less than ten days nor more than twenty days from the issuance of said writ, and shall be served by delivering a copy thereof to each of the defendants: Provided, that in all cases where service of summons is to be by publication the summons may be made returnable within forty days from the commencement of the action."

The act of 1919, ch. 304, which is known as the "Crisp Act," and the provisions of which were written into the sections of the Consolidated Statutes, was similar to this except as to the service of the summons and the proviso. (C. S. 476.) The practice as to the return of the summons is different from the original Code, in that the return day named in the summons, and not the date of service, fixes the definite time for answer. Since the return day could not be more than twenty days from the date of issuing the summons, a difficulty arose where it was necessary to make service by publication, which requires a notice to be published for four weeks. In *Campbell v. Campbell*,<sup>5</sup> the summons was issued on July 21, returnable before the clerk on August 8; but since the defendant was a nonresident, and service was to be made by publication, the time of publication did not expire until August 23. It was held that the time was necessarily extended by operation of law, so that the return day for the defendant was August 23. To meet this case, chapter 96, Extra Session 1920, enacted the proviso extending the time to forty days.

No particular form of summons is given in the statute, but there should be little difficulty in changing the old form to meet the present requirements. The following is suggested as a suitable form of summons, to meet the changes mentioned:

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<sup>3</sup> 63 N. C. 461 (1869).

<sup>4</sup> 64 N. C. 657 (1870).

<sup>5</sup> See note 2, *supra*.

North Carolina  
Orange County

Superior Court

A. B.

v.

Summons

C. D.

State of North Carolina,

To the Sheriff of Orange county, Greeting :

You are hereby commanded to summon the defendant C. D., if to be found in your county, to appear before the clerk of the Superior Court of Orange county, at his office at the court house in Hillsboro, on the 15th day of May, 1922, and answer or demur to the complaint of the plaintiff, a copy of which will be filed in the office of said clerk on or before the 15th day of May, 1922; and let the defendant take notice that if he shall fail to answer or demur to the complaint within twenty days after the 15th day of May, 1922, the plaintiff will apply to the court for the relief demanded in the complaint.

Herein fail not, and of this summons make due return.

Given under my hand and seal of office, this 1st day of May, 1922.

.....  
Clerk Superior Court of Orange county.

The new statute in express terms refers only to civil actions, and therefore does not make any change in the summons in special proceedings before the clerk. Under the original Code, the summons in special proceedings was the same as in civil actions. (Bat. Rev., ch. 17, sec. 421.) Afterwards this was changed so as to make the summons "command the officer to summon the defendant to appear at the office of the clerk of the Superior Court, on a day named in the summons, to answer the complaint or petition of the plaintiff. The number of days within which the defendant is summoned to appear shall in no case, be less than ten exclusive of the day of service." (C. S. 753.) This leaves the uncertainty as to the day when the answer is to be filed, depending upon the date of the service of the summons. Since the summons is now returnable in all cases before the clerk and the pleadings are filed before him, and the only difference is in the jurisdiction of the clerk to proceed to a final determination of the case, there does not appear to be any valid reason why the practice as to the summons and pleadings should not be uniform in all cases.

Under the original Code, the summons was to be served by the sheriff within ten days after receiving it, and in every case by delivering a copy to the defendant, with special provision as to the manner of delivery in case of corporations, infants, and insane persons. By the act of 1876-77, ch. 241, the manner of service was changed by requiring the officer to read the summons to the defendant, except in the case of corporations, infants, and insane persons, where the service should be by delivering a copy as before provided. This is the prac-

tice as carried forward in Consolidated Statutes, secs. 482, 483, and the act of 1919, ch. 304, made no change in this respect. The recent statute, quoted above, requires that "the summons shall be served by delivering a copy to each of the defendants." Since no mention is made of the special cases of corporations, etc., it is presumed that this would remain as it was before. This change in the manner of service is an important change, which has been in effect by express wording of the statute since February 1, 1922, and might seriously affect judgments rendered since that date. If the defendant, served in the old way, should appear and answer, the defect would be waived; but if he should fail to appear and judgment should be rendered by default final, a question might arise as to the validity of the judgment, since the statute (C. S. 595) requires proof of personal service.

Another important effect of the change in the manner of service is that it may apply to special proceedings, and also to actions in the inferior courts. The provisions of the chapter on civil procedure are applicable to special proceedings, except as otherwise provided. (C. S. 752.) The chapter on civil procedure, respecting the service of process, shall apply to justices' courts. (C. S. 1500, rule 16.) In recorders' courts, in civil actions, the rules of practice, issuing and serving process, and filing pleadings shall conform, as near as may be, to the practice in the Superior Court. (C. S. 1591.) It was held by the Supreme Court in *Guano Co. v. Supply Co.*,<sup>6</sup> that the change in practice with regard to the return of the summons before the clerk instead of at term did not apply to a special court in Forsyth county, created by special act; but by reason of the sections above cited expressly referring to the sections of civil procedure to determine the method of service of process, it is not clear that this construction would extend to justices' courts and recorders' courts created under the general law. At any rate, to prevent misunderstanding and confusion, it should definitely appear that this change was to apply only to civil actions in the Superior Court or to all courts. If it is the policy of the statute to return to the method of serving a summons by delivering a copy instead of reading it to the defendant, it would seem desirable to have the service of the summons, the same in all cases.

In filing pleadings, the original Code provided that the plaintiff should file his complaint with the clerk, within ten days from the issuing of the summons. He might also serve a copy of his complaint with the summons; but if he failed to do this, he should file with the clerk a copy of his complaint for each defendant, unless several parties appear by one attorney, and then only one copy for such defendants. (C. C. P. 76.) If the plaintiff failed to file his complaint within the ten days specified, the defendant could enter an appearance within the time limited for his doing so, and before the complaint was filed, and designate where within the State a copy of the complaint might be served upon him. The plaintiff should then, at his own expense, cause a copy of the complaint

<sup>6</sup> 181 N. C. 210, 106 S. E. 832 (1921).

to be served within sixty days, and the defendant was not required to answer until the twentieth day after such service. (C. C. P. 77.)

The time for filing pleadings could be extended by the court for good cause shown, but for not more than twenty days nor more than once, unless the delay was caused by accident or fraud; and when the time was extended, except for accident or fraud, the applicant was required to pay into court for the benefit of the other party five dollars, which could not be recovered. (C. C. P. 79.) At the time of filing his pleading, each party was required to name some place and person in the county town where the action was brought, where and upon whom service of pleadings and notices could be had; otherwise, filing with the clerk was sufficient, unless the party gave notice in writing that personal service was required, and deposited with the clerk sufficient fees for such service. (C. C. P. 80.) These regulations were not considered necessary when the pleadings were required to be filed at term, and they have not been carried forward in subsequent statutes. The parties being in court, and everything being done at term, no further notice was required.

The defendant was required to file his answer or demurrer to the complaint with the clerk, within ten days after the day limited for his appearance, and also to file a copy for the use of the plaintiff. If the answer contained a counterclaim, the plaintiff was required to file a reply or demurrer thereto within twenty days. (C. C. P. 94, 105.)

When the summons was made returnable at term, instead of before the clerk, the pleadings were required to be filed at term. The plaintiff filed his complaint within the first three days of the term, and the demurrer or answer and reply were filed during the remainder of the term. The issues of law and of fact raised by the pleadings would then stand for trial at the next term of court. With slight modifications in certain cases hereafter to be noticed, this continued to be the practice from 1870 to 1919.

By the act of 1919, ch. 304, pleadings were again required to be filed with the clerk, as under the original Code. The complaint is to be filed on or before the return day named in the summons, and the answer or demurrer within twenty days after the return day. No provision was made in this act for filing a reply, but the Consolidated Statutes carried out the general meaning of the plan by requiring the reply, when necessary, to be filed within twenty days after the answer. (Sec. 524.) This time was changed to ten days by the acts of 1920 and 1921. For good cause shown, the clerk may extend the time for filing any pleading to a day certain, and the subsequent pleading may be filed within twenty days thereafter.

These changes are consolidated in the act of Extra Session 1921, as follows:

"Subsec. 2. The complaint shall be filed on or before the return day of the summons: Provided, for good cause shown the clerk may extend the time to a day certain.

Subsec. 3. The answer or demurrer shall be filed within twenty days after the return day, or after service of the complaint upon each of the defendants, or within twenty days after the final determination of a motion to remove as a matter of right. If the time is extended for filing complaint, the defendant shall have twenty days after the final day fixed for such extension in which to file answer or demurrer, or after service of the complaint upon each of the defendants (in which latter case the clerk shall not extend the time for filing answer beyond twenty days after such service): Provided, in cases where the complaint is not served, for good cause shown, the clerk may extend the time to a day certain.

Subsec. 4. The reply, if any, shall be filed within ten days after the filing of the answer: Provided, for good cause shown the clerk may extend the time to a day certain."

The original Code required the parties to serve copies of the pleadings or to file copies with the clerk for the use of the opposite party. The above sections authorize the service of a copy of the complaint, but do not state in what cases this should be done, nor require the service of copies of other pleadings. The intention of the statute in this respect is not clear, and there would seem to be need of further amendment. Another section authorizes the clerk to render judgment in cases where a copy of the complaint has been served, and this will be discussed later. It should be definitely stated whether a copy of the complaint should be served on the defendant in all cases; if not, then in what cases is such service required; and what would be the effect if a copy of the complaint were not served.

When a demurrer was filed under the original Code, it was the duty of the clerk, within ten days thereafter, to send a copy of the record, by mail or otherwise, to the judge of the court for hearing and decision by him. Since each judge held the courts of his own district, and the rotation of judges was adopted later in 1879, no question could arise as to what judge could hear the case. The attorneys might make a request in writing to be heard in argument of the case, and the judge would fix a time and place for the hearing. The judge returned his decision to the clerk, and the plaintiff could be allowed to amend or the defendant could answer over. (C. C. P. 111, 112, 113.) When the pleadings were required to be filed at the return term, the hearing upon demurrer would come up regularly at the next term, and upon a decision the plaintiff would be allowed time to amend or the defendant to answer over. (Bat. Rev. ch. 18, s. 5.)

The practice in a hearing upon demurrer, as changed by the act of 1919, ch. 304, is contained in Consolidated Statutes, sec. 513. If the plaintiff considers the demurrer well taken, he may amend within three days, if he can do so. If he thinks it is not well taken, he and the defendant may agree upon a time and place for hearing the same "before some judge of the Superior Court." If no such agreement is made, then it is the duty of the clerk forthwith to send up the complaint and demurrer to the judge holding the courts of the district

or to the resident judge of the district, who shall fix a time and place for the hearing and notify the parties or their attorneys. This provides for a speedy hearing upon the demurrer, so that if there are issues of fact to be raised by subsequent pleadings, the case can be prepared for trial at the next term. The parties might agree upon any judge of the Superior Court who could conveniently hear the case, and a failure to agree would not delay the hearing until the next term, if either the resident judge or the judge holding the courts of the district could hear it in vacation.

From the decision of the judge, either party may appeal. If the demurrer is sustained and there is no appeal, or if there is an appeal and the judgment is affirmed, the plaintiff may move to amend his complaint within ten days and upon giving three days notice to the defendant; otherwise, judgment will be entered dismissing the action. If the demurrer is overruled, the defendant likewise has ten days to answer; and if he fails to answer, the plaintiff is entitled to judgment by default. (C. S. 515.)

Some change was made in the manner of hearing the demurrer by the act of 1920, ch. 96. and this has been adopted in the act of Extra Session 1921. The practice is defined as follows:

“Subsec. 5. If a demurrer is filed, the plaintiff may be allowed to amend. If plaintiff fail to amend within five days after notice, the parties may agree to a time and place of hearing the same before some judge of the Superior Court and upon such agreement it shall be the duty of the clerk of the Superior Court forthwith to send the complaint and demurrer to the judge holding the courts of the district, or to the resident judge of the district, who shall hear and pass upon the demurrer; Provided, if there be no agreement between the parties as to the time and place of hearing the same before the judge of the Superior Court, then it shall be the duty of the clerk of the Superior Court to send the complaint and demurrer to the judge holding the next term of the Superior Court in the county where the action is pending, who shall hear and pass upon the demurrer at that term of the court.

Subsec. 6. Upon the rendering of the decision upon the demurrer, if either party desire to appeal, notice shall be given and the appeal perfected as is now provided in case of appeals from decisions in term time.”

The provision as to amendment and answer after judgment upon demurrer remains as before. (Subsecs. 7, 8.)

The effect of this change appears to be, to limit the choice of the parties, upon an agreement, to the judge holding the courts of the district or the resident judge, who may hear the case in vacation. But upon a failure of the parties to agree, it can be heard only by the judge holding the next term of court and at that term. This would apparently retain some of the opportunities for delay which existed under the former practice. If the case is pending in a county where there are several terms of court a year, the delay would not be material;

but in many counties there are only two or three terms of court a year, and it would cause considerable delay to carry a case over from one term to the next. If the party demurring knows that a failure to agree will give him longer time, there would not be much probability of an agreement. The demurrer could not be heard until the term of court, and the case would necessarily go over to the following term before a trial upon issues of fact could be had. Even a frivolous demurrer would have the effect of delaying judgment until the next term of court.

Whether the demurrer should be retained at all as a pleading is a question that might be worthy of consideration. It has been abolished in the English system of practice, in the equity practice in the Federal Courts, and in several of the States. General demurrers are not recognized under our statutes, and special demurrers may be used only for the particular defects mentioned in the statute. Two of these objections, that the court has no jurisdiction and that the complaint does not state a cause of action, are not waived by a failure to demur, but may be taken advantage of at any time by motion; and the objection is generally made in this way. The other four defects, the want of capacity to sue, defect of parties, another action pending, and misjoinder of causes, are waived if not demurred to when they appear in the complaint. If they do not appear in the complaint, the same objections are taken by the answer, and they are heard and passed upon by the court as preliminary questions, before going into a trial upon the merits. Except for technical reasons, inherited from the old common law and equity systems, there need be no difference in settling the objections based upon these defects, whether taken by demurrer or by answer. They do not go to the merits of the case, and necessarily cause a delay however they may be raised. As preliminary matters appearing upon complaint and answer, they could be decided by the court before the term or at the term before a trial upon the merits.

Extensive powers were conferred upon the clerk of the Superior Court by the original Code, especially in the matter of process and pleadings, and the preparation of the case for trial. The general provision that wherever the word "court" is used, it shall mean the clerk unless otherwise specially stated, or reference is made to a term of court, has been retained and is found in Consolidated Statutes, sec. 397; but when the pleadings were made up at term, these questions were necessarily settled by the judge. By the recent legislation, this power has been restored to the clerk and some additional powers granted. The judge still retains the power to make orders and decrees in provisional and extraordinary remedies, to extend the time for answer in all cases upon motion and five days notice, and to allow amendments and additional pleadings at term. (Subsec. 18.)

By the act of 1919, ch. 304, (C. S. 594), if the defendant failed to answer, the clerk transferred the case to the court at term for judgment by default according to the former practice. By the act of Extra Session 1921, the clerk is authorized to enter judgment by default final and by default and inquiry. A judgment by default final becomes in all respects a judgment of the Superior

Court, for the purposes of lien and enforcement; while in cases for judgment by default and inquiry, the clerk enters judgment by default and transfers the case to the docket at term for inquiry by the jury. In the latter case, the judgment is considered as rendered at term and before the judge. This practice is substantially the same as that prescribed in C. C. P. 217.

Subsection 12 authorizes the clerk to render judgment in the following cases: 1. Judgments of voluntary nonsuit. 2. Consent judgments. 3. In all actions upon notes, bills, bonds, stated accounts, balances struck, and other evidences of indebtedness within the jurisdiction of the Superior Court. 4. Judgments by default final and by default and inquiry as authorized by sections 595, 596, 597, of Consolidated Statutes. 5. In case of judgment by default final upon a debt secured by mortgage, the clerk may order a foreclosure sale and make all orders necessary to a complete settlement. The power to render the first and second of these judgments is new; the third probably refers to cases provided for in acts of 1919, ch. 156, C. S. 593; the fourth was contained in the acts of Extra Session 1920, ch. 96; and the fifth is in acts of 1921, ch. 96.

As to the time when the clerk may render these different judgments, the act provides:

"Subsec. 10. No judgment shall be entered by the clerk except as herein otherwise provided, except on a first Monday or a third Monday of the month. The liens of all judgments rendered on the same Mondays shall each be of equal priority, and the first and third Mondays shall be held and construed, in determining the priority of judgment liens, as a term of court, and the first day thereof.

Subsec. 11. If the plaintiff shall cause a copy of the complaint to be served upon any of the defendants, either at the time of issuing summons or thereafter, judgment shall be entered by the clerk as to defendants served on first or third Monday next after the expiration of time to answer."

The only other provision in the statute, as to the time for the clerk to render judgment, is in subsection 12, which says that judgments of voluntary nonsuit and consent judgments "may be entered at any time." Does this mean that in all other cases where the clerk may enter judgment, the power cannot be exercised except on the first or third Monday of the month? If this is the meaning, then judgments on bills, notes, etc., and judgments by default can be entered only on the first or third Monday of the month, and all judgments entered on each Monday would have equal priority. Would the same construction apply as to the power of the clerk to direct foreclosure of a mortgage, since the section speaks of a "final judgment" directing the execution of a deed and the distribution of the fund? If this is the meaning, it seems to be the intention of the statute to make the first and third Mondays of the month "judgment days" or "rule days" for the clerk. If this is correct, it is not a feature to be commended. A party who has been diligent in commencing his action to enforce payment of his debt should be entitled to a judgment at the expiration of the

time for defendant's answer, without waiting for the first or third Monday of the month, when other subsequent litigants would be equally entitled to judgment and with equal priority. When all judgments were rendered at term, this equality was necessarily the effect, because the litigants could not control the order in which their cases should be tried. (C. S. 613.)

The meaning is still further complicated by the words in subsection 11, quoted above, which authorize the clerk to enter judgment on the first or third Monday, if the plaintiff has served a copy of his complaint upon the defendant. Does this mean that if the plaintiff does not serve a copy of his complaint, the clerk is not authorized to enter any judgment except that of nonsuit or by consent? With this meaning, the practice would be that the plaintiff should serve a copy of complaint upon each defendant with the summons, in order to get a judgment by default entered by the clerk, if defendant should fail to answer; but if a copy of complaint is not served, the judgment could be rendered only by the judge at term. This would seem to be the most reasonable construction, and yet it is not in keeping with the general intent of the statute, which is to bring about a speedy settlement of controversies in litigation. This is effected by allowing the clerk to enter judgment in all cases where the defendant fails to answer; if the action is for a definite debt, the judgment is by default final, and the matter is ended; if for an unascertained amount, the judgment is by default and inquiry, and the case goes up to term for the inquiry. To avoid confusion, the statute might require a copy of complaint to be served in all cases, as under the original Code, or confine the service of copy to cases in which a judgment by default final could be given.

The two divisions of subsection 12 which authorize the clerk to enter judgment on bills, notes, etc., and to enter judgments by default final and by default and inquiry "as are authorized by sections 595, 596, 597, of Consolidated Statutes, and in this act provided," would seem to overlap, since the judgments rendered by the clerk in all cases are by default, except nonsuit and consent judgments. Subsection 9 provides that if no answer is filed, the plaintiff is entitled to a judgment by default final or by default and inquiry as authorized by sections 595, 596, 597, of Consolidated Statutes. To entitle the plaintiff to a judgment by default final under C. S. 595, the complaint must be for an ascertained debt, and the complaint must be verified; otherwise the judgment is by default and inquiry. The ascertained debt would include the class of bills, notes, etc., and no service of a copy of the complaint is required in these sections. The difference in classification and the apparent confusion in the practice seems to have arisen from the attempt to include in the general law the special provisions which had been applied elsewhere to particular cases. The history of these regulations may show the purpose intended.

When the pleadings were required to be filed at term, the case was to stand for trial at the next term following the return term. By the act of 1901, ch. 626, Rev. 484, if the action was brought "upon a bill, note, bill of exchange,

liquidated or settled account, or for divorce," and summons was served on the defendant at least thirty days before the term of court, and a copy of the complaint filed in the clerk's office at least thirty days before the term, the case should stand for trial at the first term. If the action were upon a note, etc., and no defense was made, of course a judgment by default would be given at the first term. This regulation would have no effect after the pleadings were to be filed with the clerk before the term, and all cases would stand for trial at the term.

By the act of 1919, ch. 156, (C. S. 593,) which was passed before chapter 304 making the general changes in the practice, it was provided that in actions upon evidences of debt which were definite and certain in amount and within the jurisdiction of the Superior Court, the summons could be made returnable before the clerk on the first Monday of the month; and if the plaintiff should file a verified complaint at the time of issuing the summons, and serve a copy of the complaint upon the defendant with the summons, and the defendant should fail to answer on or before the second Monday of the month, the clerk was authorized to render judgment for the plaintiff on such second Monday. If the defendant answered, raising issues, the case was transferred to the docket for trial at term. It was held by the Supreme Court, in *Young v. Davis*,<sup>7</sup> that the subsequent act making the summons returnable before the clerk in all cases, and fixing a definite time within which the pleadings should be filed, did not repeal this act, which applied only to the special cases mentioned. When the recent act authorized the clerk to enter judgment by default without transferring the case to the judge at term, the advantage in this special regulation ceased to exist, and there was no longer any necessity for making a difference in the practice.

The consolidating act of 1921 expressly mentions the act of 1919, ch. 156, and purports to include its provisions, the distinguishing features of which were that the summons should be returnable on the first Monday, a copy of the complaint served on the defendant, and a judgment by default entered by the clerk on the second Monday. If these features, so far as they are included, are still to apply only to the case of bills, notes, etc., as under the original act, the distinction should be made more definite. If they are to apply to all cases so as to empower the clerk to enter judgment, and then only on the first or third Monday of the month, the classification is not necessary, and the regulation should be more clearly and definitely stated. There is nothing in the recent act which requires the summons in any case to be made returnable on the first Monday, and there would seem to be no particular advantage in requiring the judgment to be entered only on the first or third Monday, unless it is the intention to make those days special "court days" for the clerk to enter judgments. It would simplify the practice to authorize the clerk to enter judgment by default in all cases authorized by the Consolidated Statutes, and this could be done on any day if the defendant failed to file his answer within the time required by the statute.

In the removal of causes for improper venue, under the original Code, the

<sup>7</sup> 182 N. C. 200, 108 S. E. 630 (1921).

motion to remove was made before the court (meaning clerk) before the time for answering expired. (C. C. P. 69.) When the pleadings were to be filed at term, this motion was necessarily made before the judge. When the pleadings were again required to be filed before the clerk, no change was made in the law with regard to removal. The question arose in the case of *Zucker v. Oettinger*,<sup>8</sup> and the Court there said that the proper practice was for the defendant to lodge his motion to remove before the clerk, then file his answer, and the clerk would transmit the papers to the court at term, and the judge would pass upon the motion. This has been changed by subsection 15 of the recent act.

"All motions to remove as a matter of right shall be made before the clerk, who is authorized to make all necessary orders, and an appeal shall lie from such order upon such motion to the judge at the next term, who shall hear and pass upon such motion de novo." Subsection 16 also makes the same provision as to motions to remove to the Federal Court.

Since a former section extends the time for defendant to answer to twenty days after the final determination of a motion to remove, this gives an opportunity for delay. If the motion should be made three or four months before the next term of court, it goes by appeal to the judge at term, and the defendant has twenty days thereafter to answer. It might lead to a more speedy trial, if the appeal could be heard by the proper judge "at term or in vacation," as other appeals from the clerk are heard. (C. S. 633.)

The clerk is also authorized to hear motions to set aside judgments rendered by him, for irregularity, mistake, surprise, or excusable neglect, just as the judges are authorized to set aside judgments under C. S. 600, with the right of appeal to the judge at term.

When the summons was made returnable before the clerk, no change was made in the practice in attachment proceedings, and there was an inconsistency in having the summons returnable before the clerk and the warrant of attachment returnable at term. (C. S. 801.) This was changed by the act of Extra Session 1920, ch. 96, making the warrant of attachment returnable before the clerk, and this has been carried forward in the recent act. Another amendment to the attachment law provides that when a writ of attachment is issued against a nonresident debtor owning shares in a resident corporation, and no officer of the corporation is found in the county of its principal office upon whom service may be made, service may be made by leaving a copy of the warrant of attachment with the person in charge of the property in the county, with a notice showing the stock levied upon. (Acts of 1921, ch. 94, amending C. S. 817.)

There is a general provision in subsection 20 of the recent act, which authorizes the Supreme Court to prescribe "modes of making and filing proceedings, actions, and pleadings, and of entering orders and judgments and recording the same, and to prescribe and regulate the practice on appeals to the Supreme Court, and in the trial of actions in the Superior Court, and before referees," not in

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<sup>8</sup> 179 N. C. 277, 102 S. E. 413 (1920).

conflict with statutory regulations. This is a little more in detail than the power given in C. S. sec. 1421, but it confers no more power than that already exercised by the Court, as explained in *Calvert v. Carstarphen*.<sup>9</sup> It might lead to better results, if more of the details of practice were left to be regulated by the Court, as has been done in some instances, rather than to leave them to be worked out through legislative action.

Another act passed at the recent session of the Legislature confers upon emergency judges jurisdiction in matters of injunction, receivers, and habeas corpus, the same as that exercised by other judges, with the power to direct that such matters may be heard before some other judge, when the emergency judge cannot hear them.

Most of the changes in the practice in civil actions, made by statutes enacted within the last three years, have been noticed in this discussion. These changes, as a whole, will do much toward carrying out the policy involved in their enactment, to produce a speedy trial upon the merits and to avoid the expense incident to delay in litigation. Whatever questions have been raised as to the effect of such changes have not been in the spirit of criticism or fault-finding, but for the purpose of calling attention to what may prove to be defects and lead to amendments which may more effectually carry out the purpose in view.

In closing a discussion on amendments, a suggestion as to the method of making amendments may not be out of place. The State has prepared at considerable expense, from time to time, compilations of the statute law, which shall contain in separate sections the existing law, the latest of these being the Consolidated Statutes. When the statute law is referred to, the sections of these compilations are cited, and everyone may expect to find the law by looking to those sections. When amendments are made which refer only to a definite subject, and are not applied to the definite sections of the existing statutes with regard to that subject, it becomes a rather difficult task for the individual to fit the amendments into their proper places. The meaning could be more easily understood, if the particular sections of the existing law as contained in the general compilation were referred to, or better still, if the sections as amended were rewritten in full.