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# Constitutional Law -- Right of Women to Serve on Juries

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From an analysis of the cases, it appears that the principal case is distinguishable from the *Hansen* case, *supra*, for in that case the defendant intended to return to a *legitimate* occupation. In the *Lapina* case, *supra*, as in the principal case, there was an intent to return to an *illegitimate* occupation, and in this respect the cases are in point. However, upon closer analysis, it appears that the principal case is distinguishable from both cases relied upon by the court. Even though the return trip was made to resume activities in an illegal profession, still such return trip was a part of a larger planned journey, made with no intent to facilitate the purposes of prostitution, debauchery, or other immoral purposes. The primary objective of the entire trip was to enjoy a vacation, and the return to the house of prostitution was merely an incident thereto. It is submitted that the Supreme Court reached the correct result.

CECIL J. HILL

### Constitutional Law—Right of Women to Serve on Juries\*

The defendant was convicted for violations of the Prohibition laws by a jury consisting of ten men and two women. At the impaneling of the jury in the trial court, the defendant objected to the two women on the jury, but this objection was overruled. The defendant appealed on the ground of disqualification because of sex; and, in a 5-2 decision, the Supreme Court of North Carolina granted a new trial and ruled that women were not eligible to serve on juries in this state.<sup>1</sup>

The majority based its decision on these points: (1) Constitutional provisions regarding trial by jury<sup>2\*</sup> are to be construed according to their meaning at the time of the adoption of the Constitution in 1868, at which time a common law jury excluded women *propter defectum sexus*.<sup>3</sup> (2) Even prior to the adoption of the Constitution, the statute,<sup>4</sup>

\* This topic has been discussed in many periodicals. The following formed part of the bibliography for this note: Miller, *The Woman Juror* (1922) 2 ORE. L. REV. 30; NOTES (1932) 12 B. U. L. REV. 122, (1925) 13 CALIF. L. REV. 155, (1939) 18 CHI-KENT REV. 103, (1932) 32 COL. L. REV. 134, (1925) 25 COL. L. REV. 376, (1926) 11 CORN. L. Q. 533, (1930) 18 GEO. L. J. 393, (1928) 22 ILL. L. REV. 777, (1926) 21 ILL. L. REV. 292, (1927) 2 IND. L. J. 566, (1922) 7 IOWA L. BULL. 190, (1928) 32 LAW NOTES 124, (1923) 26 LAW NOTES 224, (1921) 19 MICH. L. REV. 662, (1927) 12 MINN. L. REV. 81, (1921) 6 MINN. L. REV. 78, (1921) 5 MINN. L. REV. 318, (1930) 74 SOL. J. 510, (1937) 12 ST. JOHN'S L. REV. 172, (1927) 12 ST. LOUIS L. REV. 138, (1932) 6 TULANE L. REV. 324, (1937) 71 U. S. L. REV. 75, (1921) 69 U. OF PA. L. REV. 386, (1920) 68 U. OF PA. L. REV. 398, (1926) 12 VA. L. REV. 661, (1921) 8 VA. L. REV. 139, (1926) 35 YALE L. J. 887, (1919) 28 YALE L. J. 515, (1918) 27 YALE L. J. 423.

<sup>1</sup> State v. Emery, 224 N. C. 581, 31 S. E. (2d) 858 (1944).

<sup>2</sup> "No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court." N. C. CONST. ART. I, §13. "No person ought to be . . . deprived of his . . . liberty or property, but by the law of the land." N. C. CONST. ART. I, §17. "In all controversies at law respecting property, the ancient mode of trial by jury . . . ought to remain sacred and inviolate." N. C. CONST. ART. I, §19.

<sup>3</sup> 3 BL. COMM. \*352.

<sup>4</sup> N. C. GEN. STAT. (1943) §9-1.

which authorizes the jury list to be selected from the names of (a) any such *persons* as have paid the taxes assessed against them for the preceding year, and (b) who are men of good moral character and sufficient intelligence; and the statute<sup>5</sup> which holds that “. . . every word importing the masculine only shall extend and be applied to females as well as males unless the context clearly shows to the contrary . . .”, were not pertinent because the Constitutional provisions showed a contrary intent. (3) If women were allowed to serve on juries, it would lead to an innovation in the practical administration of both state and federal courts which “. . . might endanger or prevent this excellent institution of the jury system from its usual course.”<sup>6</sup> (4) The Nineteenth Amendment to the United States Constitution eliminated discrimination in the rights of citizens to vote because of sex, but has no bearing on the right to jury service. (5) The statute<sup>7</sup> which declares, “. . . juror . . . shall when applied to the holder of such office, or occupant of such position, be words of common gender and they shall be a sufficient designation of the person holding such office or position, whether the holder be man or woman,” deals only with titles or designations and not with the qualifications of the offices or positions mentioned therein. (6) No decisions to the contrary have been found where there are similar constitutional and statutory provisions to those of North Carolina.

Justice Devin dissented on the grounds that: (1) The word “men” used in the Constitution should be interpreted in the generic sense to include women. (2) The statute,<sup>8</sup> which was in force at the time of the adoption of the Constitution, can be imputed to the knowledge of the framers of the Constitution. (3) The language of the Constitution should be given an elastic interpretation in keeping with the progress of human thought and the changing social conditions. (4) The Legislature, following the giving of equal suffrage to women, declared that the word “juror,” as used in the statutes, included women;<sup>9</sup> and the Attorney General, (the present Mr. Justice Seawell), later handed down an opinion stating women were not disqualified for service on juries.<sup>10\*</sup>

<sup>5</sup> *Id.* §12-3 (1).

<sup>6</sup> *State v. Emery*, 224 N. C. 581, 587, 31 S. E. (2d) 858, 862 (1944).

<sup>7</sup> N. C. GEN. STAT. (1943) §12-3(13).

<sup>8</sup> See note 5 *supra*.

<sup>9</sup> See note 7 *supra*.

<sup>10\*</sup> Memorandum to Hon. J. Clyde Stancill, County Attorney, Charlotte, N. C., October 5, 1937. *Eligibility of Women to Serve on Juries of North Carolina*. “It is believed that the legislative history of North Carolina with respect to the importance of the civil and political status of women, and the peculiar integration and sequence of our constitutional provisions relating to suffrage, office holding, and citizenship, through which the 19th Amendment directly operates, will fully justify our court in holding that women are now eligible for jury service (without any further statutory enactment), thus removing the last vestige of political inequality with men.” (p. 2). “To say that when our statute was enacted the word ‘person’ meant a ‘male person’ is not accurate. It never meant that, there or elsewhere. All that could be said is that on account of constitutional inhibitions,

As a result of this, women served on juries in North Carolina; and, if it were so held in this case, it would effect no change but would rather give added authority to a practice already grown up.

Justice Seawell reiterated in part the opinion of Justice Devin and added the following points: (1) The Constitution did not plainly say a jury of males as it did in conferring the right of suffrage, which suggests that ". . . if there was any ideology on the subject, it was activated only in the common law, not in the Constitution, and should disappear when the disqualifications finding expression in the common law had been removed."<sup>11</sup> (2) Many courts and many states by statute have now made women eligible for jury duty, and this has been accomplished generally without constitutional amendment.

Legislation on the subject of women jurors falls into three classifications: (a) those that expressly exclude women, (b) those that expressly include women, and (c) those that are ambiguous and need interpretation.

Thirteen states and the Territory of Hawaii expressly exclude women by statute.<sup>12\*</sup> All of these, except New Hampshire, declare that only a "male" citizen is qualified to be a juror. New Hampshire words its statute, as follows: "The burden of jury duty shall not be imposed upon women, and their names shall not be put in the lists by town officers."<sup>13</sup>

Eighteen states, the District of Columbia, and the Territory of Alaska allow women to serve on juries by express statutory provision.<sup>14\*</sup>

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it could not be made at any time applicable to women. Of course, if one desired to lay a ghost or remove a mere mental obsession, the law might plainly state that females are included. The word 'person,' however, has a continuing life and must be construed to mean women as well as men when other parts of the law permit this common sense application to be made: and, in this instance, there is no occasion for placing the word 'person' in a legalistic straight jacket." (p. 12).

<sup>11</sup> *State v. Emory*, 224 N. C. 581, 595, 31 S. E. (2d) 858, 867 (1944).

<sup>12\*</sup> ARIZ. CODE ANN. (1939) §37-102; COLO. STAT. ANN. (Michie, 1935) c. 95, §1; FLA. STAT. ANN. (1943) §40.01 (Failure to allow women to be jurors has denied the plaintiff equal protection of law as given by the 14th Amendment. *Hall v. State*, 136 Fla. 644, 187 So. 392 (1939).); MISS. CODE ANN. (Rice & Etheridge, 1942) §1762; MO. STAT. ANN. (1932) p. 4690, §8746; N. H. REV. LAWS (1942) c. 375, §29; N. MEX. STAT. ANN. (1941) §30-101; OKLA. STAT. ANN. (Supp. 1944) tit. 38, §10; S. D. CODE (1939) §32.10; TENN. CODE ANN. (Williams, 1934) §10006; VA. CODE ANN. (Michie, Sublett & Stedman, 1942) §5984; W. VA. CODE ANN. (Michie, Sublett & Stedman, 1943) §5261; WYO. REV. STAT. ANN. (Courtright, 1931) §61-201 (*McKinney v. State*, 3 Wyo. 719, 30 Pac. 292 (1892) upheld the constitutionality of this statute.); HAWAII REV. LAWS (1935) §3710.

<sup>13</sup> N. H. REV. LAWS (1942) c. 375, §29.

<sup>14\*</sup> CONN. GEN. STAT. (Supp. 1939) §1401e; DEL. REV. CODE (1935) §4721-2: "All persons qualified to vote at the general election shall be liable to serve as jurors. . . ." "Whenever any Grand or Petit Jury in this state shall be composed of both men and women and shall retire from the Court room for deliberation, the Court shall appoint two bailiffs. . . ."; IDAHO SESSION LAWS (1943) c. 158 (Prior to this statute, *State v. Kelley*, 39 Idaho 668, 229 Pac. 659 (1924), con-

Five states by judicial decision have construed their statutes to be applicable only to men. In Georgia a statute reads: ". . . selection of the most experienced . . . men to serve as grand jurors . . . as traverse jurors."<sup>15</sup> The Georgia Supreme Court ruled that the statute was not unconstitutional and that women could not be jurors.<sup>16</sup> In Idaho "A person is competent to act as a juror if he be: (1) A Citizen of the United States and an elector of the county. . . ."<sup>17</sup> It was held that the use of the pronoun "he" controlled over the broader term "persons," thereby excluding women.<sup>18</sup> A Massachusetts statute provides: "A person qualified to vote for representatives to the general court . . . shall be liable to serve as jurors. . . ."<sup>19</sup> The Court held that these words were broad enough to include women; but, when connected with the history of the times and system, it would seem that it was not so intended.<sup>20</sup> Ten years later the case of *Commonwealth v. Welosky*<sup>21</sup> substantiated this opinion. In South Carolina a constitutional provision says: "The Petit jury of the Circuit Courts shall consist of twelve men

strued a previous statute, which said a jury was a body of men, to include women.); ILL. ANN. STAT. (Smith-Hurd, Supp. 1942) c. 78, §25 (People v. Traeger, 372 Ill. 11, 22 N. E. (2d) 679 (1939) upheld the constitutionality of this statute. A previous statute passed in 1929 was declared unconstitutional in People v. Barnett, 344 Ill. 62, 176 N. E. 108 (1931); accord, People v. Schraeberg, 347 Ill. 392, 179 N. E. 829 (1932).); LA. GEN. STAT. ANN. (Dart, 1939) §1938 (Women must file applications for jury duty. State v. Bray, 153 La. 103, 95 So. 417 (1923); State v. Davis, 154 La. 295, 97 So. 449 (1923).); ME. REV. STAT. (1930) c. 120, §2; MINN. STAT. (Henderson, Kennedy & Scott, 1941) § 593.02; Mont. Session Laws (1939) c. 203; Neb. Laws (1943) c. 45, legis. bill 82 (Women are permitted to serve on juries provided the presiding district judge shall certify that the accommodations and facilities of the court house of each county are such as to permit women to serve, and such service shall be compulsory except for good cause shown.); N. J. STAT. ANN. (1939) §2: 85-1 (cf. State v. James, 96 N. J. L. 132, 114 Atl. 553 (1921).); N. Y. Cons. Laws (McKinney) Civil Rights Law (Supp. 1944) §13 (Gerry v. Volger, 252 App. Div. 217, 298 N. Y. Supp. 433 (4th Dep't 1937); cf. In Re Grilli, 110 Misc. 45, 179 N. Y. Supp. 795 (1920).); N. D. COMP. LAWS ANN. (Supp. 1925) §814; ORE. COMP. LAWS ANN. (1940) §14-107 (State v. Chase, 106 Ore. 263, 211 Pac. 920 (1922).); PA. STAT. ANN. (Purdon, 1930) tit. 17, §913: ". . . there shall be provided . . . a separate room or rooms at or adjoining the court house . . . for the comfort . . . of women jurors. . . ." (Commonwealth v. Valotta, 279 Pa. 84, 123 Atl. 681 (1924); Commonwealth v. Garletto, 81 Pa. Super. 271 (1923).); R. I. Acts (1939) c. 700, §37: "Whenever the jury commissioner shall determine that the accommodations and facilities of the superior court houses in any county are such as to allow of the service of women as jurors, he shall certify of such facts to the secretary of state and shall include women in the drawings made by him. . . ."; Vt. Laws (1941) no. 31, §6; WASH. REV. STAT. ANN. (Remington, 1932) §89: "A jury is a body of men. . . ." §95: ". . . women . . . shall not be compelled to serve as jurors . . . Provided further, that any woman desiring to be excused from jury service may claim exception by signing a written or printed notice thereof. . . ."; D. C. CODE (1940) tit. 11, §11-1418; ALASKA COMP. LAWS (1933) §1819 (Tynan v. U. S., 297 Fed. 177 (C. C. A. 9th, 1924), held this act constitutional.).

<sup>15</sup> GA. CODE ANN. (Park, Stillman & Strazier, 1936) tit. 2, §2-4502.

<sup>16</sup> Powers v. State, 172 Ga. 1, 157 S. E. 195 (1931).

<sup>17</sup> IDAHO CODE ANN. (1932) §2-201.

<sup>18</sup> State v. Kelley, 39 Idaho 668, 229 Pac. 659 (1924).

<sup>19</sup> MASS. ANN. LAWS (Michie, 1932) c. 234, §1.

<sup>20</sup> In re Opinion of the Justices, 237 Mass. 591, 130 N. E. 685 (1921).

<sup>21</sup> 276 Mass. 398, 177 N. E. 656 (1931).

. . . Each juror must be a qualified elector. . . ."<sup>22</sup> In *State v. Mittle*<sup>23</sup> it was decided that, although each juror must be an elector, not every qualified elector could be a juror. The Nineteenth Amendment to the Federal Constitution did not give women the right to serve on juries. In a Texas case,<sup>24</sup> a statute saying "All men over twenty-one are competent jurors . . . ,"<sup>25</sup> was construed as not using the word "men" in the generic sense.

The status of four states apparently is still questionable. The Alabama Constitution states: ". . . the accused has a right to . . . a speedy, public trial by an impartial jury . . ."<sup>26</sup> and the Code section on challenges to the jury speaks of a juror as a "person."<sup>27</sup> In Arkansas, a statute states: "A jury of twenty-four men, to be known as the petit jurors . . . shall be the regular jurors for trial of all jury cases. . . ."<sup>28</sup> The Arkansas court<sup>29</sup> refused to consider the competency of an indictment rendered by a grand jury on which there were two women, because of a statute prohibiting the quashing of an indictment on the grounds of qualifications of jurors. No interpretations have been found on either the Maryland or Wisconsin statutes. The Maryland statute says: "No person shall be selected and placed upon a panel as a juror who shall not have arrived at the age of twenty-five years."<sup>30</sup> The Wisconsin provision is that: "All citizens of the United States who are qualified electors of this state . . . who are men of good character . . . shall be liable to be drawn as jurors."<sup>31</sup>

Justice Seawell in his dissent in the instant case laid down a challenge to students of the law to investigate and contradict the statement made by the majority that: "We have found no case, however, in a state with constitutional and statutory provisions similar to ours, where a contrary conclusion has been reached. . . ."<sup>32</sup> Such investigation has yielded three states whose decisions would apparently tend to contradict the statements made by the majority. Not all of these states have exactly the same wording as the pertinent Constitutional and statutory provisions in North Carolina, but all are *substantially* similar.

In Iowa the Constitution provides that trial by jury shall remain inviolate and that trial by jury of less than twelve men may be authorized.<sup>33</sup> The statutory provision is that "All qualified electors . . .

<sup>22</sup> S. C. CONST. Art. V, §21.

<sup>23</sup> 120 S. C. 526, 113 S. E. 335 (1922).

<sup>24</sup> *Tremont v. State*, 96 Tex. Crim. 572, 259 S. W. 583 (1924); *accord*, *Glover v. Cobb*, 123 S. W. (2d) 794 (Tex. Civ. App. 1938).

<sup>25</sup> TEX. ANN. REV. CIV. STAT. (Vernon, 1925) tit. 42, §2133.

<sup>26</sup> ALA. CONST. Art. I, §6. <sup>27</sup> ALA. CODE ANN. (Michie, 1940) §55.

<sup>28</sup> ARK. CIV. CODE ANN. (Crawford, 1934) §342.

<sup>29</sup> *Dickerson v. State*, 161 Ark. 60, 255 S. W. 873 (1923).

<sup>30</sup> MD. ANN. CODE (Flack, 1939) Art. 51, §1.

<sup>31</sup> WIS. STAT. (1941) §255.01.

<sup>32</sup> *State v. Emery*, 224 N. C. 581, 588, 31 S. E. (2d) 858, 868 (1944).

<sup>33</sup> IOWA CONST. Art I, §9.

are competent jurors . . .";<sup>34</sup> yet decisions of the courts of that state have held that women were eligible to be jurors since women were now electors, despite the fact that the Constitution used the word "men."<sup>35\*</sup> Here is seen a parallel conflict to that of North Carolina with the exception that Iowa uses the broad term "electors" in its statute while North Carolina uses "persons" who have paid the taxes assessed.<sup>36</sup>

The Michigan Constitution mentions that trial by jury shall be inviolate<sup>37</sup> and that a jury should consist of twelve men.<sup>38</sup> A statute of that state provides that persons having the qualification of electors shall be jurors;<sup>39</sup> and, despite the use of the word "men" in the Constitution, women can serve on juries in that state. In *People v. Barltz*<sup>40</sup> the court said that the word "men" loses its significance and becomes that of "juror."

Ohio follows Michigan in similarity both as to Constitutional<sup>41</sup> and statutory provisions,<sup>42</sup> which have been interpreted to include women.<sup>43</sup>

The situation in six other states<sup>44\*</sup> might be cited also in support

<sup>34</sup> IOWA CODE (Reichmann, 1939) §10842.

<sup>35\*</sup> *State v. Hathaway*, 224 Iowa 478, 276 N. W. 207 (1937); *State v. Walker*, 192 Iowa 823, 185 N. W. 619 (1921); *accord*, U. S. v. Roenig, 52 F. Supp. (N. D. Iowa 1943) (Where the court held that the federal courts of the district must follow the same jury system as the highest court of the state in which the district lies.).

<sup>36</sup> N. C. GEN. STAT. (1943) §9-1.

<sup>37</sup> MICH. CONST. Art. II, §13.

<sup>38</sup> *Id.* §28.

<sup>39</sup> MICH. STAT. ANN. (Henderson, 1938) §27.246.

<sup>40</sup> 212 Mich. 580, 180 N. W. 423 (1920); *accord*, *People v. Merhige*, 219 Mich. 95, 188 N. W. 454 (1922).

<sup>41</sup> OHIO CONST. Art. I, §1, Art. X, §5.

<sup>42</sup> OHIO GEN. CODE ANN. (Page, 1937) §11419-9.

<sup>43</sup> *Cleveland, C. C. and St. L. Ry. Co. v. Wehmeier*, 33 Ohio App. 475, 170 N. E. 27 (1929).

<sup>44\*</sup> CALIFORNIA CONST. Art. I, §7: "The right of trial by jury shall be secured to all . . . the jury may consist of twelve . . ."; and two statutes are: "A trial jury is a body of persons . . ." and ". . . a person is competent to act as juror if he be: (1) a citizen of the United States. . ." CAL. CODE CIVIL PROC. (Deering, 1937) §§193, 198. Yet these provisions have been interpreted to include women. U. S. v. Ballard, 35 F. Supp. 105 (S. D. Cal. 1940); *People v. Parman*, 14 Cal. (2d) 17, 92 P. (2d) 387 (1939); *Ex Parte Mana*, 178 Cal. 213, 172 Pac. 986 (1918). However, it is to be noted that the California Constitution does not use the word "men" in reference to jury trial, as does the North Carolina Constitution, although the California statute uses the male pronoun "he" in conjunction with the word "persons," thereby imputing the same idea as used in N. C. GEN. STAT. (1943) §9-1. The majority in the instant case cited *People v. Lensen*, 34 Cal. App. 336, 167 Pac. 406 (1917) as expressing the California view; but Justice Seawell in his dissent pointed out that there were later California cases on the matter.

The CONSTITUTION OF INDIANA Art. I, §20 provides that jury trial shall remain inviolate, and a statute says that a person must be a resident voter to be a juror. IND. STAT. ANN. (Burns, 1933) §4-3317. Indiana cases have held that women are jurors since the suffrage amendment. *Johnson v. State*, 201 Ind. 264, 167 N. E. 531 (1929); *Moore v. State*, 197 Ind. 640, 151 N. E. 689 (1926).

The KANSAS CONSTITUTION Art. I, §5 protects the inviolate right to trial by jury, and the code provides for selection of jurors from persons having the qualifications of electors. KAN. GEN. STAT. ANN. (Corrick, 1935) §43-102. The Kentucky Constitution has the same provision as Kansas (BILL OF RIGHTS §7) and a

of Justice Seawell's dissent; however, they are not quite as closely parallel to the North Carolina situation.

It is to be noted that these three states, Iowa, Michigan, and Ohio, with constitutional and statutory provisions similar to North Carolina, have reached a conclusion contrary to that of the Supreme Court of North Carolina without the benefit of two such enlightening provisions as are found in the North Carolina statutes: ". . . every word importing the masculine gender only shall extend and be applied to females as well as to males unless the context shows to the contrary"<sup>45</sup> and "juror" should be a word of "common gender."<sup>46</sup>

However, if these decisions are not of sufficient weight to have controlled the case of *State v. Emery*,<sup>47</sup> as the instant case suggested, the responsibility now lies upon the Legislature to instigate the appropriate action to place North Carolina among those states which have women on juries.

Judge Florence Allen, of the Circuit Court of Appeals, has aptly summed up the view of the progressive states when she said: "Educated women have more leisure, unless they have young children, than business men, and therefore we find them less apt to evade jury duty than men of the same class. This means that in calling women to serve as jurors new sources of intelligence are opened, and intelligence is surely needed on a jury. The women on a jury follow the evidence as well and are usually conscientious in the verdict. It is the general verdict based upon their years of service that they will never 'play cards nor throw dice' to decide their vote. The women are not particularly sentimental. Neither are they heartless. They are much like men in their usual reactions to evidence, but they are marked by a notable desire for law enforcement. For my part, I believe that in the future we shall owe much to the woman juror because of her respect for law and her conscientious demand that society be protected and the rules of civilized conduct upheld."<sup>48</sup>

IDRIENNE E. LEVY

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statute which says jurors are "persons." KEN. REV. STAT. (1944) §29.030. But cases in both states have held that exemption clauses do not render women incompetent to serve on juries if they choose to waive the privilege of exemption. *Moore v. Cass*, 10 Kan. 220 (1872); *Smith v. Rose*, 224 Ky. 154, 5 S. W. (2d) 901 (1928).

NEVADA CONST. ART. I, §24 says that trial by jury shall remain inviolate, and it is provided by statute that a juror must be a qualified elector. NEV. COMP. LAWS (Hillyer, 1929) §8476. Here it has been held that the statute includes women. *Parus v. Dist. Ct.*, 42 Nev. 229, 174 Pac. 706 (1918); cf. NEV. COMP. LAWS (Hillyer, Supp. 1941) §8479 for when women can be exempt.

Utah is similar to Kansas and Kentucky. UTAH CONST. ART. I, §24; UTAH CODE ANN. (1940) §48-0-10.

<sup>45</sup> N. C. GEN. STAT. (1943) §12-3(1).

<sup>46</sup> *Id.* §12-3(13).

<sup>47</sup> 224 N. C. 581, 31 S. E. (2d) 858 (1944).

<sup>48</sup> Note (1923) 26 LAW NOTES 224.