THE GENERAL STATUTES OF NORTH CAROLINA OF 1943

1949 CUMULATIVE SUPPLEMENT

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

UNDER THE DIRECTION OF
A. HEWSON MICHIE, GEORGE P. SMITH, JR.
AND BEIRNE STEDMAN

Volume I

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Preface

This Cumulative Supplement contains the general laws of a permanent nature enacted at the 1945, 1947 and 1949 Sessions of the General Assembly, and brings to date the annotations included in the General Statutes of North Carolina of 1943.

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. The index is confined mainly to new laws and such amendatory laws as are not reflected in the original index. In addition, the index includes many references enlarging upon the treatment of certain topics found in the original volumes of the General Statutes.

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

GEORGE P. SMITH, JR.,
Editor in Chief.

November, 1949.

Scope of Publication

Constitution:

Amendments to the Constitution of North Carolina adopted or proposed since the publication of the General Statutes.

Statutes:

Permanent portions of the general laws enacted at the 1945, 1947 and 1949 Sessions of the General Assembly.

Annotations:

Sources of the annotations:

North Carolina Reports volumes 223-230 (p. 576).

Federal Reporter 2nd Series volumes 134 (p. 417)-174.

Federal Supplement volumes 49 (p. 225)-83.

United States Reports volumes 318-337.

Supreme Court Reporter volumes 63 (p. 862)-69.

North Carolina Law Review volumes 22 (p. 280)-27.

Constitution of North Carolina

ARTICLE I

Declaration of Rights

§ 1. The equality and rights of persons.—That we hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness. (Const. 1868; 1945, c. 634, s. 1.)

Editor's Note.—This section was amended by vote at the election held pursuant to Session Laws 1945, c. 634.

Meaning of "Liberty."—The term "liberty," as used in this section and § 17 of this article, does not consist simply of the right to be free from arbitrary physical restraint or servitude, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. It includes the right of the citizen to be free to use his faculties in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or vocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out these purposes to a successful conclusion. State v. Ballance, 229 N. C. 764, 51 S. E. (2d) 731.

This section does not preclude the legislature from making classifications and distinctions in the application of laws provided they are reasonable and just and not arbitrary. Motley v. State Board of Barber Examiners, 228 N. C. 337, 45 S. E. (2d) 550, 175 A. L. R. 253.

Statute making certain war veterans eligible for license to practice barbering without being examined does not violate this section. Motley v. State Board of Barber Examiners, 228 N. C. 337, 45 S. E. (2d) 550, 175 A. L. R. 253. See § 86-11.1.

Statute Regulating Practice of Optometry.—A portion of § 90-115, relating to the practice of optometry, was held violative of this section. Palmer v. Smith, 229 N. C. 612, 51 S. E. (2d) 8.

Statute providing for the licensing and supervision of photographers (G. S. chap. 92) is violative of this section. State v. Ballance, 229 N. C. 764, 51 S. E. (2d) 731.

§ 2. Political power and government.

Cited in Brumley v. Baxter, 225 N. C. 691, 36 S. E. (2d) 281, 162 A. L. R. 930.

§ 7. Exclusive emoluments, etc.—No person or set of persons are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services. (Const. 1868; 1945, c. 634, s. 1.)

Editor's Note.—This section was amended by vote at the election held pursuant to Session Laws 1945, c. 634.

Purpose.—

The state cannot authorize city to donate property, or to grant privileges to one class of citizens not enjoyed by all, except in consideration of public services. Brumley v. Baxter, 225 N. C. 691, 36 S. E. (2d) 281, 285, 162 A. L. R. 930, citing Brown v. Board of Com'rs, 223 N. C. 744, 28 S. E. (2d) 104, 106.

Motivation of Legislation.—The constitutional limitation contained in this section, has been frequently invoked by supreme court to strike down legislation conferring special privileges not in consideration of public service, but where the motivation is for a public purpose and in the public interest, and does not confer exclusive privilege, legislation has been upheld. Brumley v. Baxter, 225 N. C. 691, 36 S. E. (2d) 281, 286, 162 A. L. R. 930.

This section does not preclude the legislature from making classifications and distinctions in the application of laws provided they are reasonable and just and not arbitrary. Motley v. State Board of Barber Examiners, 228 N. C. 337, 45 S. E. (2d) 550, 175 A. L. R. 253.

An expenditure by a municipality for special training of a police officer does not grant an exclusive emolument or privilege to the officer contrary to this section. Green v. Kitchin, 229 N. C. 450, 50 S. E. (2d) 545, discussed in 27 N. C. Law Rev. 500.

Services in the armed forces during war are "public services" within the meaning of this section. Motley v. State Board of Barber Examiners, 228 N. C. 337, 45 S. E. (2d) 550, 175 A. L. R. 253; Brumley v. Baxter, 225 N. C. 691, 36 S. E. (2d) 281, 285, 162 A. L. R. 930.

Statute making certain war veterans eligible for license to practice barbering without being examined does not violate this section. Motley v. State Board of Barber Examiners, 228 N. C. 337, 45 S. E. (2d) 550, 175 A. L. R. 253. See § 86-11.1.

Exempting corporations chartered prior to a certain date from the proscription against emptying into streams substances inimical to fish violates this section. State v. Glidden Co., 228 N. C. 664, 46 S. E. (2d) 860. See § 113-172.

Contract to Relieve Railway of Expense of Removing Tracks Held Valid.—The state highway commission agreed to appropriate a sum of money for the improvement of a city street upon condition that tracks and facilities of a street railway company be removed therefrom. The railway company was operating under a franchise having twenty more years to run, which provided that the railway company should save the city harmless from any damage resulting from the construction of its tracks. The city entered into a contract with the railway company providing that in consideration of abandonment of its franchise along said street the city would acquire for it an alternate right of way and would remove the tracks from the street. The court held that the promise by the city to remove the tracks did not constitute a special emolument not in consideration of public service. Boyce v. Gastonia, 227 N. C. 139, 41 S. E. (2d) 355.

Statute including deputy sheriffs within term "employee" as used in Workmen's Compensation Act (G. S. § 97-2) held consonant with the provisions of this section. Towe v. Yancey County, 224 N. C. 579, 31 S. E. (2d) 754.

Gratuity to Individual for Adjusting Claim Is Unauthorized.—This section constitutes a specific constitutional prohibition against gifts of public money, and the legislature has no power to compel or even to authorize a municipal corporation to pay a gratuity to an individual to adjust a claim which the municipality is under no legal obligation to pay. Brown v. Board of Com'rs, 223 N. C. 744, 745, 28 S. E. (2d) 104.

§ 11. In criminal prosecutions.—In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony, and to have counsel for defense, and not be compelled to give self-incriminating evidence, or to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty. (Const. 1868; 1945, c. 634, s. 1.)

Editor's Note.—This section was amended by vote at the election held pursuant to Session Laws 1945, c. 634.

Information as to Accusation.—

The constitutional right of the accused in a criminal prosecution, to be informed of the accusation against him and to confront his accusers and witnesses with other testimony, carries with it, not only the right to face one's "accusers and witnesses with other testimony," but also the opportunity fairly to present one's defense. State v. Utley, 223 N. C. 39, 25 S. E. (2d) 195.

Confrontation—Does Not Apply to Civil Actions.—The right accorded defendant in a criminal prosecution to confront the witnesses against him does not apply to civil actions. Chesson v. Kieckhefer Container Co., 223 N. C. 378, 380, 26 S. E. (2d) 904.

Same—Not Denied by Refusing Motion to Continue.—There is no denial of prisoner's right to confrontation by the refusal of a motion to continue, on the ground of the absence of a material, expert, fingerprint witness, it appearing that the state's solicitor agreed that he would not, and did not offer evidence as to fingerprints. State v. Rising, 223 N. C. 747, 28 S. E. (2d) 221.

The constitutional right to be represented by counsel is further implemented by § 15-4. State v. Chesson, 228 N. C. 259, 45 S. E. (2d) 563.

A defendant has the constitutional right to be represented by counsel whom he has selected and employed, and in prosecutions for capital felonies the court has an

inescapable duty to assign counsel to a person unable to employ one. State v. Gibson, 229 N. C. 497, 50 S. E. (2d) 520.

Contemplates Reasonable Opportunity to Prepare Defense.—The constitutional guarantee of the right of counsel requires that the accused and his counsel shall be afforded a reasonable time for the preparation of his defense. State v. Gibson, 229 N. C. 497, 50 S. E. (2d) 520, discussed in 27 N. C. Law Rev. 544.

The constitutional right to be represented by counsel contemplates not only that accused shall have the privilege of engaging counsel, but also that he and his counsel shall have a reasonable opportunity in the light of all attendant circumstances to investigate, prepare, and present his defense. State v. Speller, 230 N. C. 345, 53 S. E. (2d) 294.

After the convening of the term the trial court ordered a special venire from another county to try a negro charged with rape. Counsel for defendant challenged the array on the ground that persons of defendant's race had been excluded from the jury list solely because of their race, and the court refused the request of counsel for time to investigate and secure evidence in support of such challenge to the array, but counsel obtained evidence from members of the special venire and bystanders of the courtroom tending to sustain the challenge. It was held that as it appeared that defendant was prejudiced by denial of reasonable opportunity to procure evidence in support of his challenge to the array, a new trial was awarded for the denial of defendant's constitutional right to be properly represented by counsel. Id.

But the denial of a continuance is not prejudicial error where the record fails to show that it would have enabled defendant and his counsel to obtain additional evidence or otherwise present a stronger defense. State v. Gibson, 229 N. C. 497, 50 S. E. (2d) 520.

And Depends upon Nature of Offense.—In capital felonies the provision relative to counsel is regarded as not merely permissive but mandatory. This is indicated by § 15-5 and by numerous decisions of the supreme court. But in cases of misdemeanors and felonies less than capital it has been the uniform practice in this jurisdiction to regard these provisions as guaranteeing the right of persons accused to be represented by counsel, and the right to have counsel assigned if requested and the circumstances are such, for financial or other reasons, as to show the apparent necessity of counsel for the protection of the defendant's rights. State v. Chesson, 228 N. C. 259, 45 S. E. (2d) 563.

In cases less than capital the propriety of providing counsel depends upon the circumstances of the individual case, within the sound discretion of the trial judge. State v. Chesson, 228 N. C. 259, 45 S. E. (2d) 563.

And defendant's ignorance and unfamiliarity with legal matters are not alone sufficient to render appointment of counsel mandatory in a prosecution for less than a capital offense. State v. Chesson, 228 N. C. 259, 45 S. E. (2d) 563.

Self-Incrimination—Scope of Protection.—

The constitutional inhibition against self-incrimination is directed against compulsion, and not against voluntary admissions, confessions, or testimony freely given on the trial. Such statements, confessions, and testimony voluntarily given on a former trial are received against the accused as his admissions. State v. Farrell, 223 N. C. 804, 28 S. E. (2d) 560.

Same—Forced Production of Incriminating Documents Not Allowed.—

The introduction in evidence of incriminating papers taken from the defendant at the time of the arrest does not infringe the constitutional guarantee against self-incrimination, under this section, and when he takes the stand in his own behalf he waives his constitutional right against self-incrimination. State v. Shoup, 226 N. C. 69, 36 S. E. (2d) 697, distinguishing State v. Hollingsworth, 191 N. C. 595, 132 S. E. 667, appearing in the original, where defendant was required in open court to hand over incriminating documents.

As to compelling accused to speak so that witness may identify his voice, see note, 27 N. C. Law Rev. 262.

When Motion for Continuance Presents Question of Law.—When a motion for continuance, in a criminal case, is based on a right guaranteed by the Federal and State Constitutions, 14th Amend. U. S. Constitution, Art. I, sec. 17 and this section, the question presented is one of law and not of discretion, and the decision of the court below is reviewable. State v. Farrell, 223 N. C. 321, 26 S. E. (2d) 322.

Cited in State v. White, 225 N. C. 351, 353, 34 S. E. (2d) 139.

§ 12. Answers to criminal charges.

Proposed Amendment.—Session Laws 1949, c. 579, proposed that this section be amended by adding thereto the following: "But any person, when represented by counsel, may, under such regulations as the legislature shall prescribe, waive indictment in all except capital cases."

This section sufficiently explains the function of the grand jury as a part of the court. It is competent to send to the grand jury as many bills of indictment as may be necessary to get before them necessary witnesses and evidence from which they may decide the propriety of submitting the accused to trial. State v. Lewis, 226 N. C. 249, 250, 37 S. E. (2d) 691.

§ 13. Right of jury.—No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful persons in open court. The Legislature may, however, provide other means of trial, for petty misdemeanors, with the right of appeal. (Const. 1868; 1945, c. 634, s. 1.)

Editor's Note.—This section was amended by vote at the election held pursuant to Session Laws 1945, c. 634.

The word "jury" as here used signifies a body of twelve men in a court of justice duly selected and impaneled in the case to be tried. State v. Emery, 224 N. C. 581, 583, 31 S. E. (2d) 858.

A jury of ten men and two women does not suffice as a jury of "good and lawful men" within the meaning of this section. Id.

Failure of defendant in a criminal prosecution to exhaust his peremptory challenges does not affect his right to attack an illegally constituted jury. State v. Emery, 224 N. C. 581, 31 S. E. (2d) 858.

Cited in Gregory v. Travelers Ins. Co., 223 N. C. 124, 25 S. E. (2d) 398, 147 A. L. R. 283 (con. op.); State v. White, 225 N. C. 351, 34 S. E. (2d) 139; State v. Crandall, 225 N. C. 148, 154, 33 S. E. (2d) 861 (dis. op.).

§ 14. Excessive bail.

Cross Reference.—See annotations under § 14-3.

Cruel and Unusual Punishment.—

A sentence to 18 months labor on the roads entered upon defendant's plea of guilty to a charge of drawing and uttering a worthless check was held not to be "cruel and unusual" in a constitutional sense. State v. White, 230 N. C. 513, 53 S. E. (2d) 436.

When no time is fixed by the statute, imprisonment for two years, as in the case of an assault with a deadly weapon, will not be held to be cruel and unusual, and violative of this section. State v. Crandall, 225 N. C. 148, 150, 33 S. E. (2d) 861.

§ 15. General warrants.

Ordinarily even the strong arm of the law may not invade one's dwelling except under authority of a proper search warrant. In re Walters, 229 N. C. 111, 47 S. E. (2d) 709.

§ 16. Imprisonment for debt.

Imprisonment for failure to pay a sum of money is prohibited except to enforce an appropriate judicial order which has been willfully disobeyed so as to constitute contempt of court. Stanley v. Stanley, 226 N. C. 129, 37 S. E. (2d) 118.

Quoted in Moose v. Barrett, 223 N. C. 524, 27 S. E. (2d) 532.

§ 17. No person taken, etc., but by law of land.

Cross References.—As to validity of statute prohibiting discharge of deleterious matter into streams, see note to § 113-172. As to meaning of term "liberty," see § 1 of this article.

The term "law of the land" means the general law, the law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. It means the regular course of the administration of justice through the courts of competent jurisdiction, after the manner of such courts. Procedure must be consistent with the fundamental principles of liberty and justice. State v. Chesson, 228 N. C. 259, 45 S. E. (2d) 563.

Due Process of Law.—The term "law of the land" as used in this section is synonymous with "due process of law." State v. Ballance, 229 N. C. 764, 51 S. E. (2d) 731.

Restraints upon Police Power.—"Law of the land" under this section in relation to the exercise of the state police power, imposes flexible restraints which are satisfied if the act in question is not unreasonable, arbitrary or capricious and the means selected have a real and substantial relation to the objects sought to be attained.

State v. Whitaker, 228 N. C. 352, 45 S. E. (2d) 860, affirmed in 335 U. S. 525, 69 S. Ct. 251, 93 L. Ed. 201.

The legislature may make classifications and distinctions in the application of laws provided they are reasonable and just and not arbitrary. Motley v. State Board of Barber Examiners, 228 N. C. 337, 45 S. E. (2d) 550, 175 A. L. R. 253.

Exclusion of Negroes from Grand Jury. — The evidence disclosed that the names of Negroes were printed in red and the names of white persons were printed in black in preparing names for the jury box, and that in drawing the names from the box the names of Negroes were without exception rejected. It was held that the motion of defendant, a Negro, to quash the indictment found by a grand jury so selected, should have been allowed, since such systematic and arbitrary exclusion of Negroes from the grand jury deprived him of his constitutional rights. State v. Speller, 229 N. C. 67, 47 S. E. (2d) 537.

Zoning Regulations.—The fact that a lot would be more valuable if devoted to a nonconforming use does not deprive the owner of property without due process of law when the zoning regulations are uniform in their application to all within the respective districts, and the differentiation of the uses of property within the respective districts is in accordance with a comprehensive plan in the interest of the health, safety, morals or general welfare of the entire community. Kinney v. Sutton, 230 N. C. 404, 53 S. E. (2d) 306.

Statutes declaring that the right to work shall not be dependent upon membership or non-membership in a labor union, and prohibiting certain agreements between employers and labor organizations (§§ 95-78 to 95-84), do not violate this section. State v. Whitaker, 228 N. C. 352, 45 S. E. (2d) 860, affirmed in 335 U. S. 525, 69 S. Ct. 251, 93 L. Ed. 201.

Statute making certain war veterans eligible for license to practice barbering without standing an examination does not violate this section. Motley v. State Board of Barber Examiners, 228 N. C. 337, 45 S. E. (2d) 550, 175 A. L. R. 253. See § 86-11.1.

Statute Regulating Practice of Optometry.—A portion of § 90-115, relating to the practice of optometry, was held violative of this section. Palmer v. Smith, 229 N. C. 612, 51 S. E. (2d) 8.

Statute providing for licensing and supervision of photographers (G. S. chap. 92) is violative of this section. State v. Ballance, 229 N. C. 764, 51 S. E. (2d) 731.

When Motion for Continuance Presents Question of Law.—Ordinarily, whether a cause shall be continued is a matter which rests in the sound discretion of the trial court and, in the absence of gross abuse, is not subject to review on appeal, but when the motion is based on a right guaranteed by the Federal and State Constitutions, 14th Amend., U. S. Const., Art. I, section 11 and this section, the question presented is one of law and not of discretion, and the decision of the court below is reviewable. State v. Farrell, 223 N. C. 321, 326, 26 S. E. (2d) 322.

Quoted in State v. Emery, 224 N. C. 581, 31 S. E. (2d) 858.

Cited in Reidsville v. Slade, 224 N. C. 48, 29 S. E. (2d) 215; Whitehurst v. Abbott, 225 N. C. 1, 33 S. E. (2d) 129; State v. Glidden Co., 228 N. C. 664, 46 S. E. (2d) 860; Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504.

§ 19. Controversies at law respecting property.—In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable. No person shall be excluded from jury service on account of sex. (Const. 1868; 1945, c. 634, s. 1.)

Editor's Note.—This section was amended by vote at the election held pursuant to Session Laws 1945, c. 634.

As to less than unanimous jury verdicts in civil cases, see 27 N. C. Law Rev. 539.

In General.—

The ancient mode of trial by jury has been preserved in our present Constitution. Chesson v. Kieckhefer Container Co., 223 N. C. 378, 26 S. E. (2d) 904.

The word "jury" is to be given the signification which it had when the Constitution was adopted, i. e., a body of twelve men in a court of justice duly selected and impaneled in the case to be tried. State v. Emery, 224 N. C. 581, 583, 31 S. E. (2d) 858.

Right Not Unqualified.—

The right to trial by jury applies exclusively to actions in which legal rights are involved. State v. Great Southern Trucking Co., 223 N. C. 687, 695, 28 S. E. (2d) 201 (con. op.)

Cited in Whitehurst v. Abbott, 225 N. C. 1, 33 S. E. (2d) 129.

§ 26. Religious liberty.—All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority should, in any case whatever, control or interfere with the rights of conscience. (Const. 1868; 1945, c. 634, s. 1.)

Editor's Note.—This section was amended by vote at the election held pursuant to Session Laws 1945, c. 634.

A municipal ordinance prohibiting the handling of venomous and poisonous reptiles in such manner as to endanger the public health, safety and welfare, will not be held invalid upon defendants' contention that the ordinance interferes with the exercise of their religious practices. State v. Massey, 229 N. C. 734, 51 S. E. (2d) 179.

§ 31. Perpetuities, etc.

The common-law rule against perpetuities is recognized and enforced in this state. The rule is not one of construction but a positive mandate of law to be obeyed irrespective of the question of intention. Its primary purpose is to restrict the permissible creation of future interests and prevent undue restraint upon or suspension of the right of alienation. Whenever the future interest takes effect, or the right of alienation is suspended beyond the period stipulated in the rule, it is violative thereof. Mercer v. Mercer, 230 N. C. 101, 52 S. E. (2d) 229.

As against Private Trusts.—The rule against perpetuities applies to private trusts. And when a private trust violates the rule the court will not limit the duration of the trust but will declare the whole trust invalid. Mercer v. Mercer, 230 N. C. 101, 52 S. E. (2d) 229, holding devise of property in trust void because violative of rule.

Statute Regulating Practice of Optometry.—A portion of § 90-115, relating to the practice of optometry, was held violative of this section. Palmer v. Smith, 229 N. C. 612, 51 S. E. (2d) 8.

Statute relating to licensing and supervision of photographers (G. S. 92) tends to create a monopoly in violation of this section. State v. Ballance, 229 N. C. 764, 51 S. E. (2d) 731.

ARTICLE II

Legislative Department

§ 1. Two branches.

Delegation of Power to Determine Facts.—The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some facts or state of facts upon which the law makes, or intends to make, its own action depend. State v. Curtis, 230 N. C. 169, 52 S. E. (2d) 364.

§ 28. Pay of members and officers of the General Assembly.

Proposed Amendments.—The amendment of this section proposed by Session Laws 1947, c. 361, failed of adoption at the general election held on November 2, 1948.

Session Laws 1949, c. 1267, proposed that this section be amended to read as follows: "Pay of members and presiding officers of the General Assembly.—The members of the General Assembly for the term for which they have been elected shall receive as a compensation for their services the sum of fifteen dollars ($15.00) per day for each day of their session, for a period not exceeding ninety days; and should they remain longer in session they shall serve without compensation. The compensation of the presiding officers of the two houses shall be twenty dollars ($20.00) per day for a period not exceeding ninety days. Should an extra session of the General Assembly be called, the members and presiding officers shall receive a like rate of compensation for a period not exceeding twenty-five days."

§ 29. Limitations upon power of General Assembly to enact private or special legislation.

Municipal Board of Control is a creature of the General Assembly within the provisions of this section. Hunsucker v. Winborne, 223 N. C. 650, 27 S. E. (2d) 817.

Statute including deputy sheriffs within term "employee" as used in Workmen's Compensation Act (G. S. § 97-2) held consonant with the provisions of this section. Towe v. Yancey County, 224 N. C. 579, 31 S. E. (2d) 754.

Cited in Reidsville v. Slade, 224 N. C. 48, 29 S. E. (2d) 215; State v. Mitchell, 225 N. C. 42, 33 S. E. (2d) 134.

§ 30. Inviolability of sinking funds.

Expenditure of Surplus Unencumbered Funds.—Although the General Assembly cannot authorize a diversion of a county's sinking funds which are necessary to pay outstanding sinking fund bonds, it can direct the expenditure of surplus unencumbered sinking funds, provided the expenditure is for a public purpose. Johnson v. Marrow, 228 N. C. 58, 44 S. E. (2d) 468.

§ 31. Use of funds of teachers' and state employees' retirement system restricted.

Proposed Amendment.—Session Laws 1949, c. 821, proposed that a new section be added to article II of the constitution to read as follows: "Sec. 31. Use of funds of Teachers' and State Employees' Retirement System restricted.—The General Assembly shall not use, or authorize to be used, nor shall any agency of the state, public officer or public employee use or authorize to be used the funds, or any part of the funds, of the Teachers' and State Employees' Retirement System except for retirement system purposes. The funds of the Teachers' and State Employees' Retirement System shall not be applied, diverted, loaned to or used by the state, any state agency, state officer, public officer or employee except for purposes of the Retirement System: Provided, that nothing in this section shall prohibit the use of said funds for the payment of benefits, administrative expenses and refunds as authorized by the Teachers' and State Employees' Retirement Law, nor shall anything in this provision prohibit the proper investment of said funds as may be authorized by law."

ARTICLE III

Executive Department

§ 1. Officers of the executive department; terms of office.—The executive department shall consist of a Governor, in whom shall be vested the supreme executive power of the State; a Lieutenant Governor, a Secretary of State, an Auditor, a Treasurer, a Superintendent of Public Instruction, an Attorney General, a Commissioner of Agriculture, a Commissioner of Labor, and a Commissioner of Insurance, who shall be elected for a term of four years by the qualified electors of the State, at the same time and places and in the same manner as members of the General Assembly are elected. Their term of office shall commence on the first day of January next after their election, and continue until their successors are elected and qualified: Provided, that the officers first elected shall assume the duties of their office ten days after the approval of this Constitution by the Congress of the United States, and shall hold their offices four years from and after the first day of January. (1943, c. 57.)

Editor's Note.—This section was amended by vote at the general election of November 7, 1944.

§ 6. Reprieves, commutations and pardons.

After a defendant has begun the service of his term, or at least when that takes place after the adjournment of the court, it is beyond the jurisdiction of the judge to alter it or interfere with it in any way, as the power of pardon, parole or discharge during the term of imprisonment is by this section the exclusive prerogative of the Governor. State v. Lewis, 226 N. C. 249, 37 S. E. (2d) 691, 693.

§ 11. Duties of the Lieutenant-Governor.—The Lieutenant-Governor shall be president of the Senate but shall have no vote unless the Senate be equally divided. He shall receive such compensation as shall be fixed by the General Assembly. (1943, c. 497.)

Editor's Note.—This section was amended by vote at the general election of November 7, 1944.

§ 13. Duties of other executive officers.—The respective duties of the Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance shall be prescribed by law. If the office of any of said officers shall be vacated by death, resignation, or otherwise, it shall be the duty of the Governor to appoint another until the disability be removed or his successor be elected and qualified. Every such vacancy shall be filled by election at the first general election that occurs more than thirty days after the vacancy has taken place, and the person chosen shall hold the office for the remainder of the unexpired term fixed in the first section of this article. (1943, c. 57.)

Editor's Note.—This section was amended by vote at the general election of November 7, 1944.

§ 14. Council of State.—The Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Commissioner of Agriculture, Commissioner of Labor and Commissoner of Insurance shall constitute, ex officio, the Council of State, who shall advise the Governor in the execution of his office, and three of whom shall constitute a quorum; their advice and proceedings in this capacity shall be entered in a journal, to be kept for this purpose, exclusively, and signed by the members present, from any part of which any member may enter his dissent; and such journal shall be placed before the General Assembly when called for by either house. The Attorney General shall be, ex officio, the legal adviser of the executive department. (1943, c. 57.)

Editor's Note.—This section was amended by vote at the general election of November 7, 1944.

ARTICLE IV

Judicial Department

§ 8. Jurisdiction of Supreme Court.

Remedial Writs Controlling Proceedings of Inferior Courts.—The supreme court is vested with authority to issue any remedial writ necessary to give it general supervision and control over the proceedings of inferior courts. State v. Cochran, 230 N. C. 523, 53 S. E. (2d) 663.

Writ of Error Coram Nobis.—The supreme court, in its supervisory power, has authority to entertain a petition for permission to apply to the superior court for a writ of error coram nobis. In re Taylor, 230 N. C. 566, 53 S. E. (2d) 857. As to allowance of petition where trial court failed to appoint counsel, see note to § 15-4.

Writ of Certiorari.—

Where the case is not one in which the alleged error appears on the face of the record proper, which might be corrected in supreme court's supervisory power under this section, but it is to review a ruling of the court entered on motion after trial, as well as an application for certiorari, it was held that since the case was one in which the state had no right of appeal, a dismissal must necessarily follow. State v. Todd, 224 N. C. 776, 32 S. E. (2d) 313.

Stated in State v. Thompson, 226 N. C. 651, 39 S. E. (2d) 823.

Cited in State v. Biggs, 224 N. C. 23, 29 S. E. (2d) 121 (dis. op.)

§ 9. Claims against the State.

Only Way State Can Be Sued.—

A state cannot be sued in its own courts or elsewhere unless it has consented to such suit, by statutes or in cases authorized by provisions of the organic law, instanced by Art. III, Const. of U. S.; this section, Const. of North Carolina. Dalton v. State Highway, etc., Comm., 223 N. C. 406. 27 S. E. (2d) 1.

§ 10. Judicial districts for superior courts.

Proposed Amendment.—Session Laws 1949, c. 393, proposed that this section be amended to read as follows: "Judicial districts for superior courts.—The General Assem-

bly shall divide the state into a number of judicial districts which number may be increased or reduced and shall provide for the election of one or more superior court judges for each district. There shall be a superior court in each county at least twice in each year to continue for such time in each county as may be prescribed by law."

§ 11. Residences of judges; rotation in judicial districts; and special terms.

Proposed Amendment.—Session Laws 1949, c. 775, proposed that this section be amended to read as follows: "Sec. 11. Judicial districts; rotation; special superior court judges; assignment of superior court judges by chief justice.—Each judge of the superior court shall reside in the district for which he is elected. The General Assembly may divide the state into a number of judicial divisions. The judges shall preside in the courts of the different districts within a division successively; but no judge shall hold all the courts in the same district oftener than once in four years. The General Assembly may provide by general laws for the selection or appointment of special or emergency superior court judges not assigned to any judicial district, who may be designated from time to time by the chief justice to hold court in any district or districts within the state; and the General Assembly shall define their jurisdiction and shall provide for their reasonable compensation. The chief justice, when in his opinion the public interest so requires, may assign any superior court judge to hold one or more terms of superior court in any district."

As to rotation of superior court judges, see leading article in 27 N. C. Law Rev. 181. See also, § 26 N. C. Law Rev. 334.

The Power of Special and Emergency Judges Is Defined, etc.—

Under this section, the power and authority of special and emergency judges is defined and limited by the words "in the courts which they are appointed to hold"; and the General Assembly is without power to grant such judges jurisdiction in excess of this definite limitation. Shepard v. Leonard, 223 N. C. 110, 25 S. E. (2d) 445.

This section does not confer or authorize the legislature to confer any "in chambers" or "vacation" jurisdiction upon special judges assigned to hold a designated term of court. Shepard v. Leonard, 223 N. C. 110, 113, 25 S. E. (2d) 445.

Cited in In re Advisory Opinion, 225 N. C. 772, 39 S. E. (2d) 217; State v. Anderson, 228 N. C. 720, 47 S. E. (2d) 1.

§ 12. Jurisdiction of courts inferior to supreme court.

Superior Court.—

The legislature has full authority to provide for appeals to the superior court by licensees whose driving licenses have been suspended or revoked by the discretionary action of the department of motor vehicles. In re Wright, 228 N. C. 584, 46 S. E. (2d) 696. See § 20-25.

§ 13. In case of waiver of trial by jury.

In Civil Actions. — The right to trial by jury in civil cases may be waived. Simmons v. Lee, 230 N. C. 216, 53 S. E. (2d) 79; Chesson v. Kieckhefer Container Co., 223 N. C. 378, 26 S. E. (2d) 904. As to waiver in reference cases, see note to § 1-189.

Special Proceeding to Establish Boundary Line.—As to defendant's waiver of jury trial by failure to tender pertinent issues, see Simmons v. Lee, 230 N. C. 216, 53 S. E. (2d) 79.

§ 21. Elections, terms of office, etc., of justices of the Supreme and judges of the Superior courts.

Applied in Ingle v. State Board of Elections, 226 N. C. 454, 38 S. E. (2d) 566.

§ 27. Jurisdiction of justices of the peace.

Cross References.—

As to punishment for assault, see annotations under section 14-33.

Jurisdiction of Justice.—

In accord wtih original. See Hopkins v. Barnhardt, 223 N. C. 617, 27 S. E. (2d) 644.

In summary proceeding in ejectment, based upon affidavit that defendant had entered into possession of house and lot and refused to vacate the house, justice of peace had no jurisdiction in absence of allegation that relationship of landlord and tenant existed and that defendant was holding over. Howell v. Branson, 226 N. C. 264, 37 S. E. (2d) 687.

ARTICLE V

Revenue and Taxation

§ 3. State taxation.

Editors Note.—

For a brief discussion of this section, see 25 N. C. Law Rev. 504.

Meaning of "Public Purpose."—A tax or an appropriation is for a public purpose if it is for the support of the government, or for any of the recognized objects of the government. Green v. Kitchin, 229 N. C. 450, 50 S. E. (2d) 545, discussed in 27 N. C. Law Rev. 500. As to what are "public purposes," for which a municipality may levy taxes, see 25 N. C. Law Rev. 504.

"Public purpose, as we conceive the term to imply, when used in connection with the expenditure of municipal funds from the public treasury, refers to such public purpose within the frame of governmental and proprietary power given to the particular municipality, to be exercised for the benefit, welfare and protection of its inhabitants and others coming within the municipal care. It involves reasonable connection with the convenience and necessity of the particular municipality whose aid is extended in its promotion." Nash v. Tarboro, 227 N. C. 283, 287, 42 S. E. (2d) 209, quoting Greensboro-High Point Airport Authority v. Johnson, 226 N. C. 1, 36 S. E. (2d) 803.

There can be no lawful tax which is not levied for a public purpose. Nash v. Tarboro, 227 N. C. 283, 42 S. E. (2d) 209.

The fact that moneys are paid to an individual does not affect the character of the expenditure, since the object of the expenditure and not to whom paid determines whether it is for a public purpose. Green v. Kitchin, 229 N. C. 450, 50 S. E. (2d) 545, discussed in 27 N. C. Law Rev. 500.

An expenditure by a municipality for special training of a police officer is for a public purpose. Green v. Kitchin, 229 N. C. 450, 50 S. E. (2d) 545, discussed in 27 N. C. Law Rev. 500.

Municipal Airport Is Public Purpose.—The construction and maintenance of a municipal airport for a city of more than ten thousand inhabitants, engaged in many industries and pursuits, is for a public purpose within the meaning of this section, and no right guaranteed by the 14th Amendment to the Federal Constitution will be injuriously affected thereby. Turner v. Reidsville, 224 N. C. 42, 29 S. E. (2d) 211; Reidsville v. Slade, 224 N. C. 48, 29 S. E. (2d) 215.

The cost of constructing and maintaining a hotel is not a public purpose, within the meaning of this section. Nash v. Tarboro, 227 N. C. 283, 290, 42 S. E. (2d) 209.

The word "trades" as used in this section means any employment or business engaged in for gain or profit. Nesbitt v. Gill, 227 N. C. 174, 41 S. E. (2d) 646.

The purchase of horses or mules for the purpose of resale, at wholesale or retail, is a trade within the meaning of this section, and the imposition of a license tax on such trade is valid. Id.

§ 4. Limitations upon the increase of public debts.

Proposed Amendment. — The amendment of this section proposed by Session Laws 1947, c. 784, failed of adoption at the general election held on November 2, 1948.

The provisions of this section now constitute the dominant or controlling limitation upon the power of local units to contract debts or to issue bonds, and its provisions are superimposed upon the limitations contained in article 7, § 7, and in article 5, § 6, of the Constitution. Coe v. Surry County, 226 N. C. 125, 36 S. E. (2d) 910, 912.

Bonds are outstanding within the meaning of this section until actually paid and canceled, or delivered to the county for cancellation. Coe v. Surry County, 226 N. C. 125, 36 S. E. (2d) 910, 912.

Thus, where county bonds were payable at a certain banking institution on the first day of a county fiscal year, and before the close of the next preceding fiscal year the county made available funds for payment thereof, the bonds were outstanding at the close of the latter year within the meaning of this section. Id.

In an election for the issuance of county bonds for a new school building, a necessary expense, a favorable vote of the majority of those voting is sufficient to validate the bond resolution and authorize the issuance and sale of the proposed bonds. Mason v. Moore County Board of Com'rs, 229 N. C. 626, 51 S. E. (2d) 6.

Cited in Jefferson Standard Life Ins. Co. v. Guilford County, 225 N. C. 293, 301, 34 S. E. (2d) 430.

§ 5. Property exempt from taxation.

Assessments on public school property for special benefits thereto, caused by the improvement of the street on which it abuts, are not embraced within the prohibition of this section exempting property belonging to the State or to municipal corporations from taxation. Raleigh v. Raleigh City Administrative Unit, 223 N. C. 316, 26 S. E. (2d) 591.

§ 6. Taxes levied for counties.

Proposed Amendment.—The amendment of this section proposed by Session Laws 1947, c. 421, failed of adoption at the general election held on November 2, 1948.

Ordinarily Expenses of Holding Courts and Maintaining Jails, etc.—

In accord with original. See Atlantic Coast Line R. Co. v. Duplin County, 226 N. C. 719, 40 S. E. (2d) 371.

Levy for Public Welfare.—The board of county commissioners of Beaufort County having levied, in the year 1942, a tax rate of fifteen cents on the one hundred dollars property valuation for general purposes, the limit fixed by this section, the levy for public welfare or poor relief was limited to a rate of five cents on the one hundred dollars property valuation, and any levy for public welfare or poor relief, in excess thereof, was held invalid. Atlantic Coast Line R. Co. v. Beaufort County, 224 N. C. 115, 29 S. E. (2d) 201.

Levy for Home for Aged.—Under this section Cumberland County is authorized by the Act of 1923 to levy annually five cents only on the one hundred dollar valuation, for maintaining county homes for the aged and infirm and for similar purposes. Atlantic Coast Line R. Co. v. Cumberland County, 223 N. C. 750, 28 S. E. (2d) 238.

Upkeep of county buildings and upkeep and maintenance of county home for the aged and infirm are general expenses and must be covered in the fifteen-cent levy limited for general purposes. Atlantic Coast Line R. Co. v. Duplin County, 226 N. C. 719, 40 S. E. (2d) 371.

ARTICLE VI

Suffrage and Eligibility to Office

§ 1. Who may vote.—Every person born in the United States, and every person who has been naturalized, twenty-one years of age, and possessing the qualifications set out in this article, shall be entitled to vote at any election by the people of the State, except as herein otherwise provided. (Const. 1868; Convention 1875; 1899, c. 218; 1900, c. 2; 1945, c. 634, s. 2.)

Editor's Note.—This section was amended by vote at the election held pursuant to Session Laws 1945, c. 634.

§ 2. Qualifications of voters.

"Residence" Defined.—

In accord with 1st paragraph in original. See State v. Chaplin, 228 N. C. 705, 47 S. E. (2d) 12.

This constitutional provision applies primarily to an incoming person who is not permitted to exercise political rights until after he has been in the state and the voting precinct for the prescribed periods. State v. Chaplin, 228 N. C. 705, 47 S. E. (2d) 12.

And Not to a Citizen Temporarily Absent.—This constitutional provision is not designed to disfranchise a citizen of the state when he leaves his home and goes into another state or into another county of this state for temporary purposes with the intention of retaining his home and of returning to it when the objects which call him away are attained. State v. Chaplin, 228 N. C. 705, 47 S. E. (2d) 12.

ARTICLE VII

Municipal Corporations

§ 7. No debt or loan except by a majority of voters.—No county, city, town, or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless approved by a majority of those who shall vote thereon in any election held for such purpose. (1947, c. 34.)

II. GENERAL CONSIDERATION.

Editor's Note.—This section was amended by vote at the general election of November 2, 1948. For a brief comment on the amendment, see 25 N. C. Law Rev. 395.

Rule and Exception Thereto.—Under this section approval of taxation by popular vote is the rule, and the power to impose a tax for a necessary expense without a vote is the exception. Purser v. Ledbetter, 227 N. C. 1, 40 S. E. (2d) 702.

Function Must Be Public.—A municipal corporation cannot, even with express legislative sanction, embark on any private enterprise or assume any function which is not in a legal sense public. Brown v. Board of Com'rs, 223 N. C. 744, 28 S. E. (2d) 104.

Where appropriations were made by two cities and county to airport authority out of funds not derived from ad valorem taxes and funds were free from other specified purpose or legal commitment, no question of credit or taxation in violation of this section is involved. Greensboro-High Point Airport Authority v. Johnson, 226 N. C. 1, 36 S. E. (2d) 803, distinguishing Sing v. Charlotte, 213 N. C. 60, 195 S. E. 271.

III. NECESSARY EXPENSES.

A. General Considerations and Applications.

Legislative Declaration and Municipal Commissioners Finding That Tax Is for Necessary Expense, etc.—

In accord with original. See Purser v. Ledbetter, 227 N. C. 1, 40 S. E. (2d) 702.

What Are "Necessary Expenses."—

Where the purpose for which a proposed expense is to be incurred by a municipality is the maintenance of public peace or administration of justice, or partakes of a governmental nature, or purports to be an exercise by the municipality of a portion of the state's delegated sovereignty, the expense is a necessary expense within this section, and may be incurred without a vote of the people. Green v. Kitchin, 229 N. C. 450, 50 S. E. (2d) 545, discussed in 27 N. C. Law Rev. 500.

Bonds for establishing and maintaining playgrounds, in populous, industrial city, for its children, are for a necessary expense within the meaning of Art. VII, § 7 of the North Carolina Constitution and it is not required that the issuance of the bonds be submitted to a vote of qualified electors of the municipality. Atkins v. Durham, 210 N. C. 295, 186 S. E. 330.

The imposition of a tax or the expenditure of funds derived therefrom for municipal parks and recreational facilities is for a public purpose but it is not for a necessary municipal expense, within the meaning of this section, and the expenditure of funds for this purpose derived from a tax imposed without a referendum will be enjoined by the courts. Purser v. Ledbetter, 227 N. C. 1, 40 S. E. (2d) 702.

The Legislature is without power to authorize a municipal corporation to issue its bonds and levy a tax for the payment of the principal and interest on such indebtedness, in order to enable it to obtain funds for the construction and maintenance of a municipal hotel. Nash v. Tarboro, 227 N. C. 283, 290, 42 S. E. (2d) 209.

Operating and Improving Airport.—

The construction, maintenance and operation of an airport by a city is a public purpose for which funds may be provided by taxation, when approved by a vote of the majority of the qualified voters in accordance with this section. Reidsville v. Slade, 224 N. C. 48, 29 S. E. (2d) 215.

An expenditure by a municipality for special training of a police officer is a necessary expense within the meaning of this section. Green v. Kitchin, 229 N. C. 450, 50 S. E. (2d) 545, discussed in 27 N. C. Law Rev. 500.

B. School Bonds or Taxation.

As to school district bonds or taxes for athletic stadium, see Boney v. Board of Trustees, 229 N. C. 136, 48 S. E. (2d) 56.

§ 12. Debts in aid of the rebellion not to be paid.

Editor's Note.—The word "remembered" in the second line of the Editor's Note in the original should read "renumbered."

ARTICLE VIII

Corporations Other than Municipal

§ 1. Corporations under general laws.

Legislature May Create Corporation for Public Purpose.—The legislative power as to state and political and administrative subdivisions thereof is restrained only by the limitations imposed by the State Constitution or that of the United States, and there is no constitutional limitation

on power of the General Assembly to create a corporation for a public purpose. Brumley v. Baxter, 225 N. C. 691, 36 S. E. (2d) 281, 284, 162 A. L. R. 930.

§ 4. Legislature to provide for organizing cities, towns, etc.

In General.—
Municipal corporations derive their powers almost solely from legislative enactment under this section, and are subject to statutory restrictions and regulations of their taxing power. Purser v. Ledbetter, 227 N. C. 1, 40 S. E. (2d) 702.

The authority of cities and towns as instrumentalities for the administration of local government may be enlarged, abridged or withdrawn entirely at the will or pleasure of the legislature. Rhodes v. Asheville, 230 N. C. 134, 52 S. E. (2d) 371; Murphy v. Webb & Co., 156 N. C. 402, 72 S. E. 460.

ARTICLE IX

Education

§ 2. General Assembly shall provide for schools; separation of the races.

Duty on Legislature.—
The establishment and operation of the public school system is under the control of the legislative branch of the government, subject only to the pertinent constitutional provisions as to uniformity, as provided in this section, and length of term, as provided in the following section. Coggins v. Board of Education, 223 N. C. 763, 28 S. E. (2d) 527.

§ 3. Counties to be divided into districts.

Legislative Function.—
The establishment and operation of the public school system is under the control of the legislative branch of the government, subject only to pertinent constitutional provisions as to uniformity, as provided in the preceding section, and length of term, as provided in this section. Coggins v. Board of Education, 223 N. C. 763, 767, 28 S. E. (2d) 527.

§ 5. County school fund; proviso.

This section was designed in its entirety to secure two wise ends, namely: (1) To set apart the property and revenue specified therein for the support of the public school system; and (2) to prevent the diversion of public school property and revenue from their intended use to other purposes. Boney v. Board of Trustees, 229 N. C. 136, 48 S. E. (2d) 56.

The maintenance of an athletic field and playground is a proper use of school funds, since physical training is a legitimate function of education. Boney v. Board of Trustees, 229 N. C. 136, 48 S. E. (2d) 56.

An agreement under which a graded school district, without monetary consideration, was to transfer in fee to a municipality a tract of school property, and the municipality was to construct thereon an athletic stadium and grant the graded schools of the district free and unlimited use of the stadium and grounds during the school term except when required for regularly scheduled games of a professional baseball association, did not constitute a diversion of school property in contravention of this section. Id.

§ 7. Benefits of the University.

The right of succession by escheat to all property, when there is no wife or husband or parties entitled to inherit or take under the statutes of descent and distribution, has been conferred upon the University of North Carolina by this section, and extended by several statutes which are now G. S., 116-20 through 116-25. Board of Education v. Johnston, 224 N. C. 86, 88, 29 S. E. (2d) 126.

§ 8. State Board of Education.—The general supervision and administration of the free public school system, and of the educational funds provided for the support thereof, except those mentioned in section five of this article, shall, from and after the first day of April, one thousand nine hundred and forty-five, be vested in the State Board of Education to consist of the Lieutenant Governor, State Treasurer, the Superintendent of Public Instruction, and ten members to be appointed by the Governor subject to confirmation by the General Assembly in joint session. The General Assembly shall divide the State into eight educational districts, which may be altered from time to time by the General Assembly. Of the appointed members of the State Board of Education, one shall be appointed from each of the eight educational districts, and two shall be appointed as members at large. The first appointments under this section shall be: Two members appointed from educational districts for terms of two years; two members appointed from educational districts for terms of four years; two members appointed from educational districts for terms of six years; and two members appointed from educational districts for terms of eight years. One member at large shall be appointed for a period of four years and one member at large shall be appointed for a period of eight years. All subsequent appointments shall be for terms of eight years. Any appointments to fill vacancies shall be made by the Governor for the unexpired term, which appointments shall not be subject to confirmation. The State Superintendent of Public Instruction shall be the administrative head of the public school system and shall be secretary of the board. The board shall elect a chairman and vice chairman. A majority of the board shall constitute a quorum for the transaction of business. The per diem and expenses of the appointive members shall be provided by the General Assembly. (Const. 1868; 1941, c. 151; 1943, c. 468.)

Editor's Note.—This section was amended by vote at general election of November 7, 1944.

Quoted in Session Laws 1945, c. 530, s. 1.

Cited in In re Yelton, 223 N. C. 845, 28 S. E. (2d) 567.

§ 9. Powers and duties of the board.

Quoted in Session Laws 1945, c. 530, s. 1.

ARTICLE X

Homesteads and Exemptions

§ 2. Homestead.

A Constitutional Right.—The right to a homestead is guaranteed by the constitution. Williams v. Johnson, 230 N. C. 338, 53 S. E. (2d) 277.

Only Residents Entitled to Homestead.—Evidence held insufficient to support finding by the court that judgment debtor is resident and entitled to homestead. Scott & Co. v. Jones, 230 N. C. 74, 52 S. E. (2d) 219.

Duration of Homestead.—The homestead as allowed lasts during the life of the owner thereof; and, after his death, it lasts during the minority of his children, or any one of them, and the widowhood of his widow, unless she be the owner of a homestead in her own right. Williams v. Johnson, 230 N. C. 338, 53 S. E. (2d) 277.

Presumption of Continuance.—Once acquired the homestead is presumed to continue. Williams v. Johnson, 230 N. C. 338, 53 S. E. (2d) 277.

Allotment Unnecessary.—See note to § 1-369.

The only way property may lose its homestead character, after the homestead has been allotted, is by death, abandonment or alienation. Williams v. Johnson, 230 N. C. 338, 53 S. E. (2d) 277.

Homestead interest in land is terminated by the owner's removal from the state. Scott & Co. v. Jones, 230 N. C. 74, 52 S. E. (2d) 219.

Cited in Sample v. Jackson, 225 N. C. 380, 35 S. E. (2d) 236.

§ 6. Property of married women secured to them.

Wife May Not Convey Real Estate by Estoppel.—By this section and the laws of this State a married woman is incapable of making a valid conveyance of her real estate without the written assent of her husband and privy examination duly taken and certified. Hence, she may not convey it by estoppel, fraudulently divest herself of coverture, if such characterization be preferred. Buford v. Mochy, 224 N. C. 235, 239, 29 S. E. (2d) 729.

The renunciation of a will is not a conveyance which requires the written assent of the husband, as provided in this section. Perkins v. Isley, 224 N. C. 793, 32 S. E. (2d) 588.

Statute providing that earnings and damages from personal injury are wife's property (G. S. § 52-10) should be read in the light of this section. Helmstetler v. Duke Power Co., 224 N. C. 821, 32 S. E. (2d) 611.

§ 8. How deed for homestead may be made.—Nothing contained in the foregoing sections of this article shall operate to prevent the owner of a homestead from disposing of the same by deed; but no deed made by the owner of a homestead shall be valid without the signature and acknowledgment of his wife. (1943, c. 662.)

Editor's Note.—This section was amended by vote at the general election of November 7, 1944.

ARTICLE XII

Militia

§ 1. Who are liable to militia duty.

Stated in In re Yelton, 223 N. C. 845, 28 S. E. (2d) 567.

§ 3. Governor Commander-in-chief.

Officers in the militia are liable to be called out to suppress riots or insurrection, "and to repel invasion." In re Yelton, 223 N. C. 845, 852, 28 S. E. (2d) 567.

ARTICLE XIV

Miscellaneous

§ 3. Drawing money.

Legislative Authority Required.—

Moneys paid into the hands of the state treasurer by virtue of a state law become public funds for which the treasurer is responsible and may be disbursed only in accordance with legislative authority. Gardner v. Board of Trustees, 226 N. C. 465, 38 S. E. (2d) 314.

§ 7. Holding office.—No person who shall hold any office or place of trust or profit under the United States, or any department thereof, or under this State or under any other state or government, shall hold or exercise any other office or place of trust or profit under the authority of this State, or be eligible to a seat in either House of the General Assembly: Provided, that nothing herein contained shall extend to officers in the militia, notaries public, justices of the peace, commissioners of public charities, or commissioners for special purposes. (1943, c. 432.)

Editor's Note.—This section was amended by vote at the general election of November 7, 1944.

Purpose.—

This section was never intended to discourage public officials from assuming military leadership in time of emergency. In re Yelton, 223 N. C. 845, 852, 28 S. E. (2d) 567.

Under this section, which is intended and designed to prevent or inhibit double office-holding, except in certain instances, it is not permissible for one person to hold two offices at the same time. In re Advisory Opinion, 226 N. C. 772, 39 S. E. (2d) 217, 221.

Definition of Public Office.—An office is a public station, or employment, conferred by appointment of government and the term embraces the idea of tenure, duration, emolument, and duties. In re Advisory Opinion, 226 N. C. 772, 39 S. E. (2d) 217, 220.

Where the office which judge proposed to accept carried with it some of the attributes of sovereignty, and perforce invested him with governmental authority, he would be holding an office or place of trust or profit under the United States, or a department thereof, within the meaning of this section. Id.

Effect of Acceptance of Similar Office.—

Under this section which is intended and designed to prevent or inhibit double office-holding, except in certain instances, it is not permissible for one person to hold two offices at the same time. The acceptance of a second office, which is forbidden or incompatible with the office already held, operates ipso facto to vacate the first. In re Yelton, 223 N. C. 845, 28 S. E. (2d) 567.

One who holds an office or place or trust under authority of this state forfeits such office or place of trust when he accepts another office or place of trust which is forbidden by this section or is incompatible with the office or place of trust already held, and the acceptance of the second forbidden or incompatible office or place of trust, operates ipso facto to vacate the first. In re Advisory Opinion, 226 N. C. 772, 39 S. E. (2d) 217, 221.

§ 8. Intermarriage of white and negroes prohibited.

Persons within Prohibited Degree.—Every person who has one-eighth negro blood in his veins is within the prohibited degree set out in this section and § 51-3. State v. Miller, 224 N. C. 228, 29 S. E. (2d) 751.

The General Statutes of North Carolina of 1943
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Chapter 1. Civil Procedure.

Art. 4. Limitations, Real Property.

Art. 7. Venue.

Art. 8. Summons.

Art. 11. Lis Pendens.

Art. 13. Defendant's Pleadings.

Art. 18A. Pre-Trial Hearings.

Art. 23. Judgment.

Art. 28. Execution.

Art. 29. Execution and Judicial Sales.

Art. 29A. Judicial Sales.

Part 1. General Provisions.

Part 2. Procedure for Public Sales of Real and Personal Property.

Part 3. Procedure for Private Sales of Real and Personal Property.

Art. 2. General Provisions.

§ 1-11. How party may appear.

This Right Is Alternative.—
In accord with original. See New Hanover County v. Sidbury, 225 N. C. 679, 36 S. E. (2d) 242, 243.

This section cannot be construed to mean that litigant may not first appear in person and then later through counsel. New Hanover County v. Sidbury, 225 N. C. 679, 36 S. E. (2d) 242, 243.

Thus, litigant who elects to employ counsel at any stage of proceedings may not be deprived of his services for the reason he has theretofore appeared in person and it is error for the court to undertake so to do. Id.

However, a party is entitled to appear in propria persona, and when a defendant insists upon this right notwithstanding his ability to employ counsel and the efforts of the trial judge to assign him counsel, it cannot be pressed successfully on appeal that he was prejudiced by the action of the trial court in failing to provide counsel and in permitting him wide latitude in the introduction of evidence. State v. Pritchard, 227 N. C. 168, 41 S. E. (2d) 287.

Cited in In re Taylor, 229 N. C. 297, 49 S. E. (2d) 749.

Art. 3. Limitations, General Provisions.

§ 1-15. Statute runs from accrual of action; pleading.

When personal services are rendered with the understanding that compensation is to be made in the will of the recipient, payment therefor does not become due until death, and the statutes of limitation do not begin to run until that time. Stewart v. Wyrick, 228 N. C. 429, 45 S. E. (2d) 764.

§ 1-17. Disabilities.

This section has no application to a proceeding to set aside a void judgment of foreclosure. Johnston County v. Ellis, 226 N. C. 268, 38 S. E. (2d) 31.

§ 1-21. Defendant out of state; when action begun or judgment enforced.

Where the defendant is a nonresident of the state the statute of limitations has not run. Lassiter v. Powell, 164 F. (2d) 186.

Stated in Holderness v. Hamilton Fire Ins. Co., 54 F. Supp. 145.

§ 1-22. Death before limitation expires; action by or against executor.

Purpose of Filing Claim.—If a judgment creditor of a deceased judgment debtor wishes to protect himself against the running of the statute of limitations as against the debt, he must file his claim with the personal representative of the deceased. Williams v. Johnson, 230 N. C. 338, 53 S. E. (2d) 277.

§ 1-23. Time of stay by injunction or prohibition.

Evidence Sufficient to Overrule Motion to Nonsuit.—Where plaintiff showed that shortly after the defendant's steamship collided with bridge, proceedings were instituted in the United States district court, in which it was ordered that all suits arising out of the collision be stayed, and immediately after plaintiff's claim was dismissed in that court for want of jurisdiction, it instituted present action, plaintiff's evidence was sufficient to overrule motion to nonsuit on the ground of the bar of the statute of limitations. State Highway, etc., Comm. v. Diamond Steamship Transp. Corp., 226 N. C. 371, 38 S. E. (2d) 214.

§ 1-25. New action within one year after nonsuit, etc.

The words "new action," "new suit," and "original suit."
In accord with original. See Bourne v. Southern Ry. Co., 224 N. C. 444, 31 S. E. (2d) 382.

Judgment of Nonsuit on Merits of Case, etc.—
A judgment of nonsuit does not bar a subsequent action on the same cause instituted within one year unless the evidence is substantially identical, and therefore the plea of res judicata to the second cause cannot be determined from the pleadings alone. Craver v. Spaugh, 227 N. C. 129, 41 S. E. (2d) 82.

Effectiveness of doctrine of lis pendens ought to prevail so long as equities have not themselves been determined or dismissed, but by appropriate statute are kept within the care of the law and the prospective adjudication by the court. It is difficult to see how this section, intended to accomplish this result, could be made effective in any other way. Goodson v. Lehmon, 225 N. C. 514, 35 S. E. (2d) 623, 164 A. L. R 510.

Where a decree of dismissal expressly reserves to plaintiff right to begin another proceeding, such grant of authority continues the operation of the lis pendens. A fortiori, this section, giving such permission as a matter of law, must be read into every final judgment of nonsuit entered by any court, and of this law all persons affected must take notice. Goodson v. Lehmon, 225 N. C. 514, 35 S. E. (2d) 623, 164 A. L. R. 510.

Applied in State Highway, etc., Comm. v. Diamond Steamship Transp. Corp., 226 N. C. 371, 38 S. E. (2d) 214.

§ 1-26. New promise must be in writing.

III. PART PAYMENT.

The principle that making a payment on a note repels the statute is not altered by the provisions of this section, for it expressly provides that "this section does not

alter the effect of any payment of principal or interest." The decisions treating of this provision hold that the effect of this clause is to leave the law as it was prior to the adoption of this section as regards the effect of a partial payment in removing the bar of the statute of limitations. Smith v. Davis, 228 N. C. 172, 45 S. E. (2d) 51, 174 A. L. R. 643.

§ 1-30. Applicable to actions by state.

Section Abrogated Common Law Maxim.—
The maxim is no longer in force in this state, except as otherwise provided by statutory exceptions. Guilford County v. Hampton, 224 N. C. 817, 32 S. E. (2d) 606.

When Statute Does Not Apply.—
Notwithstanding the inclusive provisions of this section it has been uniformly held that no statute of limitations runs against the state, unless it is expressly named therein. Raleigh v. Mechanics, etc., Bank, 223 N. C. 286, 293, 26 S. E. (2d) 573.

§ 1-32. Not applicable to bank bills.

The annotation under this section in the original should be deleted.

Art. 4. Limitations, Real Property.

§ 1-36. Title presumed out of state.

Plaintiff Must Rely upon Strength of Own Title.—In actions involving title to real property, the state not being a party, title is conclusively presumed out of the state without presumption in favor of either party, and plaintiff must rely upon the strength of his own title. Smith v. Benson, 227 N. C. 56, 40 S. E. (2d) 451.

May Show Title Out of State.—
In accord with original. See Ward v. Smith, 223 N. C. 141, 25 S. E. (2d) 463.

Stated in Ramsey v. Ramsey, 224 N. C. 110, 29 S. E. (2d) 340.

Cited in Vance v. Guy, 224 N. C. 607, 611, 31 S. E. (2d) 766.

§ 1-38. Seven years possession under color of title.

I. GENERAL NOTE ON ADVERSE POSSESSION.

A. General Consideration.

Definition.—
Possession of real property to be adverse must be actual possession, and must be open, decided and as notorious as the nature of the property will permit, indicating assertion of exclusive ownership, and of intention to exercise dominion over it against all other claimants. The possession must be continuous, though not necessarily unceasing, for the statutory period, and of such character as to subject the property to the only use of which it is susceptible. Vance v. Guy, 223 N. C. 409, 413, 27 S. E. (2d) 117.

Effect of Holding Portion of Land under Colorable Title.—Where one enters into possession of land under a colorable title which describes the land by definite lines and boundaries, and occupies and holds adversely a portion of the land within the bounds of his deed, by construction of law his possession is extended to the outer bounds of his deed, and possession so held adversely for seven years ripens his title to all the land embraced in his deed which is not actually occupied by another. Vance v. Guy, 223 N. C. 409, 413, 27 S. E. (2d) 117.

Where the title deeds of two rival claimants lap upon each other, and neither is in the actual possession of any of the land covered by both deeds, the law adjudges the possession of the lappage to be in the one who has the better title. If one be seated on the lappage and the other not, the possession of the whole interference is in the former. If both have actual possession of some part of the lappage, the possession of the true owner, by virtue of his superior title, extends to all not actually occupied by the other. Vance v. Guy, 224 N. C. 607, 611, 31 S. E. (2d) 766.

B. Character of Possession.

Sufficiency of Possession.—In actions between individual litigants when one claims title to land by adverse possession and shows such possession (1) for seven years under color, or (2) for twenty years without color, either showing is sufficient to establish title in this jurisdiction. Ward v. Smith, 223 N. C. 141, 142, 25 S. E. (2d) 463.

The possession of one tenant in common is in law the possession of all his cotenants, unless and until there has been an actual ouster or a sole adverse possession for twenty years, receiving rents and profits and claiming the land as his own from which actual ouster would be presumed. Winstead v. Woolard, 223 N. C. 814, 28 S. E. (2d) 507.

II. NOTE TO SECTION 1-38.

Cross Reference.—See note to § 1-39.

This section has no reference to titles good in themselves, but is intended to protect apparent titles void in law. Lofton v. Barber, 226 N. C. 481, 39 S. E. (2d) 263, 264.

Character of Possession under Section.—
Where deed was regular upon its face and purported to convey title without limitation, reservation or exception, it was at least color of title to the entire interest in the land it purported to convey so that grantee and those claiming under her who immediately went into possession and remained in exclusive possession thereof for "12 or 15 years" acquired title by their adverse possession under color, if not by their deed. Lofton v. Barber, 226 N. C. 481, 39 S. E. (2d) 263, 265.

Applied in Layden v. Layden, 228 N. C. 5, 44 S. E. (2d) 340; Hughes v. Oliver, 228 N. C. 680, 47 S. E. (2d) 6; Grady v. Parker, 230 N. C. 166, 52 S. E. (2d) 273.

Cited in Parham v. Henley, 224 N. C. 405, 30 S. E. (2d) 372; Perry v. Alford, 225 N. C. 146, 33 S. E. (2d) 665; Ramsey v. Nebel, 226 N. C. 590, 39 S. E. (2d) 616; Smith v. Benson, 227 N. C. 56, 40 S. E. (2d) 451.

§ 1-39. Seizin within twenty years necessary.

Where one tenant in common claims sole seizin and adverse possession under a void judgment, his status as to any title by adverse possession must be determined by this section, rather than the seven-year statute, § 1-38. Ange v. Owens, 224 N. C. 514, 31 S. E. (2d) 521.

§ 1-40. Twenty years adverse possession.

Tenants in Common—Possession of One Possession of All.—
The possession of one tenant in common is the possession of all his cotenants unless and until there has been an actual ouster or sole adverse possession for twenty years. Parham v. Henley, 224 N. C. 405, 30 S. E. (2d) 372.

Where the owner of a lot encroaches upon a strip of the adjacent lot and builds structures located partly thereon, the owner of the adjacent lot is not estopped by his silence and failure to object from asserting his title thereto in an action in ejectment, and does not lose his title thereto until such adverse user has continued for the twenty years necessary to ripen title by adverse possession, under this section, the user not being under color of title. Ramsey v. Nebel, 226 N. C. 590, 39 S. E. (2d) 616.

A grantee cannot tack adverse possession of predecessor in title as to land not embraced within the description in his deed, and therefore where he has been in possession for less than twenty years, he cannot establish title by adverse possession to land lying outside the boundaries of his deed. Ramsey v. Ramsey, 229 N. C. 270, 49 S. E. (2d) 476; Simmons v. Lee, 230 N. C. 216, 53 S. E. (2d) 79.

§ 1-42. Possession follows legal title; severance of surface and subsurface rights.

In all controversies and litigation wherein it shall be made to appear from the public records that there has been at some previous time a separation or severance between the surface and the subsurface rights, title or properties of an area, no holder or claimant of the subsurface title or rights therein shall be entitled to evidence or prove any use of the surface, by himself or by his predecessors in title or of lesses or agents, as adverse possession against the holder of said surface rights or title; and likewise no holder or claimant of the surface rights shall be entitled to evidence or prove any use of the subsurface rights, by himself, or by his predecessors in title or of lessees or agents, as adverse possession against the holder of said subsurface rights, unless, in either case, at the time of beginning such allegedly adverse use and in each year of the same, said party or his predecessor in title so using shall have placed or caused to be placed upon the records of the register of deeds of the county wherein such property lies and in a book therein kept or provided for such

purposes, a brief notice of intended use giving (a) the date of beginning or recommencing of the operation or use, (b) a brief description of the property involved but sufficiently adequate to make said property readily locatable therefrom, (c) the name and, if known, the address of the claimant of the right under which the operation or use is to be carried on or made and (d) the deed or other instrument, if any, under which the right to conduct such operation or to make such use is claimed or to which it is to be attached. (Rev., s. 386; Code, s. 146; C. C. P., s. 25; 1945, c. 869; C. S. 432.)

Editor's Note.—The 1945 amendment added the above paragraph at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

For comment on the 1945 amendment, see 23 N. C. Law Rev. 355.

Cited in Ownbey v. Parkway Properties, 222 N. C. 54, 21 S. E. (2d) 900.

§ 1-43. Tenant's possession is landlord's.

Loyalty Is to Title and Not to Landlord.—The rule that tenant's possession is possession of the landlord, and that tenant under lease may not maintain an action against his landlord involving title during the period of lease without first surrendering the possession he has under the lease, does not apply where after the renting title of landlord has terminated or has been transferred either to third person or the tenant himself, for, under the doctrine as it now prevails, the loyalty required is to the title, not to the person of the landlord. Lofton v. Barber, 226 N. C. 481, 39 S. E. (2d) 263, 265.

Where tenant acquired the title of his landlord tenant's leasehold estate was merged in the greater estate conveyed by his deed, and thereafter he was under no obligation to recognize his former landlord as such or to surrender possession to him before asserting title thus acquired. Id.

Section Does Not Apply Where Tenant's Claim Is Based on Landlord's Title.—The rule that the possession of the tenant is possession of the landlord, precluding adverse possession by tenant without first surrendering the possession he has under the lease, obtains only when tenant seeks to assert a title adverse to that of the landlord or assumes an attitude of hostility to his title or claim of title, and does not obtain where tenant, or those claiming under him, do not assert title hostile to that of the landlord, but are acknowledging, asserting, and relying upon that title, as acquired in due course by them. The strength of his title is the foundation of their claim. Lofton v. Barber, 226 N. C. 481, 39 S. E. (2d) 263, 265.

§ 1-45. No title by possession of public ways.

Cited in Guilford County v. Hampton, 224 N. C. 817, 32 S. E. (2d) 606.

Art. 5. Limitations, Other than Real Property.

§ 1-46. Periods prescribed.

Effect of Failure to Plead Particular Section.—Defendant's allegations that plaintiff's cause of action on bond coupons had accrued more than ten years prior to the institution of the action and was barred under the provisions of this section, is a sufficient pleading of statute of limitations, although no specific reference is made to the particular sections of the statute applicable. Jennings v. Morehead City, 226 N. C. 606, 39 S. E. (2d) 610.

Burden of Proof.—Where defendant sufficiently pleads the statute of limitations the burden is upon plaintiff to show that his action was commenced within the time permitted by the statute, and upon his failure to do so, nonsuit is proper. Jennings v. Morehead City, 226 N. C. 606, 39 S. E. (2d) 610.

Quoted in Guilford County v. Hampton, 224 N. C. 817, 32 S. E. (2d) 606.

§ 1-47. Ten years.

I. IN GENERAL.

Editor's note.—

See 22 N. C. Law Rev., 146 for comment touching on this section.

Plea of Statute against Administrator Available to Distributee.—In an action by plaintiff to recover his distributive share of an estate, where defendant administrator sets up and pleads debts of plaintiff's due intestate as an offset, the claims of both plaintiff and defendant being legal, the doctrine of equitable set-off has no application and the plea of the statute of limitations is available to plaintiff as a valid defense to the affirmative claim of offset pleaded by defendant. Perry v. First Citizens Bank and Trust Co., 223 N. C. 642, 27 S. E. (2d) 636.

Applied in Layden v. Layden, 228 N. C. 5, 44 S. E. (2d) 340; Bell v. Chadwick, 226 N. C. 598, 39 S. E. (2d) 743.

Cited in Raleigh v. Mechanics, etc., Bank, 223 N. C. 286, 26 S. E. (2d) 573.

III. SUBS. (2) SEALED INSTRUMENTS.

When Statute Begins to Run—Coupons of Bonds.—

Where bond coupons are negotiable in form and payable to the bearer, and have been detached from the bonds and the bonds sold, the statute of limitations begins to run against each of them from their respective dates of maturity, and in such instance a contention that the coupons were incident to the principal obligation of the bond and were valid during the life of the bond is untenable. Jennings v. Morehead City, 226 N. C. 606, 39 S. E. (2d) 610, distinguishing Knight v. Braswell, 70 N. C. 709.

Application to Bills, Notes, etc.—

Where plaintiff offered in evidence a note, apparently executed by defendant and another as joint obligors, with the word "seal" in brackets opposite the name of each, nothing else appearing, this would repel the three-year statute of limitations, as sealed instruments against principals are not barred until lapse of ten years. Lee v. Chamblee, 223 N. C. 146, 25 S. E. (2d) 433.

Where action was instituted on note under seal on 10 February, 1943 and last payment had been made upon the note on 1 October, 1933, the action was not barred by this section as the statute commenced again to run from the day when the last payment was made. Sayer v. Henderson, 225 N. C. 642, 35 S. E. (2d) 875, citing Green v. Greensboro Female College, 83 N. C. 449, 454, 35 Am. Rep. 579.

IV. SUBS. (3) MORTGAGE FORECLOSURE.

Where partial payment is made on a note secured by deed of trust, action to foreclose the instrument is not barred until ten years from date of such payment. Smith v. Davis, 228 N. C. 172, 45 S. E. (2d) 51, 174 A. L. R. 643.

V. SUBS. (4) REDEMPTION OF MORTGAGE.

Applied in Hughes v. Oliver, 228 N. C. 680, 47 S. E. (2d) 6.

§ 1-51. Five years.

This section makes uniform the periods of limitation against railroad companies for damages or compensation for lands taken for rights of way or use and occupancy. Carolina, etc., Ry. Co. v. Piedmont Wagon, etc., Co., 229 N. C. 695, 51 S. E. (2d) 301, discussed in 27 N. C. Law Rev. 579.

§ 1-52. Three years.

11. For the recovery of any amount under and by virtue of the provisions of the Fair Labor Standards Act of one thousand nine hundred and thirty-eight and amendments thereto, said act being an act of congress. (Rev., s. 395; Code, s. 155; C. C. P., s. 34; 1895, c. 165; 1889, cc. 269, 218; 1899, c. 15, s. 71; 1901, c. 558, s. 23; 1913, c. 147, s. 4; 1945, c. 785; C. S. 441.)

Editor's Note.—The 1945 amendment added subsection 11. As the rest of the section was not affected by the amendment it is not set out.

I. IN GENERAL.

This section is not applicable to an action specifically brought under provisions of § 105-414. Miller v. McConnell, 226 N. C. 28, 36 S. E. (2d) 722.

An action to recover damages for patent infringement and for appropriating and using confidential information relating to the patent was governed by subsections 5 and 9 of this section and not by § 1-56. Reynolds v. Whitin Mach. Works, 167 F. (2d) 78.

Applied in Craver v. Spaugh, 227 N. C. 129, 41 S. E. (2d) 82.

Cited in King v. Richardson, 136 F. (2d) 849 (dis. op.); State Highway, etc., Comm. v. Diamond Steamship Transp. Corp., 226 N. C. 371, 38 S. E. (2d) 214.

II. SUBSECTION ONE—CONTRACTS.

Application to Sealed Instruments—In General.—Civil action, to recover on six promissory notes under seal executed December 3, 1929, and maturing one each year for

five successive years, which was begun on August 30, 1940, was not barred by the limitation in this section or ten year statute of limitation in § 1-47. Bell v. Chadwick, 226 N. C. 598, 39 S. E. (2d) 743.

Same—Sureties.—

The three-year statute of limitations is applicable to sureties on sealed instruments as well as on instruments not under seal. Lee v. Chamblee, 223 N. C. 146, 25 S. E. (2d) 433.

An action on a note under seal against an endorser on the note is ordinarily barred after three years from the maturity of the note, even though the endorsement is under seal. Hertford Bkg. Co. v. Stokes, 224 N. C. 83, 86, 29 S. E. (2d) 24.

Claims for Services.—In absence of special contract to compensate plaintiff for his services to defendant's intestate by will effective at defendant's death, the statute of limitations bars all claims for services except those rendered within three years. Grady v. Faison, 224 N. C. 567, 31 S. E. (2d) 760.

Recovery cannot be had upon assumpsit or quantum meruit for personal services rendered in reliance upon the oral contract to devise when the action is instituted more than three years after the death of the promisor, and the statute of limitations is pleaded in bar. Dunn v. Brewer, 228 N. C. 43, 44 S. E. (2d) 353.

Plea of Statute against Administrator Available to Distributee.—In an action by plaintiff to recover his distributive share of an estate, where defendant administrator sets up and pleads debts of plaintiff's due intestate as an offset, the claims of both plaintiff and defendant being legal, the doctrine of equitable set-off has no application and the plea of the statute of limitations is available to plaintiff as a valid defense to the affirmative claim of offset pleaded by defendant. Perry v. First Citizens Bank and Trust Co., 223 N. C. 642, 27 S. E. (2d) 636.

Cited in Sayer v. Henderson, 225 N. C. 642, 35 S. E. (2d) 875.

III. SUBSECTION TWO—LIABILITY CREATED BY STATUTE.

An action by county against inmate of county home to secure reimbursement or indemnity for sums expended for upkeep in the home comes within this section. Guilford County v. Hampton, 224 N. C. 817, 32 S. E. (2d) 606.

IV. SUBSECTION THREE—TRESPASS UPON REALTY.

Action in Tort for Continuing Trespass. — Plaintiffs alleged that construction of dam caused progressive injury to their land from improper drainage, and that the mere construction was the cause of the injury. It was held that the action being limited to "injury and damage" caused by the "construction" of the dam, rests in tort, and the trespass being continuous rather than a renewing or intermittent one, and the action not being for an appropriation of plaintiffs' property or an easement therein by reason of the operation of the dam, the action was barred by the three-year statute of limitations. Tate v. Western Carolina Power Co., 230 N. C. 256, 53 S. E. (2d) 88.

IX. SUBSECTION NINE—FRAUD OR MISTAKE.

Same—Sufficiency of Evidence.—

See Small v. Dorsett, 223 N. C. 754, 28 S. E. (2d) 514.

Action to Remove Cloud from Title.—The right to maintain an action to remove a cloud from a title is a continuing one to which the statute of limitations is not applicable. Cauble v. Trexler, 227 N. C. 307, 314, 42 S. E. (2d) 77.

§ 1-53. Two years.—Within two years—

1. All claims against counties, cities and towns of this state shall be presented to the chairman of the board of county commissioners, or to the chief officers of the cities and towns, within two years after the maturity of such claims, or the holders shall be forever barred from a recovery thereon; provided, however, that the provisions of this paragraph shall not apply to claims based upon bonds, notes and interest coupons, except claims based upon bonds, notes and interest coupons of a county, city, town, township, road district, school district, school taxing district, sanitary district or water district which mature on or after March first, one thousand nine hundred forty-five, and which have been incorporated in and are subject to the terms of a plan of composition or refinancing of indebtedness providing for exchange of bonds and adjustment of interest thereon and pursuant to which any bonds have been exchanged, shall be presented within two years after maturity or, if such bonds, notes and interest coupons have matured subsequent to March twenty-second, one thousand nine hundred thirty-five but prior to March first, one thousand nine hundred forty-five, such claims shall be presented within two years after March first, one thousand nine hundred forty-five, or the holders of any such claims shall be forever barred from recovery thereon, and any such claims shall be presented to the officer or officers charged by law with the payment of the same or with providing for such payment.

2. An action to recover the penalty for usury.

3. The forfeiture of all interest for usury. (Rev., s. 396; Code, ss. 756, 3836; 1874-5, c. 243; 1876-7, c. 91, s. 3; 1895, c. 69; 1931, c. 231; 1937, c. 359; 1945, c. 774; C. S. 442.)

Editor's Note.—

The 1945 amendment added the exception to the proviso of paragraph 1.

As to necessity for presenting tort claims, see 27 N. C. Law Rev. 145.

§ 1-56. All other actions, ten years.

I. IN GENERAL.

Cited in Jennings v. Morehead City, 226 N. C. 606, 39 S. E. (2d) 610.

II. ACTIONS TO WHICH APPLICABLE.

An action for relief against an executor must be filed within ten years after the action accrues. King v. Richardson, 136 F. (2d) 849, 867 (dis. op.).

An action by the beneficiaries of a trust to establish a constructive or resulting trust in certain stock sold by the executor-trustee, to recover the property, and for an accounting, is not barred by laches or the statute of limitations if brought within ten years from the date of the accrual of the cause of action. Jarrett v. Green, 230 N. C. 104, 52 S. E. (2d) 223.

An action to recover damages for patent infringement and for appropriating and using confidential information relating to the patent was governed by subsections 5 and 9 of § 1-52 and not by this section. Reynolds v. Whitin Mach. Works, 167 F. (2d) 78.

Art. 6. Parties.

§ 1-57. Real party in interest; grantees and assignees.

I. REAL PARTIES IN INTEREST.

C. Actions Concerning Realty.

Reformation of Deed of Trust.—

In an action to reform a deed, all parties claiming an interest in the land or any part thereof, purported to have been conveyed by the instrument sought to be reformed, and whose interest will be affected by the reformation of the instrument, are necessary parties to the action. Kemp v. Funderburk, 224 N. C. 353, 355, 30 S. E. (2d) 155.

Lease of Hunting Rights.—The grantor of land reserved the hunting rights and later leased them. Defendant successor to grantee refused to permit the lessee to enter upon the property for the purpose of hunting. It was held that the lessee and not the lessor was the proper party to maintain an action against defendant for damages. Jones v. Neisler, 228 N. C. 444, 45 S. E. (2d) 369.

III. ASSIGNMENTS.

Effect in General.—

The provision in the first sentence as to assignment means merely that the statute does not authorize for the first time the assignment of a "thing in action not arising out of contract" which was not assignable under the existing law. The provision does not in itself forbid the assignment of all choses in action not arising out of contract. American Surety Co. v. Baker, 172 F. (2d) 689.

The assignee of a contract to convey real estate may maintain an action thereon against the seller for specific

performance. Harry's Cadillac-Pontiac Co. v. Norburn, 230 N. C. 23, 51 S. E. (2d) 916.

§ 1-64. Infants, etc., sue by guardian or next friend.

Distinction between Next Friend and Guardian ad Litem.—A next friend is appointed to bring or prosecute a proceeding in which the infant suitor is plaintiff or seeks to assert some positive right, while a guardian ad litem is appointed to defend, and the distinction between them in legal effect is substantial and not merely formal. Johnston County v. Ellis, 226 N. C. 268, 38 S. E. (2d) 31.

Thus, while a next friend, in the prosecution of some positive relief for an infant suitor, may be called upon to defend against incidental or opposing rights, such as offsets, counterclaims, or other defenses or demands connected with the original claim, a next friend of minor heirs at law seeking to set aside a tax foreclosure is not required to defend a mortgage foreclosure asserted by an intervener in the action, and his representation of the minors in such unrelated and independent cause does not legally exist. His office as next friend becomes functus officio. Id.

Cited in Smith v. Smith, 226 N. C. 544, 39 S. E. (2d) 458.

§ 1-65. Infants, etc., defend by guardian ad litem.

As to minor veterans, see § 165-16.

Where Minors Not Represented by Guardian Ad Litem in Suit to Enforce Tax Lien.—In a suit to enforce a tax lien by foreclosure where the affidavit, orders and notices appear sufficient in form to constitute service by publication of notice of summons in accordance with prescribed procedure upon all persons named therein, including heirs at law, both adult and minors, under § 1-98, yet the minors, if any, not having been represented by a guardian ad litem would not be bound by the judgment of confirmation rendered in the action. McIver Park, Inc. v. Brinn, 223 N. C. 502, 512, 27 S. E. (2d) 548.

Exception that judgment was rendered before sufficient time had elapsed after notice as prescribed by this section was held not borne out by the record. Garner v. Phillips, 229 N. C. 160, 47 S. E. (2d) 845.

Cited in Johnston County v. Ellis, 226 N. C. 268, 38 S. E. (2d) 31.

§ 1-66. Appointment of guardian ad litem in actions begun by publication.

Cited in McIver Park, Inc. v. Brinn, 223 N. C. 502, 27 S. E. (2d) 548; Johnston County v. Ellis, 226 N. C. 268, 38 S. E. (2d) 31.

§ 1-67. Guardian ad litem to file answer.

Where, in an action for divorce against a person who has been declared non compos mentis, process has been duly served in accordance with § 1-97 (3). Guardian ad litem under this section must answer, and demurrer on the ground that marital relation is so personal only the spouse may elect to prosecute or defend the action and that defendant's inability to appear and answer in person defeats the jurisdiction of the court, is untenable. Smith v. Smith, 226 N. C. 544, 39 S. E. (2d) 458.

Cited in McIver Park, Inc. v. Brinn, 223 N. C. 502, 27 S. E. (2d) 548; Johnston County v. Ellis, 226 N. C. 268, 38 S. E. (2d) 31.

§ 1-68. Who may be plaintiffs.

Editor's Note.—

For an interesting and exhaustive treatment of permissive joinder of parties, see 25 N. C. Law Rev. 1. See also 25 N. C. Law Rev. 245.

Applied in Ezzell v. Merritt, 224 N. C. 602, 31 S. E. (2d) 751.

Cited in Fleming v. Carolina Power, etc., Co., 229 N. C. 397, 50 S. E. (2d) 45.

§ 1-69. Who may be defendants.

Editor's Note.—

For an interesting and exhaustive treatment of permissive joinder of parties, see 25 N. C. Law Rev. 1. See also 25 N. C. Law Rev. 245.

Applied in Ezzell v. Merritt, 224 N. C. 602, 31 S. E. (2d) 751; Owen v. Hines, 227 N. C. 236, 41 S. E. (2d) 739.

Cited in Fleming v. Carolina Power, etc., Co., 229 N. C. 397, 50 S. E. (2d) 45.

§ 1-70. Joinder of parties; action by or against one for benefit of a class.

Editor's Note.—For discussion of class actions, see 26 N. C. Law Rev. 223.

Provisions of Chapter Controlling. — Whether legal or equitable, the joinder of causes of action and the parties to whom they belong must come within the provisions of this chapter, unless by some special modifying statute or recognized rule of practice an exception is created. Fleming v. Carolina Power, etc., Co., 229 N. C. 397, 50 S. E. (2d) 45.

Cited in Smoke Mount Industries v. Eureka, etc., Ins. Co., 224 N. C. 93, 29 S. E. (2d) 20.

§ 1-73. New parties by order of court.

Scope of Section.—This section contemplates that all persons necessary to a complete determination of the controversy, the matter in litigation, and affected by the same in some way, as between the original parties to the action, may, in some instances, and must in others, be made parties plaintiff or defendant. But it does not imply that any person who may have cause of action against the plaintiff alone, or cause of action against the defendant alone, unaffected by the cause of action as between the plaintiff and defendant, may or must be made a party. It does not contemplate the determination of two separate and distinct causes of action, as between the plaintiff and a third party, or the defendant and a third party, in the same action. It is only when, as between the original parties litigant, other parties are material or interested, that it is proper to make them parties. Moore v. Massengill, 227 N. C. 244, 246, 41 S. E. (2d) 655, citing McDonald v. Morris, 89 N. C. 99.

This section does not authorize the joinder of a party claiming under an independent cause of action not essential to a full and complete determination of the original cause of action. Moore v. Massengill, 227 N. C. 244, 245, 41 S. E. (2d) 655.

Requisite Interest of New Party.—To entitle one to the benefits of this section allowing new parties to be brought in, such additional parties must have a legal interest in the subject matter of the litigation; and the interest of a new party must be of such direct and immediate character that he will either gain or lose by the direct operation and effect of the judgment. Griffin & Vose v. Non-Metallic Minerals Corp., 225 N. C. 434, 35 S. E. (2d) 247.

Discretion of the Court.—As a general rule the trial court has the discretionary power to make new parties, especially when necessary in order that there may be a full and final determination and adjudication of all matters involved in the controversy. Service Fire Ins. Co. v. Horton Motor Lines, 225 N. C. 588, 35 S. E. (2d) 879.

The fact that plaintiff alone, without joinder of the owner, could not maintain the action does not limit the discretionary power of the judge. Id.

Where one partner is sued individually for a tort committed by him in the course of the partnership business, the court even after judgment may direct that the other partner be made a party. Dwiggins v. Parkway Bus Co., 230 N. C. 234, 52 S. E. (2d) 892.

In action by purchaser against real estate brokers to recover earnest money paid, wherein the seller was a necessary party to a complete determination of the controversy, denial of motion for his joinder as additional party defendant was held reversible error. Lampros v. Chipley, 228 N. C. 236, 45 S. E. (2d) 126.

Applied in Ezzell v. Merritt, 224 N. C. 602, 31 S. E. (2d) 751.

§ 1-74. Abatement of actions.

Death, Resignation or Removal of Representative.—Once personal representative of estate is duly appointed, if such representative dies, resigns or is removed, the law contemplates a continuity of succession until estate has been fully administered, and upon death, resignation or removal of representative, who has properly brought action for wrongful death, action does not abate. Harrison v. Carter, 226 N. C. 36, 40, 36 S. E. (2d) 700, 164 A. L. R. 697.

§ 1-75. Procedure on death of party.—When a party to an action in the superior court dies pending the action, his death may be suggested before the clerk of the court where the action is pending, during vacation. It is then the duty of the clerk to issue a summons to the party who succeeds to the rights or liabilities of a deceased defendant, commanding him to appear before him within thirty days after the service of the summons, and answer the complaint, and the issue joined by the filing of the answer stands for trial at the succeed-

ing term of the superior court. It is the duty of the clerk to issue a notice to the party succeeding to the rights of a deceased party who will be necessary to the prosecution of the action to final judgment to appear and become party plaintiff; and if the party made plaintiff files an amended complaint, the defendant has thirty days after notice of same in which to file an answer thereto, and the issue thus made up stands for trial at the succeeding term. For good cause shown, the clerk may extend the time of filing such answer to a day certain, but the clerk shall not extend such time more than once, nor for a period of time exceeding twenty days, except with the consent of the parties. (Rev., ss. 416, 417, 418; 1887, c. 389; 1949, c. 46; C. S. 462.)

Editor's Note.—The 1949 amendment substituted in the second sentence the words "within thirty days after the service of the summons" for the words "on a day named in the summons, which must be at least twenty days after its service." It also substituted "thirty days" for "twenty days" in the third sentence and added the last sentence. For brief comment on 1949 amendment, see 27 N. C. Law Rev. 438.

Art. 7. Venue.

§ 1-76. Where subject of action situated.

I. IN GENERAL.

Applied in Holden v. Totten, 224 N. C. 547, 31 S. E. (2d) 635.

V. RECOVERY OF PERSONAL PROPERTY.

Recovery as Sole Object.—

If an action be one in which the recovery of personal property is not the sole or chief relief demanded, it is not removable to the county in which the personal property is located; but, if the recovery of specific personal property is the principal relief sought, the action is removable to the county where the property is situated. House Chevrolet Co. v. Cahoon, 223 N. C. 375, 26 S. E. (2d) 864.

Section Does Not Apply to Actions for Monetary Recovery.—This section applies only to action for the recovery of specific tangible articles of personal property and not to actions for monetary recovery. Flythe v. Wilson, 227 N. C. 230, 41 S. E. (2d) 751.

§ 1-77. Where cause of action arose.

Cross References.—

See note to § 1-82.

Action against Municipality Is Action against Public Officer.—

In accord with original. See Godfrey v. Tidewater Power Co., 224 N. C. 657, 32 S. E. (2d) 27.

Venue of Action against Municipality.—

In accord with original. See Godfrey v. Tidewater Power Co., 224 N. C. 657, 32 S. E. (2d) 27

Cited in Godfrey v. Tidewater Power Co., 223 N. C. 647, 27 S. E. (2d) 736; Flythe v. Wilson, 227 N. C. 230, 41 S. E. (2d) 751.

§ 1-78. Official bonds, executors and administrators.

Applicable to All Actions against Administrators.—

This section applies to all actions against executors and administrators in their official capacity, whether upon their bonds or not. Godfrey v. Tidewater Power Co., 224 N. C. 657, 32 S. E. (2d) 27.

§ 1-79. Domestic corporations.

Domesticated foreign corporations are residents of the state for purposes of venue of the state courts. Hill v. Atlantic Greyhound Corp., 229 N. C. 728, 51 S. E. (2d) 183.

A foreign corporation domesticated under § 55-118 may sue and be sued under the rules and regulations which apply to domestic corporations, and is entitled to have an action against it, instituted by a nonresident, removed to the county of its main place of business in this state. In such case § 1-80 does not apply. Id.

§ 1-80. Foreign corporations.

Cross Reference.—As to domesticated foreign corporations, see note to § 1-79.

§ 1-82. Venue in all other cases.

Cross Reference.—As to domesticated foreign corporations, see note to § 1-79.

Construed with Other Provisions for Venue.—

Section 1-77 relates to particular cases, and this section is intended to cover all cases for which provision is not otherwise made. Hence, in the event of conflict, the former section expressing a particular intention will be taken as an exception to the general provision. Godfrey v. Tidewater Power Co., 224 N. C. 657, 659, 32 S. E. (2d) 27.

Fiduciaries.—In determining the residence of fiduciaries for the purpose of venue or citizenship, the personal residence of the fiduciary controls, in the absence of statute. This is true as to receivers, trustees, executors and administrators, including statutory receivers of banks. Hartford Acci., etc., Co. v. Hood, 225 N. C. 361, 34 S. E. (2d) 204.

§ 1-83. Change of venue.—If the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court.

The court may change the place of trial in the following cases:

1. When the county designated for that purpose is not the proper one.

2. When the convenience of witnesses and the ends of justice would be promoted by the change.

3. When the judge has, at any time, been interested as party or counsel.

4. When motion is made by the plaintiff and the action is for divorce and the defendant has not been personally served with summons. (Rev., s. 425; Code, s. 195; C. C. P., s. 69; R. C., c. 31, ss. 115, 118; 1870-1, c. 20; 1945, c. 141; C. S. 470.)

Editor's Note.—The 1945 amendment added subsection 4.

Cited in Boney v. Parker, 227 N. C. 350, 42 S. E. (2d) 222.

§ 1-84. Removal for fair trial.

Applied in State v. Bell, 228 N. C. 659, 46 S. E. (2d) 834.

§ 1-86. Additional jurors from other counties instead of removal.

Applied in State v. Speller, 230 N. C. 345, 53 S. E. (2d) 294.

§ 1-87.1. Dismissal of action arising out of state when parties are nonresidents.—For the convenience of parties and witnesses and in the interest of justice, any judge of any court in this state may dismiss without prejudice any civil action over which such court has jurisdiction if the court shall find that:

(1) The cause of action arose out of the state, and

(2) The defendant is a nonresident of this state, and

(3) The plaintiff is a nonresident of this state or the deceased person in behalf of whose estate the action has been instituted was at the time of his death a nonresident of this state. (1949, c. 676.)

Editor's Note.—For brief comment on this section, see 27 N. C. Law Rev. 438.

Art. 8. Summons.

§ 1-88. Civil actions commenced by.

Delivery to Sheriff Fixes Beginning of Action.—In a civil action, the delivery of summons and copy of complaint to the sheriff for service fixes the beginning of the action as of that date. Raleigh v. Mechanics and Farmers Bank, 223 N. C. 286, 26 S. E. (2d) 573.

Cited in Moore v. Moore, 224 N. C. 552, 31 S. E. (2d) 690.

§ 1-89. Contents, return, seal.

Whenever a summons is issued for service under the provisions of § 1-104 it may be served by the sheriff or other process officer of the county and state where the defendant resides at any time within thirty (30) days after the date of its issue. (Rev., ss. 430, 431; Code, ss. 200, 203, 213; C. C. P., s. 74; 1876-7, cc. 85, 241; 1919, c. 304, s. 1; Ex. Sess. 1920, c. 96, s. 1; Ex. Sess. 1921, c. 92, s. 1; 1927, c. 66, s. 1; 1927, c. 132; 1929, c. 237, s. 1; 1935, c. 343; 1939, c. 15; 1945, c. 664; C. S. 476.)

Editor's Note.—

The 1945 amendment added the above sentence at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

Summons Loses Vitality if Not Served within Prescribed Time.—In order to bring a defendant into court and hold him bound by its decree, in the absence of waiver or voluntary appearance, a summons must be issued by the clerk and served upon him by the officer within ten days after date of issue, and if not served within that time the summons must be returned by the officer to the clerk with proper notation. Then, if plaintiff wishes to keep his case alive, he must have an alias summons issued. In the event of failure of service within the time prescribed, the original summons loses its vitality. It becomes functus officio. There is no authority in the statute for the service of that summons on defendant after the date therein fixed for its return, and if plaintiff desires the original action continued, he must cause alias summons to be issued and served. Green v. Chrismon, 223 N. C. 723, 726, 28 S. E. (2d) 215.

Applied, as to service after expiration of more than ten days, in In re Walters, 229 N. C. 111, 47 S. E. (2d) 709.

Cited in Washington County v. Blount, 224 N. C. 438, 31 S. E. (2d) 374; Johnson v. Sidbury, 225 N. C. 208, 34 S. E. (2d) 67.

§ 1-94. When officer must execute and return.

Cited in Smith v. Smith, 226 N. C. 544, 39 S. E. (2d) 458.

§ 1-95. Alias and pluries.—When the defendant in a civil action or special proceeding is not served with summons within ten days, the plaintiff may sue out an alias or pluries summons, returnable in the same manner as original process. An alias or pluries summons may be sued out at any time within ninety (90) days after the date of issue of the next preceding summons in the chain of summonses. Provided, however, that in case of tax suits and special assessment foreclosure suits brought under the provisions of § 105-391 and § 105-414, as amended, an alias or pluries summons may be sued out at any time within two years after the issuance of the original summons, whether any intervening alias or pluries summons has heretofore been issued or not, and after the issuance of such alias or pluries summons, the chain of summonses may be kept up as in any other action. (Rev., s. 437; Code, s. 205; R. C., c. 31, s. 52; 1777, c. 115, ss. 23, 71; 1929, c. 237, s. 2; 1931, c. 264; 1945, c. 163; C. S. 480.)

Editor's Note.—

The 1945 amendment made the proviso applicable to special assessment foreclosure suits and inserted the reference to § 105-414.

Alias Summons Must Be Sued Out within Ninety Days.—

An alias or pluries summons must be served within ninety days after the date of issue of the next preceding summons in the chain of summonses, if the plaintiff wishes to avoid a discontinuance. The word "may" in this statute means "must." Green v. Chrismon, 223 N. C. 723, 28 S. E. (2d) 215.

§ 1-96. Discontinuance.

When Discontinuance Occurs.—

In order to bring a defendant into court and hold him bound by its decree, in the absence of waiver or voluntary appearance, a summons must be issued by the clerk and served upon him by the officer within ten days after date of issue; and if not served within that time, the summons must be returned, with proper notation, and alias or pluries summons issued and served in accordance with the statute, otherwise the original summons loses its vitality and becomes functus officio and void. Green v. Chrismon, 223 N. C. 723, 28 S. E. (2d) 215.

§ 1-97. Service by copy.

5. Every nonresident individual who is engaged in business in this state and who conducts such business through an agent, employee, trustee, or other representative in this state, or who is a member of a partnership, firm, or unincorporated organization or association, or beneficiary or shareholder in a business trust doing business in this state, shall be subject to process in any action or proceeding in any court of competent jurisdiction in this state arising out of or connected with such business in this state, and such process may be served upon such agent, employee, trustee, or other representative or upon any person in this state receiving or collecting money with respect to such business, or upon any member of such partnership, firm, organization or association residing in this state or upon any person residing in this state who is authorized to act or contract for or collect or receive money on behalf of such partnership, firm, organization, association, or business trust with respect to its business in this state. Within five days after such service the plaintiff or petitioner or his attorney shall send by registered mail to said nonresident individual at his last address, if known, a copy of the summons and a copy of the complaint or petition with a statement calling attention to the provisions hereof and of the expiration of the time to answer or demur. Such service shall bind such individual as fully and effectually as if it had been made upon him personally. But no final decree shall be entered unless the presiding judge at the trial shall find as a fact that the plaintiff mailed by registered mail with the return receipt request to the last known address of the defendant a copy of the summons and complaint in the action. The return postal receipt shall be evidence of the mailing of said summons and complaint as herein provided for. (1945, c. 123.)

I. IN GENERAL.

Editor's Note.—

The 1945 amendment added the last two sentences of subsection 5. As the rest of the section was not affected by the amendment it is not set out.

For comment on the 1943 amendment, see 25 N. C. Law Rev. 319.

Cited in Washington County v. Blount, 224 N. C. 438, 31 S. E. (2d) 374.

II. SERVICE ON CORPORATIONS.

A. Corporations Generally.

Subsection 1 of this section was intended to facilitate service on a corporation, and to resolve any doubt as to who might be validly served. Townsend v. Carolina Coach Co., 229 N. C. 523, 50 S. E. (2d) 567.

And a person who receives money for a corporation need not be its employee or agent in order for service of process on such person to be effective. Townsend v. Carolina Coach Co., 229 N. C. 523, 50 S. E. (2d) 567.

Summons against defendant bus company was served on a bus station employee who sold tickets for defendant as well as for others, and who was employed by third parties operating the bus station. Money collected for the tickets was received by the ticket seller as the employee of the operators and turned over by them to the defendant. It was held that the service of the summons on the ticket seller was sufficient. Id.

B. Foreign Corporations.

In action by domestic corporation against defendant for-

eign corporation, which had removed all property from State except intrastate franchise, service of process upon one time lessee of franchise was invalid, and mere fact that lessee was process agent of his own corporation did not make him process agent of defendant nor was he a "local" agent within the meaning of this section. Central Motor Lines v. Brooks Transp. Co., 225 N. C. 733, 36 S. E. (2d) 271, 162 A. L. R. 1419.

IV. SERVICE ON INSANE PERSONS.

Process in Divorce Action.—This section provides the method of service of process on insane persons generally in all classes of actions against them, and process in an action for divorce may be served under its provisions. Smith v. Smith, 226 N. C. 544, 39 S. E. (2d) 458.

§ 1-98. Service by publication.—Where the person on whom the service of the summons is to be made cannot, after due diligence, be found in the state, and that fact appears by affidavit to the satisfaction of the court, or a judge thereof and it in like manner appears that a cause of action exists against the defendant in respect to whom service is to be made, or that he is a proper party to an adoption proceeding instituted in this state, or that he is a proper party to an action relating to real property in this state, such court or judge may grant an order that the service be made by publication of a notice in either of the following cases:

9. Where the action or proceeding is for the adoption of a minor child or children, residents of the state, whose parent or parents are necessary parties to the action or proceeding, and the said parent or parents are nonresidents of the state or cannot, after due and diligent search, be found within the state.

10. Where the action is for annulment of marriage. (Rev., s. 442; Code, ss. 218, 221; 1885, c. 380; 1889, cc. 108, 263; 1895, c. 334; 1947, c. 838; 1949, c. 85; C. S. 484.)

I. IN GENERAL.

Editor's Note.—

The 1947 amendment inserted in the preliminary paragraph the words "or that he is a proper party to an adoption proceeding instituted in this state." It also added subsection 9. The 1949 amendment added subsection 10. As subsections 1 through 8 were not affected by the amendments they are not set out.

For brief comments on the 1947 and 1949 amendments, see 25 N. C. Law Rev. 392, 27 N. C. Law Rev. 452.

For an article criticising certain aspects of the procedural divorce law and recommending changes thereof, see 25 N. C. Law Rev. 192.

The affidavit on which the order of service by publication is made is jurisdictional, and it is always best to use the form suggested in the statute. The omission from the affidavit of those averments on which service of notice by publication is substituted for personal service would be fatal to the proceeding. But the statement in the affidavit that the applicant has a "good" cause of action, of a certain character, is not no classed. Neither this section nor § 1-99 requires the applicant to swear to the merits of his cause of action—only to say that he has one and the purpose thereof. Simmons v. Simmons, 228 N. C. 233, 45 S. E. (2d) 124.

Same—Necessity for Averment of Due Diligence.—

The jurisdiction of the court, where substituted service is sought, depends upon the factual representations made to it under statutory procedure. Since this method of giving notice is out of the ordinary, a strict compliance with this section has always been deemed to be necessary. Averment as to due diligence is jurisdictional and its absence is a fatal defect. Rodriguez v. Rodriguez, 224 N. C. 275, 29 S. E. (2d) 901.

An averment in an affidavit that "defendant . . . after diligent inquiry cannot be found in the state of North Carolina" is in substantial compliance with this section and supports an order for service by publication. Simmons v. Simmons, 228 N. C. 233, 45 S. E. (2d) 124.

Same—Amendment.—

While an affidavit, upon which substituted service is based, may be amended, such amendment will not validate a prior judgment rendered upon the defective service, which judgment is void for want of jurisdiction. Rodriguez v. Rodriguez, 224 N. C. 275, 29 S. E. (2d) 901.

Necessity That Minors Be Represented by Guardian.—In a suit to enforce a tax lien by foreclosure, where the affidavit, orders and notices appear sufficient in form to constitute service by publication upon all persons named therein, both adult and minors, their heirs and assigns, known and unknown, under this section, yet, minors, if any, must be represented by guardian, or guardian ad litem, otherwise such minors are not bound by the judgments in the action. McIver Park, Inc. v. Brinn, 223 N. C. 502, 27 S. E. (2d) 548.

An action for specific performance under this section is in the nature of an action in rem, and a contract for the conveyance of real property may be enforced against a nonresident. In such cases the court has the power to determine who is entitled to the property and to vest title by decree in the party entitled to the same. Voehringer v. Pollock, 224 N. C. 409, 412, 30 S. E. (2d) 374.

III. SERVICE BY PUBLICATION ON NONRESIDENT WITH PROPERTY WITHIN STATE.

In General.—

To make valid substituted service under this section, the nonresident defendant not only must have property in the state, but the subject of the suit must be within the jurisdiction, or under the control of the court by attachment, restraining order, or otherwise. Southern Mills v. Armstrong, 223 N. C. 495, 27 S. E. (2d) 281, 148 A. L. R. 1248.

§ 1-99. Manner of publication.

The cost of publishing a summons in a newspaper shall be in accordance with the provisions of § 1-596 of the General Statutes of North Carolina. (Rev., s. 443; Code, s. 219; 1903, c. 134; C. C. P., c. 84; 1876-7, c. 241, s. 3; 1949, c. 205, s. 1; C. S. 485.)

Local Modification.—Nash: 1949, c. 205, s. 2.

Editor's Note.—For an article criticising certain aspects of the procedural divorce law, see 25 N. C. Law Rev. 192.

The 1949 amendment rewrote the second sentence. As the first sentence was not changed it is not set out.

The statutory provisions as to time and method of giving notice by publication are mandatory. And service of process by publication upon an individual nonresident is valid only when the provisions of the statutes authorizing constructive service have been strictly complied with. Southern Mills v. Armstrong, 223 N. C. 495, 27 S. E. (2d) 281, 148 A. L. R. 1248. The primary purpose of the requirements as to publication is to give notice to the defendant, and publication in a newspaper of general circulation in the county is permitted as the most likely means available for that purpose. Hence, the minimum time prescribed is essential for establishing constructive notice. Publication for a period, or in a manner, less than that prescribed would be insufficient in law to bring the defendant constructively into court or justify a judgment based thereon. Scott & Co. v. Jones, 230 N. C. 74, 52 S. E. (2d) 219.

The expression "not less than once a week for four successive weeks" contemplates a publication once each week for four consecutive weeks, and this requires that the publications be spaced substantially at intervals of 7 days for four successive weeks. The four publications need not occupy the full period of 28 days and may be deemed completed with less than that number of days intervening between first and last publication when considered in connection with the statutory provision (§ 1-100) that service shall be deemed complete 7 days after last publication. Thus, under the statutes now in effect, a publication on the 1st, 8th, 15th and 22nd would be sufficient, though there be less than 28 days between the first and last publication. Scott & Co. v. Jones, 230 N. C. 74, 52 S. E. (2d) 219.

A publication on Saturday of one week and on Monday of each of the following three weeks, is insufficient to meet the requirements of the statute. Id.

The order for publication need not state that the newspaper is the one most likely to give notice to the person to be served. Smith v. Smith, 226 N. C. 506, 39 S. E. (2d) 391, 394.

Presumption in Favor of Sufficient Publication.—An order for publication of notice of summons being made by a court of record there is a presumption in favor of the rightfulness of its decrees, and it will be presumed that the statutory findings and determination had been made without spe-

cific adjudication in the order to that effect. Smith v. Smith, 226 N. C. 506, 39 S. E. (2d) 391, 394.

This section does not require applicant to swear to the merits of his cause of action—only to say that he has one and the purpose thereof. Simmons v. Simmons, 228 N. C. 233, 45 S. E. (2d) 124.

A judgment rendered upon an insufficient publication of notice of summons and attachment is void and does not constitute a lien upon the lands of the judgment debtor. Scott & Co. v. Jones, 230 N. C. 74, 52 S. E. (2d) 219.

Cited in In re Estate of Smith, 226 N. C. 169, 37 S. E. (2d) 127.

§ 1-100. When service by publication complete; time for pleading.—In the cases in which service by publication is allowed, the summons is deemed served at the expiration of seven days from the date of the last publication, and the party so served is then in court. Such party shall have twenty days thereafter in civil actions and ten days in special proceedings in which to answer or demur. (Rev., s. 444; Code, s. 227; C. C. P., s. 88; 1939, c. 49, s. 1; 1945, c. 158; C. S. 487.)

Editor's Note.—

The 1945 amendment substituted the words "seven days from the date of the last publication" for the words "the time prescribed by the order of publication."

As to effect of amendment, see 23 N. C. Law Rev. 331.

Validation of Certain Judgments.—For act validating certain judgments, orders, etc., in actions in which summons was served by publication without complying with § 1-100, as amended in 1945, see Session Laws 1947, c. 666. See also 25 N. C. Law Rev. 394.

Cited in In re Estate of Smith, 226 N. C. 169, 37 S. E. (2d) 127; Scott & Co. v. Jones, 230 N. C. 74, 52 S. E. (2d) 219.

§ 1-103. Voluntary appearance by defendant.

Effect of General Appearance.—

A defendant who makes a general appearance thereby waives irregularities in the service of summons and subjects himself to the jurisdiction of the court. The same result follows when defendant obtains time within which to answer. Wilson v. Thaggard, 225 N. C. 348, 34 S. E. (2d) 140.

Where the controverted matter of custody of his two children was originally presented to the juvenile court by appellant, it was held that he may not be heard to complain of irregularity, since the proceeding was instituted at his instance, and he was personally present in court for the hearing which he had invoked. In re Prevatt, 223 N. C. 833, 836, 28 S. E. (2d) 564.

§ 1-104. Personal service on nonresident.—When the place of residence of a person out of the state is known and the same is made to appear by affidavit or in a verified complaint, in lieu of publication in a newspaper it is sufficient to mail a copy of the summons, notice or other process, accompanied by a statement as to the nature of the action or proceeding, to the sheriff or other process officer of the county and state where the defendant resides, who shall serve same according to its tenor. The process officer who serves the paper shall, in making his return, use a form of certificate substantially as follows:

State of .....

County of .....

Affidavit of

Service of Summons;

Clerk's Certificate

I, ... [Sheriff or other process officer] of the county [or city] of ....., State of ....., being duly sworn, do certify that on the .... day of ....., 19.., I served the summons and accompanying statement hereto attached by delivering a copy of the same to ....., the defendant(s) therein named.

..... [Sheriff or other process officer]

I, ..., Clerk of the ..... Court of the County [or City] of ....., State of ....., do certify that said court is a court of record having the seal hereto attached; that ..... is well known to me as ..... [Sheriff or other process officer] of said county [or city] of ....., and that he has full power and authority to serve any and all legal processes issuing from courts of this state; that said ..... personally appeared before me this day and made and subscribed the above affidavit relative to service of summons on .....

This the .... day of ....., 19..

[L. S.] .....

Clerk of the ..... Court of the County [or City] of ....., State of .....

Provided, that in all cases where service of process has been made upon a nonresident based upon a verified complaint in conformity with the amendment set forth in this section, all such service of process is hereby declared to be lawful, legal and valid, and all orders, judgments and decrees based thereon are declared to be legal and valid and binding upon all of the parties thereto, and all proceedings based upon the same are hereby validated, except that this proviso shall not apply to pending litigation. Rev., s. 448; 1891, c. 120; 1943, c. 543; 1945, c. 139; C. S. 491.)

Editor's Note.—

The 1945 amendment inserted in line four the words "or in a verified complaint," and added the proviso at the end of the section. The amendment mentioned in the proviso refers to the insertion of the quoted words.

§ 1-105. Service upon non-resident drivers of motor vehicles.

What Sheriff's Return Must Show.—When service of process on a nonresident, through the Commissioner of Motor Vehicles, as provided in this section, is sought, it is essential that the sheriff's return show that such service was made as specifically required, and that a copy of the process be sent defendant by registered mail and return receipt therefor and plaintiff's affidavit of compliance be attached to summons and filed. Propst v. Hughes Trucking Co., 223 N. C. 490, 27 S. E. (2d) 152.

Applied in MacClure v. Accident, etc., Ins. Co., 229 N. C. 305, 49 S. E. (2d) 742.

§ 1-107. Alternative method of service upon non-resident defendants.

Cited in Propst v. Hughes Trucking Co., 223 N. C. 490, 27 S. E. (2d) 152.

§ 1-107.1. Service upon motor vehicle dealers not found within the state.—(a) The application for and obtaining of a license from the commissioner of revenue to engage in any business activity under the provisions of subsection (4) of § 105-89, relating to motor vehicle dealers, shall be deemed equivalent to the appointment by such licensee of the commissioner of revenue, or his successor in office, to be his true and lawful attorney upon whom may be served all summonses or other lawful process in any action or proceeding against such licensee resulting from any claim arising out of any business carried on or conducted pursuant to or authorized by said license, and said application for and obtaining of said license shall be a

signification of his agreement that any such process against him shall be of the same legal force and validity as if served on him personally.

(b) Service of such process shall be made by leaving a copy thereof, with a fee of one dollar ($1.00), in the hands of said commissioner of revenue, or in his office, and such service shall be sufficient service upon the said licensee provided that notice of such service and a copy of the process are forthwith sent by registered mail by the plaintiff or commissioner of revenue to the defendant and the defendant's return receipt and the plaintiff's affidavit of compliance herewith are appended to the summons or other process and filed with said summons, complaint and other papers in the cause. The court in which the action is pending shall order such continuance as may be necessary to afford the defendant reasonable opportunity to defend the action.

(c) The commissioner of revenue shall keep a record of all such processes, which shall show the day and hour of service upon him. When the registry return receipt shall be returned to the commissioner of revenue, he shall deliver it to the plaintiff on request and keep a record showing the date of its receipt by him and its delivery to the plaintiff.

(d) Service of process may not be made by the method provided in this section unless the person on whom the service is to be made cannot, after due diligence, be found in this state, and that fact is established by affidavit to the satisfaction of the court or a judge thereof. (1947, c. 817, s. 1.)

Editor's Note.—For a brief discussion of this section, see 25 N. C. Law Rev. 392.

§ 1-108. Defense after judgment on substituted service.—The defendant against whom publication is ordered, or who is served under the provisions of §§ 1-104 through 1-107.1, or his representatives, on application and sufficient cause shown at any time before judgment, must be allowed to defend the action; and, except in an action for divorce or annulment or in an action for the foreclosure of county or municipal taxes, the defendant against whom publication is ordered, or his representatives, may in like manner, upon good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof, and within five years after its rendition, on such terms as are just; and if the defense is successful and the judgment or any part thereof has been collected or otherwise enforced, such restitution may be compelled as the court directs.

(1947, c. 817, s. 2; 1949, c. 256.)

Editor's Note.—

The 1947 amendment substituted "1-107.1" for "1-107" in line three of the first sentence. And the 1949 amendment inserted the words "or annulment" in lines six and seven. As the other sentences were not affected by the amendments they are not set out.

For a brief comment on the 1949 amendment, see 27 N. C. Law Rev. 452.

Judgments by Default.—

A nonresident served by publication is entitled to an order setting aside a judgment by default of inquiry, upon good cause shown, within one year after rendition of the judgment or notice thereof, and such notice referred to in this section means actual notice, and therefore evidence disclosing that defendant did not have actual notice of the pendency of the action is sufficient to support the trial court's finding that he had no notice thereof. Russell v. Edney, 227 N. C. 203, 41 S. E. (2d) 585.

Art. 9. Prosecution Bonds.

§ 1-109. Plaintiff's, for costs.

3. File with him a written authority from a judge or clerk of a superior court, authorizing the plaintiff to sue as a pauper: Provided, however, that the requirements of this section shall not apply to counties, cities and towns; provided, further, that counties, cities and towns may institute civil actions and special proceedings without being required to give a prosecution bond or make deposit in lieu of bond. (Rev., s. 450; Code, s. 209; R. C., c. 31, s. 40; C. C. P., s. 71; 1935, c. 398; 1949, c. 53; C. S. 493.)

Editor's Note. — The 1949 amendment inserted the word "counties" in lines five and six of subsection 3. As the rest of the section was not affected by the amendment it is not set out.

§ 1-111. Defendant's, for costs and damages in actions for land.

Formal Order Fixing Amount of Bond Not Required.—Neither formal order fixing the amount of the defense bond required of defendant in actions for the recovery of real property, nor notice to plaintiff, is required. Privette v. Allen, 227 N. C. 164, 41 S. E. (2d) 364.

An action to establish a parol trust, with prayer that defendant be directed to execute deed to plaintiff, is not an action for recovery or possession of real property within the meaning of this section and plaintiff is not entitled to have the answer stricken and judgment by default final rendered for failure of defendant to file bond. Hodges v. Hodges, 227 N. C. 334, 335, 42 S. E. (2d) 82.

Substantial Compliance with Section.—Where, in an action in ejectment, defendant, after consultation with the clerk, tenders justified bond in the minimum amount required by this section, and the clerk accepts the bond and makes notation thereof on the records, there is a substantial compliance with the statute and plaintiff's remedy if he deems the bond insufficient is by motion in the cause. Privette v. Allen, 227 N. C. 164, 41 S. E. (2d) 364.

Waiver.—The requirement that the defendant must "execute and file" a defense bond, or in lieu thereof a certificate and affidavit as provided by § 1-112, may be waived unless seasonably insisted upon by the plaintiff. Calaway v. Harris, 229 N. C. 117, 47 S. E. (2d) 796.

Applied in Moody v. Howell, 229 N. C. 198, 49 S. E. (2d) 233.

Cited in Whitaker v. Raines, 226 N. C. 526, 39 S. E. (2d) 266; Teel v. Johnson, 228 N. C. 155, 44 S. E. (2d) 727.

§ 1-112. Defense without bond.

Cross Reference.—See note to § 1-111.

Cited in Whitaker v. Raines, 226 N. C. 526, 39 S. E. (2d) 266.

Art. 11. Lis Pendens.

§ 1-116. Filing of notice of suit.—In actions affecting the title to real property, the plaintiff, at the time of issuing the summons, or at any time after the time of filing the complaint, or when at any time after a warrant of attachment is issued, or a defendant when he sets up an affirmative cause of action in his answer and demands substantive relief, or at any time after the time of filing his answer, if it is intended to affect real estate, may file with the clerk of each county in which the property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action, and the description of the property in that county affected thereby. (Rev., s. 460; Code, s. 229; C. C. P., s. 90; 1917, c. 106; 1949, c. 260; C. S. 500.)

Editor's Note.—The 1949 amendment rewrote this section and inserted the words "at the time of issuing the summons" in lines two and three. See 27 N. C. Law Rev. 475.

This section is designed to supplement the registration law and to provide a simple and readily available means of ascertaining the existence of adverse claims to land not otherwise disclosed by the registry. Notice under the act is required to give constructive notice to prospective

purchasers when the claim is in derogation of the record. Whitehurst v. Abbott, 225 N. C. 1, 5, 33 S. E. (2d) 129.

The effect of lis pendens and the effect of registration are in their nature the same thing. They are only different examples of the operation of the rule of constructive notice. They are each record notices upon the absence of which a prospective innocent purchaser may rely. Id.

The filing of notice under this section is essential to give constructive notice to those who are not directly interested in the proceedings. Whitehurst v. Abbott, 225 N. C. 1, 5, 33 S. E. (2d) 129.

Lis pendens notice under this section is not exclusive. Nor is it designed to protect intermeddlers. Whitehurst v. Abbott, 225 N. C. 1, 6, 33 S. E. (2d) 129.

"Action" as used in this section embraces all judicial proceedings affecting the title to real property or in which title to land is at issue. Whitehurst v. Abbott, 225 N. C. 1, 5, 33 S. E. (2d) 129.

Applies to Action in Another County.—

The pending action does not constitute notice as to land in another county until and unless notice thereof is filed in the county in which the land is located. Whitehurst v. Abbott, 225 N. C. 1, 4, 33 S. E. (2d) 129.

§ 1-116.1. Extending time to file complaint when notice of suit already filed; issuance of notice with summons; when notice inoperative or cancelled.— In all actions as defined in § 1-116 in which notice of pendency of the action is filed prior to the filing of the complaint, the plaintiff shall first obtain from the clerk a written order extending the date for filing the complaint as is provided in § 1-121 of the General Statutes of North Carolina. A copy of the aforesaid order of the clerk and a copy of the notice of the pendency of the action shall be served on the defendant, or defendants, at the time of the service of summons. Provided, that in all such cases if the complaint is not filed within the time fixed by the order or orders of the clerk, entered in conformity with the provisions of § 1-121 of the General Statutes of North Carolina, the notice of lis pendens shall become inoperative and of no effect. Provided further, that if the complaint is not filed within the time fixed by the order or orders of the clerk, the clerk may on his own motion and shall on the ex parte application of any interested party cancel such notice of lis pendens by appropriate marginal entry on the original record, which entry shall recite the failure of the plaintiff to file his complaint within the time allowed. Such applications for cancellation, when made in a county other than that in which the action was instituted, shall include a certificate over the hand and seal of the clerk of the county in which the action was instituted that the plaintiff did not file his complaint within the time allowed. The fees of the clerk may be recovered against the plaintiff and his surety. (1949, c. 260.)

§ 1-120.1. Article applicable to suits in federal courts.— The provisions of this article shall apply to suits affecting the title to real property in the federal courts. (1945, c. 857.)

Editor's Note.—As to lis pendens in federal courts, see 23 N. C. Law Rev. 330.

It would seem that the Advisory Committee notes under Rule 64 of Civil Procedure for the District Courts of the United States (1938 Edition, p. 139) support the validity of this statute.

Art. 12. Complaint.

§ 1-121. First pleading and its filing.

When the complaint is not filed at the time of the issuance of the summons the clerk shall, when the complaint is filed, make an order directing the sheriff to serve a copy of such complaint on each of the defendants by delivery of a copy thereof to each of them, and the sheriff shall within ten days make such service and make a written return, on the paper containing the order issued to him, showing the date of service and the date of return, or, if for any reason he is unable to make service, he shall show in his return the reason therefor. If the sheriff's return shows that service of copy of the complaint as provided above has not been made on a defendant because such defendant is not to be found in the county where the summons was originally served on him, and the plaintiff causes affidavit to be made and filed showing that such defendant cannot, after due diligence, be found in the state, it shall not be necessary to make, or attempt to make, service thereof on such defendant in any other manner. (Rev., ss. 465, 466; Code, ss. 206, 232, 238; C. C. P., s. 92; 1868-9, c. 76, s. 3; 1870-1, c. 42, s. 3; 1919, c. 304, s. 2; 1927, c. 66, s. 3; 1949, c. 1113, s. 1; C. S. 505.)

Editor's Note.—The 1949 amendment rewrote the former last three sentences of this section to appear as the two sentences above. As the first three sentences were not changed by the amendment they are not set out.

For comment on the 1949 amendment, see 27 N. C. Law Rev. 432.

Duty to Plead though Copy of Complaint Not Delivered.—A defendant, having made a general appearance, by motion to set aside a default judgment, which was allowed and time granted defendant in which to plead, it is his duty to answer or demur, even though a copy of the complaint filed has not been delivered to him as required by this section, and, upon his failure to do either, the court has authority to enter judgment by default and inquiry, without notice. Wilson v. Thaggard, 225 N. C. 348, 34 S. E. (2d) 140.

Amendment of Order Extending Time for Filing Complaint.—The trial court below permitted plaintiffs to amend order extending time to file complaint, served together with the summons, to show the nature and purpose of the suit as required by this section, and denied a motion to dismiss for want of proper service of process. The case was affirmed by an equally divided court. Whitehurst v. Anderson, 228 N. C. 787, 44 S. E. (2d) 358.

Cited in Johnson v. Sidbury, 225 N. C. 208, 34 S. E. (2d) 67.

§ 1-122. Contents.

III. STATEMENT OF FACTS CONSTITUTING THE CAUSE OF ACTION.

Material and Essential Rather than Collateral or Evidential Facts Must Be Stated.—The meaning of this section is that the complaint shall contain the material, essential, and ultimate facts upon which the right of action is based, and not collateral or evidential facts, which are only to be used to prove and establish the ultimate facts. Chason v. Marley, 223 N. C. 738, 28 S. E. (2d) 223.

The function of the complaint is to state the ultimate and decisive facts which constitute the cause of action but not the evidence necessary to prove such issuable facts. Long v. Love, 230 N. C. 535, 53 S. E. (2d) 661.

Plaintiff need not set forth the full contents of the contract which is the subject matter of his action, nor incorporate the same in the complaint by reference to a copy thereof attached as an exhibit. He must allege in a plain and concise manner the material, ultimate facts which constitute his cause of action. The production of evidence to support the allegations thus made may and should await the trial. Wilmington v. Schutt, 228 N. C. 285, 45 S. E. (2d) 364.

Facts Supporting Provisional Remedy.—In an action for assault and battery in which the provisional remedy of arrest and bail is invoked, it is appropriate for plaintiff to allege in the complaint the facts necessary to support the provisional remedy of arrest and bail, notwithstanding that such facts were also set out in the affidavit filed as a basis for the provisional remedy. In such case a motion to strike allegations that the injury was willful, wanton or malicious, is properly denied. Long v. Love, 230 N. C. 535, 53 S. E. (2d) 661.

Motion to Strike Out Redundant Matter, etc.—

Where, in an action attacking the administratrix and guardian in the administration of an estate on the ground of fraud, recitals and denunciations of fraud in matters not necessary to a statement of any cause of action set forth in the pleading should be stricken as a matter of

right upon motion made in apt time. Privette v. Morgan, 227 N. C. 264, 41 S. E. (2d) 845.

IV. DEMAND FOR RELIEF.

This section contemplates that the complaint should set forth a demand for relief to which the plaintiff supposes himself entitled. Griggs v. Stoker Service Co., 229 N. C. 572, 50 S. E. (2d) 914.

But Relief Is Granted in Absence of Prayer Therefor.—Notwithstanding this section, the decisions have consistently followed the rule that under the code of civil procedure the relief to be granted in an action does not depend upon that asked for in the complaint, but upon whether the matters alleged and proved entitle the complaining party to the relief granted, and this is so in the absence of any prayer for relief. Griggs v. Stoker Service Co., 229 N. C. 572, 50 S. E. (2d) 914.

§ 1-123. What causes of action may be joined.

I. IN GENERAL.

Editor's Note.—For a discussion of this section in connection with the right to join in one action that right of an injured person to sue for personal injury and the right of the personal representative to sue conferred by the wrongful death statute, see 25 N. C. Law Rev. 84.

For an article recommending this section be changed to conform to corresponding provision in Federal Rules of Civil Procedure, see 25 N. C. Law Rev. 245.

Purpose of Section.—

In accord with original. See Ezzell v. Merritt, 224 N. C. 602, 31 S. E. (2d) 751.

The purpose of this section is to permit the consolidation of causes of action when the facts as to all may be stated as a connected whole, are so restricted in scope that they may be examined in relation to each other, and are directed to the same subject matter which constitutes one general right. Pressley v. Great Atlantic, etc., Tea Co., 226 N. C. 518, 39 S. E. (2d) 382, 384.

Same — Section Relating to Counterclaim. — The purpose and intent of subsection 1 of this section and subsection 1 of § 1-137, relating to causes which may be pleaded as counterclaims, are substantially the same, i. e., to permit the trial in one action of all causes of action arising out of one contract or transaction connected with the same subject of action, and therefore decisions on one of the statutes is authority on the other. Hancammon v. Carr, 229 N. C. 52, 47 S. E. (2d) 614.

This section should be liberally construed to the end that justiciable controversies may be expeditiously adjusted by judicial decree at a minimum of cost to the litigants and the public. Pressley v. Great Atlantic, etc., Tea Co., 226 N. C. 518, 39 S. E. (2d) 382, 383.

Joinder Is Subject to Restrictions.—The joinder of causes of action is not primarily instigated by the court, but is done on the initiative of the parties seeking to assert and enforce their rights by final judgment of the court; and while under the supervision of the court it is not a matter of discretion but is subject to the restrictions provided in this section. Horton v. Perry, 229 N. C. 319, 49 S. E. (2d) 734.

Whether legal or equitable, the joinder of causes of action and the parties to whom they belong must come within the provisions of this chapter, unless by some special modifying statute or recognized rule of practice an exception is created. Fleming v. Carolina Power, etc., Co., 229 N. C. 397, 50 S. E. (2d) 45.

Consolidation of Actions Distinguished.—There is a substantial difference between the consolidation of cases for the convenience of trial and the joinder of causes of action for judicial determination in their combined aspect. The former is in the exercise of the inherent power of the court and, in applicable cases, in its discretion; but this may be exercised only for the purpose of trial, and in that declared purpose will be found its limitations;—it cannot annul or suspend the statute relating to joinder. Horton v. Perry, 229 N. C. 319, 49 S. E. (2d) 734.

Provision Requiring Each Cause of Action to Be Stated Separately.—When a plaintiff seeks to recover in one action on two or more causes of action, he must state each cause of action separately, setting out in each the facts upon which that cause of action rests. King v. Coley, 229 N. C. 258, 49 S. E. (2d) 648.

Is Improperly Arranged as Printed in General Statutes.—The provision of this section requiring each cause of action to be stated separately, as printed in the General Statutes of 1943, is so arranged as to make it appear that it relates only to subsection 7. However, the history of the statute, as well as the language used, indicates that it applies to each and every case in which two or more causes of action are joined in the same complaint. The last sentence in subsection 7 should appear in a separate and distinct paragraph following that subsection. King v. Coley, 229 N. C. 258, 49 S. E. (2d) 648.

Effect of Dismissal upon Appeals from Preliminary Orders.—Upon the dismissal of an action for misjoinder of parties and causes, appeals from all preliminary orders such as for an audit of the books of one of defendants are dismissed. Southern Mills v. Summit Yarn Co., 223 N. C. 479, 27 S. E. (2d) 289.

Where Defect in Pleading Relates Merely to Misjoinder.—If the defect in the pleading, upon demurrer under this section, relates merely to misjoinder of actions, the court will, under § 1-132, salvage the action by ordering it to be divided into as many actions as are necessary for determination of the causes of action stated; but where there is a misjoinder both of causes and of parties, this procedure cannot be followed. Southern Mills v. Summit Yarn Co., 223 N. C. 479, 27 S. E. (2d) 289.

Cited in Corbett v. Hilton Lbr. Co., 223 N. C. 704, 28 S. E. (2d) 250; Hatcher v. Williams, 225 N. C. 112, 33 S. E. (2d) 617.

II. CAUSES OF ACTION WITH REFERENCE TO TRANSACTION, OR SUBJECT OF ACTION.

The General Rule.—

In accord with original. See Owen v. Hines, 227 N. C. 236, 41 S. E. (2d) 739.

Where the matter is wholly distinct and did not stem out of the transaction set out in the original complaint and is not sufficiently correlated thereto, the real objection would be noncompliance with this section. Nassaney v. Culler, 224 N. C. 323, 326, 30 S. E. (2d) 226.

Each cause of action must relate to one general right, and each must be so germane to it as to be regarded as a part thereof. Pressley v. Great Atlantic, etc., Tea Co., 226 N. C. 518, 39 S. E. (2d) 382, 383.

The complaint is multifarious unless all the causes of action alleged therein arose out of one and the same transaction or series of transactions forming one course of dealing, and all tending to one end. Id.

If grounds of bill are not entirely distinct and wholly unconnected, if they arise out of one and the same transaction or series of transactions, forming one course of dealing and tending to one end; if one connected story can be told of the whole, the complaint is not subject to attack by demurrer for misjoinder of causes of action. Id.

The "subject of action" means the thing in respect to which the plaintiff's right of action is asserted, whether it be specific property, a contract, a threatened or violated right, or other thing concerning which an action may be brought and litigation had. Hancammon v. Carr, 229 N. C. 52, 47 S. E. (2d) 614.

The connection with the subject of action must be immediate and direct. A remote, uncertain, partial connection is not enough to satisfy the requirements of the statute. Hancammon v. Carr, 229 N. C. 52, 47 S. E. (2d) 614.

Mental Incompetency and Undue Influence.—In action to set aside deed on ground of mental incompetency of grantor, and duress and undue influence on part of grantees, a demurrer for misjoinder of causes of action was properly overruled. Mental incompetency and weakness of mind are not too far apart psychologically or too radically inconsistent as to require assertion in separate actions. Goodson v. Lehmon, 225 N. C. 514, 35 S. E. (2d) 623, 164 A. L. R. 510.

IV. CAUSES OF ACTION FOR TORT TO PERSON OR PROPERTY.

Complaint alleging that plaintiff was injured by defendant's negligence and that thereafter defendant wrongfully discharged him is subject to demurrer for misjoinder as two causes of action have no interdependent connection and are not connected with same subject matter. Pressley v. Great Atlantic, etc., Tea Co., 226 N. C. 518, 39 S. E. (2d) 382, distinguishing Hamlin v. Tucker, 72 N. C. 502; Peitzman v. Zebulon, 219 N. C. 473, 14 S. E. (2d) 416.

Art. 13. Defendant's Pleadings.

§ 1-125. When defendant appears and pleads; petition to remove to federal court; extension of time; clerk to mail answer to plaintiff.—The defendant must appear and demur or answer within thirty (30) days after the service of summons upon him, or within thirty (30) days after the final determination of a motion to remove as a matter of right, or after the final determination of a motion to dismiss upon a special appearance, or

after the final determination of any other motion required to be made prior to the filing of the answer, or after final judgment overruling demurrer, or after the final determination of a motion to set aside a judgment by default under § 1-220, or to set aside a judgment under § 1-108. Upon the filing in a district court of the United States of a petition for the removal of a civil action or proceeding from a court in this state and the filing of a copy of the petition in the state court, the state court shall proceed no further therein unless and until the case is remanded; and in the event it shall be finally determined in the United States courts that the case was not removable or was improperly removed, or for other reason should be remanded, and a final order is entered remanding the case to the state court, the defendant or defendants, or any other party who would have been permitted or required to file a pleading had the removal proceedings not been instituted, will have thirty (30) days after the filing in such state court of a certified copy of the order of remand to file motions or demur, answer or otherwise plead. If the time is extended for filing the complaint, and a copy of the complaint, when filed, is served on the defendant, then, in such case, the defendant shall have thirty days after the date when the copy of the complaint was served on him, pursuant to G. S. § 1-121, or the defendant shall have thirty days after the final date fixed for filing the complaint, whichever is the later date, in which to plead. If the time is extended for filing complaint, and a copy of the complaint, when filed, is not served on the defendant, then, in such case, said defendant shall have thirty days after the date of the sheriff's return showing that service was not made of such complaint, pursuant to G. S. § 1-121, or the defendant shall have thirty days after the final day fixed for filing the complaint, whichever is the later date, in which to plead. The clerk shall not extend the time for filing answer or demurrer more than once nor for a period of time exceeding twenty days except by consent of parties. The defendant shall, when he files answer, likewise file at least one copy thereof for the use of the plaintiff, and his attorney; and the clerk shall not receive and file any answer until and unless such copy is filed therewith. The clerk shall forthwith mail the copy of answer filed to the plaintiff or his attorney of record. This section shall also apply to all courts of record inferior to the superior court, where any defendant resides out of the county from which the summons is issued and no court of record inferior to the superior court shall fix such return date at less than thirty (30) days. (Rev., s. 473; Code, 207; 1870-1, c. 42, s. 4; 1919, c. 304, s. 3; Ex. Sess. 1921, c. 92, s. 1, par. 3; 1927, c. 66, s. 4; 1935, c. 267; 1949, c. 808, s. 1; c. 1113, s. 2; C. S. 509.)

Editor's Note.—The first 1949 amendment inserted the present second sentence. The second 1949 amendment inserted the present third and fourth sentences in lieu of the former second sentence. For comment on amendments, see 27 N. C. Law Rev. 432.

Where purported special appearance did not challenge the jurisdiction of the court and it could not be treated as a demurrer, the court properly concluded that it was not a valid plea, but having overruled it without finding that it was irrelevant and frivolous and made in bad faith for purpose of delay, leave to answer should have been granted. New Hanover County v. Sidbury, 225 N. C. 679, 36 S. E. (2d) 242, 243.

Cited in Whitaker v. Raines, 226 N. C. 526, 39 S. E. (2d) 266.

§ 1-126. Sham and irrelevant defenses.

Applied in New Hanover County v. Sidbury, 225 N. C. 679, 36 S. E. (2d) 242.

Art. 14. Demurrer.

§ 1-127. Grounds for.

I. IN GENERAL.

Demurrer Does Not Admit Conclusions of Law.—The office of a demurrer is to test the sufficiency of a pleading, admitting for the purpose the truth of factual averments well stated and such relevant inferences as may be deduced therefrom, but it does not admit any legal inferences or conclusions of law asserted by the pleader. General American Life Ins. Co. v. Stadiem, 223 N. C. 49, 51, 25 S. E. (2d) 202.

Section Differs from § 1-183.—Under this section demurrer to plaintiff's pleadings challenges the sufficiency of the pleadings, and is different in purpose and result from demurrer to the evidence under § 1-183, which challenges the sufficiency of the evidence. Coleman v. Whisnant, 226 N. C. 258, 37 S. E. (2d) 693, 694.

Applied in Goodson v. Lehmon, 225 N. C. 514, 35 S. E. (2d) 623, 164 A. L. R. 510; Boney v. Parker, 227 N. C. 350, 42 S. E. (2d) 222; Bledsoe v. Coxe Lbr. Co., 229 N. C. 128, 48 S. E. (2d) 50.

Cited in Montgomery v. Blades, 223 N. C. 331, 26 S. E. (2d) 567; Sandlin v. Yancey, 224 N. C. 519, 31 S. E. (2d) 532.

IV. PENDENCY OF ANOTHER ACTION.

Availed of by Demurrer or Answer.—Where a prior action is pending between the same parties, involving substantially the same subject matter, the second action will be dismissed upon demurrer if the pendency of the prior action appears on the face of the complaint. But if the fact does not so appear, objection may be raised by answer (§ 1-133) and treated as a plea in abatement. Dwiggins v. Parkway Bus Co., 230 N. C. 234, 52 S. E. (2d) 892.

§ 1-128. Must specify grounds.

Notwithstanding any other provisions of this section, any such demurrer, upon ten days' notice to the adverse party, may be heard and passed upon out of term by the resident judge of the district or by any judge regularly assigned to hold the courts of the district. (1919, c. 304, s. 4; Ex. Sess. 1921, c. 92, s. 5; 1949, c. 147; C. S. 513.)

Editor's Note.—The 1949 amendment added the above sentence at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

For brief comment on amendment, see 27 N. C. Law Rev. 434.

Cited in Early v. Farm Bureau Mut. Automobile Ins. Co., 224 N. C. 172, 29 S. E. (2d) 558.

§ 1-131. Procedure after return of judgment.—

Within thirty days after the return of the judgment upon the demurrer, if there is no appeal, or within thirty days after the receipt of the certificate from the supreme court, if there is an appeal, if the demurrer is sustained the plaintiff may move, upon three days' notice, for leave to amend the complaint. If this is not granted, judgment shall be entered dismissing the action. If the demurrer is overruled the answer shall be filed within thirty days after the receipt of the judgment, if there is no appeal, or within thirty days after the receipt of the certificate of the supreme court, if there is an appeal. Otherwise the plaintiff shall be entitled to judgment by default final or by default and inquiry according to the course and practice of the court. (1919, c. 304, ss. 6, 7; Ex. Sess. 1921, c. 92, ss. 7, 8; 1949, c. 972; C. S. 515.)

Editor's Note.—The 1949 amendment substituted "thirty days" for "ten days" so as to make the section consistent with § 1-125. For brief comment on amendment, see 27 N. C. Law Rev. 434.

Dismissal for Failure to Amend.—A failure to amend the complaint after judgment sustaining demurrer thereto works a dismissal. Webb v. Eggleston, 228 N. C. 574, 46 S. E. (2d) 700.

Cited in Watson v. Lee County, 224 N. C. 508, 31 S. E. (2d) 535.

§ 1-132. Division of actions when misjoinder.

Where causes of action alleged in the complaint are improperly joined, the action need not be dismissed. Pressley v. Great Atlantic, etc., Tea Co., 226 N. C. 518, 39 S. E. (2d) 382, 384.

Misjoinder of Causes and Parties.—

If the defect in the pleading related merely to misjoinder of actions, the court might, under this section, salvage the action by ordering it to be divided into as many actions as are necessary for determination of the causes of action stated; but where there is a misjoinder both of causes of actions and of parties who have no community of interest, this proceeding cannot be followed. Southern Mills v. Summit Yarn Co., 223 N. C. 479, 485, 27 S. E. (2d) 289.

In a suit by a county against three defendants to foreclose a tax lien on five tracts of land, title to tracts 1, 2, and 3, being in E. L. for life with remainder to E. J., title to tract 4 being in E. L. in fee and the other defendants never having had any interest therein, and title to tract 5 being in E. J., and the other defendants never having had any interest therein, the joinder of the third defendant, H. F., was mere surplusage and not fatal, as he was not a necessary party; but a joint demurrer for misjoinder of actions and parties should have been sustained, since there can be no division of the action under this section. Moore County v. Burns, 224 N. C. 700, 32 S. E. (2d) 225.

§ 1-133. Grounds not appearing in complaint.

Pendency of Another Suit.—See note to § 1-127.

One partner was sued individually for damages resulting in a collision occurring while driving a partnership vehicle in the course of the partnership business. Thereafter the individual partners instituted suit in another county against the plaintiff in the first action to recover damages resulting to them out of the same collision. It was held that the parties to the two actions were identical for the purposes of a plea in abatement, and the second action was abated in the supreme court upon the plea, the remedy in the second action being by counterclaim in the first. Dwiggins v. Parkway Bus Co., 230 N. C. 234, 52 S. E. (2d) 892.

Cited in Boney v. Parker, 227 N. C. 350, 42 S. E. (2d) 222.

§ 1-134. Objection waived.

Demurrer after Answer.—

In accord with 1st paragraph in original. See Ezzell v. Merritt, 224 N. C. 602, 31 S. E. (2d) 751.

Art. 15. Answer.

§ 1-135. Contents.

I. IN GENERAL.

The plea of res judicata cannot be presented by demurrer, unless the facts supporting it appear on the face of the complaint. It must be taken by answer. Hampton v. North Carolina Pulp Co., 223 N. C. 535, 27 S. E. (2d) 538.

Cited in Smoke Mount Industries v. Fisher, 224 N. C. 72, 29 S. E. (2d) 128.

§ 1-137. Counterclaim.

II. CLAIMS ARISING OUT OF PLAINTIFF'S DEMAND.

A. General Rules and Instances.

Same Purpose as Subsection 1 of § 1-123.—See note to § 1-123.

Tort against Contract Claim.—

Under subsection 1 of this section, a cause of action ex delicto may be pleaded as a counterclaim to an action ex contractu provided it arises out of the same transaction or is connected with the same subject of action. Hancammon v. Carr, 229 N. C. 52, 47 S. E. (2d) 614.

A cause of action in tort may be pleaded as a counterclaim to an action on contract only if it rests upon some wrong or breach of duty committed by plaintiffs in making or performance of the contract. Id.

Where plaintiff sued her former husband to recover a monetary consideration under a written separation agreement, defendant's counterclaim for slander sounds in tort and is not "a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject of actions" within the purview of the statute. Smith v. Smith, 225 N. C. 189, 34 S. E. (2d) 148.

The "subject of the action" means the thing in respect to which plaintiff's right of action is asserted, whether it be specific property, a contract, a threatened or violated right, or other thing concerning which an action may be brought and litigation had. Hancammon v. Carr, 229 N. C. 52, 47 S. E. (2d) 614.

To be "connected with the subject of the action", the connection must be immediate and direct. A remote, uncertain, partial connection is not enough to satisfy the requirements of the statute. Hancammon v. Carr, 229 N. C. 52, 47 S. E. (2d) 614.

The cross action must have such relation to plaintiff's claim that the adjustment of both is necessary to a full and final determination of the controversy. This means that it must be so interwoven in plaintiff's cause of action that a full and complete story as to the one cannot be told without relating the essential facts as to the other. And mere historical sequence, or the fact that a connected story may be told of the whole, is not alone sufficient. Hancammon v. Carr, 229 N. C. 52, 47 S. E. (2d) 614.

Plaintiffs cashed a check for the payee upon his endorsement and gave the payee in exchange merchandise and money. The maker of the check stopped payment on it, and plaintiffs procured a warrant charging the maker with issuing a worthless check. The prosecution was nol prossed on appeal from the recorder's court. Plaintiffs then instituted an action to recover on the check. It was held that defendant maker was not entitled to set up a cross action for abuse of process. Id.

Overtime and Payments under Fair Labor Standards Act.—A complaint, alleging a breach by defendant of his contract to make patterns and cut goods for plaintiff, states a cause of action ex contractu, notwithstanding such breach may have been caused by defendant's neglect and failure to perform his obligations thereunder; and defendant may, therefore, plead as a counterclaim overtime, under payment and penalties under the Federal Fair Labor Standards Act of 1938. Smoke Mount Industries v. Fisher, 224 N. C. 72, 29 S. E. (2d) 128.

§ 1-138. Several defenses.

Demurrer to answer will not be sustained if sufficient facts can be gathered from pleadings to entitle defendant to some relief, notwithstanding answer fails to state separately cause or causes relied on for affirmative relief and the matters relied on as defenses, as required by this section and Rule 20(2) of the supreme court. Pearce v. Pearce, 226 N. C. 307, 37 S. E. (2d) 904.

§ 1-139. Contributory negligence pleaded and proved.

Motion for Nonsuit.—While contributory negligence is an affirmative defense which the defendant must plead and prove, a defendant may take advantage of his plea of contributory negligence by a motion for a compulsory judgment of nonsuit under § 1-183 when the facts necessary to show the contributory negligence are established by the plaintiff's own evidence. Bundy v. Powell, 229 N. C. 707, 51 S. E. (2d) 307.

Art. 16. Reply.

§ 1-140. Demurrer or reply to answer; where answer contains a counterclaim.

Applied in Williams v. Thompson, 227 N. C. 166, 41 S. E. (2d) 359.

§ 1-141. Content; demurrer to answer.

The right to reply is not restricted to cases in which defendant pleads a counterclaim, but a reply is proper if the answer alleges facts which, if established, entitle defendant to some relief. Williams v. Thompson, 227 N. C. 166, 41 S. E. (2d) 359.

Cited in Watson v. Lee County, 224 N. C. 508, 31 S. E. (2d) 535; Smith v. Smith, 225 N. C. 189, 34 S. E. (2d) 148.

Art. 17. Pleadings, General Provisions.

§ 1-144. Subscription and verification of pleading.

The requirement as to verification of subsequent pleadings may be waived, except in those cases where the form and substance of the verification is made an essential part of the pleading; as in an action for divorce in which a special form of affidavit is required, § 50-8, in a proceed-

ing to restore a lost record, § 98-14, and in an action against a county or municipal corporation, § 153-64. Calaway v. Harris, 229 N. C. 117, 47 S. E. (2d) 796.

Plaintiff, filing verified complaint in an action in the nature of an action to quiet title, waives verification of the answer by filing reply and allowing the matter to go to two hearings before the referee and failing to interpose objection until after an adverse referee's report. Id.

Failure to Verify Amended Answer. — Where a verified complaint is filed and defendants file a verified answer, the fact that an amended answer, which merely amplifies the defense of the original answer, is not verified, does not justify the court in disregarding the defense. Calaway v. Harris, 229 N. C. 117, 47 S. E. (2d) 796.

Cited in Whitaker v. Raines, 226 N. C. 526, 39 S. E. (2d) 266.

§ 1-145. Form of verification.

Instance of Sufficient Verification.—

A petition in proceedings for contempt which is verified in accordance with the form prescribed by this section is sufficient to give the court jurisdiction of the persons named when the facts set forth in the petition constituting a sufficient basis for judgment of contempt are stated to be within the knowledge of affiant and not upon information and belief. Safie Mfg. Co. v. Arnold, 228 N. C. 375, 45 S. E. (2d) 577.

§ 1-149. When verification omitted; use in criminal prosecutions.

Action for Annulment of Marriage.—Where testimony of a witness as to her bigamous marriage with defendant is competent, the complaint filed by her in an action to annul the marriage is competent for the purpose of corroborating her testimony. State v. Phillips, 227 N. C. 277, 41 S. E. (2d) 766.

In prosecution for larceny of an automobile, permitting solicitor to cross-examine defendant in regard to allegation made by defendant in his complaint in a prior civil action for the purpose of impeaching defendant's testimony, by showing defendant had made two contradictory statements about the matter, both of which the solicitor contended were incorrect, was not an impingement upon this section, since the purpose and effect was not to prove the fact alleged in the pleading, but to the contrary. State v. McNair, 226 N. C. 462, 38 S. E. (2d) 514.

§ 1-150. Items of account; bill of particulars.

Discretion of Court, etc.—

In accord with original. See Moss-Marlow Bldg. Co. v. Jones, 227 N. C. 282, 41 S. E. (2d) 742.

The denial of a motion under § 1-153 to make a pleading more definite does not preclude defendant from applying for a bill of particulars. Lowman v. Asheville, 229 N. C. 247, 49 S. E. (2d) 408.

§ 1-151. Pleadings construed liberally.

In Favor of Pleader.—

Pleading must be liberally construed, and every reasonable intendment and presumption must be in favor of the pleader. A pleading must be fatally defective before it will be rejected as insufficient. Corbett v. Hilton Lbr. Co., 223 N. C. 704, 709, 28 S. E. 250. See Sandlin v. Yancey, 224 N. C. 519, 31 S. E. (2d) 532; Ferrell v. Worthington, 226 N. C. 609, 39 S. E. (2d) 812, 815; Winston v. Williams, etc., Lbr. Co., 227 N. C. 339, 42 S. E. (2d) 218.

If in any portion of the complaint or to any extent it presents facts sufficient to constitute a cause of action or if facts sufficient for that purpose fairly can be gathered from it, the pleading will stand, "however inartificially it may have been drawn or however uncertain, defective and redundant may be its statements, for, contrary to the common-law rule, every reasonable intendment and presumption must be made in favor of the pleader." Presnell v. Beshears, 227 N. C. 279, 281, 41 S. E. (2d) 835.

Statement of Cause of Action.—

In the construction of a pleading to determine whether or not the allegations meet the requirements laid down by the court, we are directed by statute to construe such allegations liberally with a view to substantial justice between the parties. Kemp v. Funderburk, 224 N. C. 353, 355, 30 S. E. (2d) 155.

Answer Not Rejected Unless Fatally Defective.—

Both this section and the decisions of the Supreme Court require that the pleading be liberally construed, and that every reasonable intendment and presumption must be in favor of the pleader. A pleading must be fatally defective before it will be rejected as insufficient. Dickensheets v. Taylor, 223 N. C. 570, 576, 27 S. E. (2d) 618, citing Anderson Cotton Mills v. Royal Mfg. Co., 218 N. C. 560, 11 S. E. (2d) 550.

Cited in Wilson v. Chastain, 230 N. C. 390, 53 S. E. (2d) 290.

§ 1-153. Irrelevant, redundant, indefinite pleadings.—If irrelevant or redundant matter is inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby, but this motion must be made before answer or demurrer, or before an extension of time to plead is granted. When the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment. Any such motion to strike any matter out of any pleading may, upon ten days' notice to the adverse party, be heard out of term by the resident judge of the district or by any judge regularly assigned to hold the courts of the district. (Rev., s. 496; Code, s. 261; C. C. P., s. 120; 1949, c. 146; C. S. 537.)

Cross References.—

In the last line of the 2nd paragraph in the original the "25" should be "55."

Editor's Note.—The 1949 amendment added the last sentence. For brief comment on the amendment, see 27 N. C. Law Rev. 434.

Defendant Not Deprived of Any Substantial Right.—Irrelevant, redundant or evidential matter may be stricken from the pleading upon motion of party aggrieved, and the order striking such matter from the pleading does not deprive defendant of any substantial right. Brown v. Hall, 226 N. C. 732, 40 S. E. (2d) 412.

Discretion of Court.—

In accord with 4th paragraph in original. See Patuxent Development Co. v. Bearden, 227 N. C. 124, 41 S. E. (2d) 85.

Ordinarily whether or not the trial judge grants a motion to make a pleading more definite, as provided in this section, is within his discretion. And where there is nothing on the record to indicate that the motion was denied as a matter of law, it will be presumed the judge denied it in his discretion. Lowman v. Asheville, 229 N. C. 247, 49 S. E. (2d) 408.

A motion to strike made before pleading or extension of time to plead, is made as a matter of right, while such motion not made in apt time is addressed to the discretion of the court. Brown v. Hall, 226 N. C. 732, 40 S. E. (2d) 412.

Allegations to Support Provisional Remedy.—In an action for assault and battery in which the provisional remedy of arrest and bail is invoked, it is appropriate for plaintiff to allege in the complaint the facts necessary to support the provisional remedy of arrest and bail, notwithstanding that such facts were also set out in the affidavit filed as a basis for the provisional remedy. Long v. Love, 230 N. C. 535, 53 S. E. (2d) 661.

Denial of motion to make pleading more definite does not preclude bill of particulars. Lowman v. Asheville, 229 N. C. 247, 49 S. E. (2d) 408.

Motion to Strike Upheld.—In action for damages that part of defendant's answer containing stipulation that plaintiff had taken nonsuit in prior action for same collision and paid costs, together with summons and complaint in former action was properly stricken from pleadings as not being germane to case. Brown v. Hall, 226 N. C. 732, 40 S. E. (2d) 412.

Motion to Strike Denied.—In an action for assault and battery in which the provisional remedy of arrest and bail is invoked, motion to strike allegations that the injury was willful, wanton and malicious, is properly denied, since plaintiff is entitled to allege facts necessary to support the provisional remedy. Long v. Love, 230 N. C. 535, 53 S. E. (2d) 661.

§ 1-159. Allegations not denied, deemed true.

Applications in Divorce Actions.—

In an action for divorce the charge of wilful abandonment of defendant by plaintiff and the defense of recrimination do not amount to a cross cause, and are deemed controverted by the adverse party. Taylor v. Taylor, 225 N. C. 80, 33 S. E. (2d) 492.

§ 1-160. Pleading lost, copy used.

Order of Substitution Not Reviewable.—
In accord with original. See McIver Park, Inc. v. Brinn, 223 N. C. 502, 27 S. E. (2d) 548.

Art. 18. Amendments.

§ 1-161. Amendment as of course.

Editor's Note.—
For a discussion of this section, see 25 N. C. Law Rev. 76.

§ 1-163. Amendments in discretion of court.

I. IN GENERAL.

Editor's Note.—For a discussion of this section, see 25 N. C. Law Rev. 76.

Liberal Allowance on Proper Terms—Exception.—
In order to facilitate the determination of causes on their merits, in the furtherance of justice, the courts have wide powers with respect to amendments to pleadings. Amendments, which are permitted in order to conform the pleading to the proof, are limited to those which do not change substantially the claim or defense. Bank of Ashe v. Sturgill, 223 N. C. 825, 28 S. E. (2d) 511.

"Anything May Be Amended at Any Time."—
In accord with original. See McDaniel v. Leggett, 224 N. C. 806, 32 S. E. (2d) 602.

Relation Back Doctrine.—
In the absence of showing that the rights of innocent third persons would be injuriously affected, an amendment relates back to the commencement of the action. McDaniel v. Leggett, 224 N. C. 806, 810, 32 S. E. (2d) 602.

Amendment of Affidavit upon Which Substituted Service Based.—While an affidavit upon which substituted service is based may be amended, and ordinarily in that respect comes under the provisions of this section, such amendment will not validate a prior judgment rendered upon the defective service, which judgment is necessarily void because of want of jurisdiction. Rodriguez v. Rodriguez, 224 N. C. 275, 283, 29 S. E. (2d) 901.

Applied in Smith v. Smith, 226 N. C. 506, 39 S. E. (2d) 391.

II. DISCRETIONARY POWERS OF THE COURT.

Powers Discretionary.—
An application for leave to amend a pleading after time for filing has expired is addressed to the sound discretion of the trial court, and its ruling thereon is not reviewable in the absence of abuse of discretion. Hooper v. Glenn, 230 N. C. 570, 53 S. E. (2d) 843.

Where plaintiff learned the facts for the first time when defendant was examined adversely, and over objection was allowed to file an amendment to the complaint, it was held that this was a matter resting in the sound discretion of the trial court. Hatcher v. Williams, 225 N. C. 112, 33 S. E. (2d) 617.

Instances of New Cause Not Introduced.—
In a suit by an administratrix against a business associate of her intestate and others for an accounting as to properties purchased, for the joint account of such intestate and such associate, with moneys furnished by plaintiff's intestate for their joint enterprise, an amendment to the complaint, alleging fraud in concealing property purchased for such joint account and failure to account therefor, is allowable as a cause of action arising out of the same transaction and connected with the same subject of action. Hatcher v. Williams, 225 N. C. 112, 33 S. E. (2d) 617.

Ruling on Motion Not Reviewable on Appeal.—A discretionary ruling on a motion to amend pleadings is not reviewable on appeal. Byers v. Byers, 223 N. C. 85, 25 S. E. (2d) 466.

A motion to amend pleading is discretionary with the trial court and is not reviewable on appeal. Pharr v. Pharr, 223 N. C. 115, 25 S. E. (2d) 471.

III. INTRODUCING NEW CAUSE OF ACTION, DEFENSE OR RELIEF.

Permissible When It Introduces No New Cause.—
The court in its discretion may allow an amendment to pleadings setting up new matter, even where the transaction occurred after the action was brought, provided it does not assume the role of a new and entirely different claim. Nassaney v. Culler, 224 N. C. 323, 30 S. E. (2d) 226.

Except in proper instances a party to a suit should not be allowed to change his position with respect to a material matter in the course of litigation. . . . Especially is this so where the change of front is sought to be made between the trial and appellate courts. Hylton v. Mount Airy, 227 N. C. 622, 626, 44 S. E. (2d) 51.

Plaintiff sued to recover a truck purchased by him which he permitted his brother to drive under a rental agreement. Plaintiff's evidence was to the effect that the truck plus certain rent money and money belonging to plaintiff were used in the swap of the truck for another vehicle. It was held that the trial court had discretionary power to allow plaintiff to amend to assert his right to recover the new vehicle by virtue of a resulting or a constructive trust, since the amendment does not change the nature of the case or add any cause of action. Baker v. Baker, 230 N. C. 108, 52 S. E. (2d) 20.

V. AMENDMENTS OF PROCESS.

Absence of Clerk's Signature.—
Where a clerk of the Superior Court received and docketed summons and complaint in a civil action, affixed the seal of court to the summons and sent the papers with necessary fees to the sheriff of another county for service, and the papers were properly served and returned to the clerk issuing same, who then signed the summons, upon motion of defendant to dismiss upon special appearance, the court has power, in its discretion, to allow the summons to be amended by affixing thereto the signature of the clerk. North Carolina Joint Stock Land Bank v. Aycock, 223 N. C. 837, 28 S. E. (2d) 494.

Summons Issued under Erroneous Name.—In a civil action, where summons is issued and served and complaint filed against defendant under an erroneous name, and such defendant, on special appearance, moves to dismiss for want of jurisdiction on that ground, and plaintiff files a motion to amend summons and complaint to conform to defendant's true name, there is no error in allowing the motion to correct the mistake. Propst v. Hughes Trucking Co., 223 N. C. 490, 27 S. E. (2d) 152.

VI. AMENDMENTS AS TO PARTIES.

Generally.—
As a general rule the trial court has the discretionary power to make new parties, especially when necessary in order that there may be a full and final determination and adjudication of all matters involved in the controversy. Service Fire Ins. Co. v. Horton Motor Lines, 225 N. C. 588, 35 S. E. (2d) 879.

VIII. SPECIFIC INSTANCES.

Petition Omitting Portion of Land.—When lands of a deceased person are sold in a partition proceeding and it appears from the pleadings and evidence that it was the manifest intention of all parties that the entire lands of decedent were included in the sale, but by mistake a tract of 1.3 acres was omitted from the specific description in the petition, although announced at the sale as included, a motion in the cause by the purchaser, or his assignee, is the proper procedure to have the mistake corrected by amendment nunc pro tunc, and the court may make its decree conform thereto. McDaniel v. Leggett, 224 N. C. 806, 32 S. E. (2d) 602.

Subchapter VII. Pre-Trial Hearings; Trial and Its Incidents.

Art. 18A. Pre-Trial Hearings.

§ 1-169.1. Pre-trial dockets and cases placed thereon; pre-trial orders; time for hearings and matters for consideration.—The clerk of the superior court of every county shall maintain a pre-trial docket. Upon written request of counsel for any party, filed with the clerk and served upon counsel for all other parties after issue has been joined and not less than ten days prior to the term at which the case is to be tried, a civil case, except a case specified in § 1-169.5, shall be placed on this docket. The judge holding court in the district or the presiding judge, at any time after issue has been joined, may, in his discretion, order that any civil case except a case specified in § 1-169.5, be placed on the pre-trial docket. Except by order of the presiding judge, no case on this docket shall be tried until a pre-trial order has been entered therein in conformity with this article, but this shall not be construed to prohibit

the calendaring of any case for trial prior to the pre-trial hearing or the entry of such order.

Pre-trial hearings in the cases on the pre-trial docket shall be held on the first day of every term of superior court for the trial of civil cases only, preference being given to those cases on such docket which are calendared for trial at the same term. The attorneys for the parties shall appear before the presiding judge to consider:

1. Motions to amend or supplement any pleading.
2. The settling of the issues.
3. The advisability or necessity of a reference of the case, either in whole or in part.
4. The possibility of obtaining admissions of facts and of documents which will avoid unnecessary proof.
5. Facts of which the court is to be asked to take judicial notice.
6. The determination of any other matters which may aid in the disposition of the case.
7. In the discretion of the presiding judge, the hearing and determination of any motion, or the entry of any order, judgment or decree, which the presiding judge is authorized to hear, determine, or enter at term.

Following the hearing the presiding judge shall enter an order reciting the stipulations made and the action taken. Such order shall control the subsequent course of the case unless in the discretion of the trial judge the ends of justice require its modification.

After the entry of the pre-trial order, the case shall stand for trial and may be tried at the same term in which the pre-trial hearing is held or at a subsequent term, as ordered by the judge. (1949, c. 419, s. 1.)

Editor's Note.—Section 6 of the chapter from which this article was codified made it effective as of March 18, 1949, for purposes of pre-trial hearings under § 1-169.3. With respect to pre-trial hearings under § 1-169.1 or § 1-169.4, this article was made effective on October 1, 1949, as to civil cases in which issue is joined.

For comment on this article, see 27 N. C. Law Rev. 430.

§ 1-169.2. Time allotted to hearings; summoning of jurors.—The presiding judge may devote any additional day or days of the term to pre-trial hearings as he may find necessary or desirable. In the event pre-trial hearings, herein provided for, do not consume the whole of the first day of the term, the presiding judge may proceed to the consideration of the motion docket or any other matters not requiring the intervention of a jury. At the time jurors are to be summoned for the first week of the term, the clerk of the superior court shall determine whether it is probable that the pre-trial docket and other matters not requiring the intervention of a jury will consume the first day of the term and, in accordance with such determination, shall direct the sheriff to summon the jurors for the first or second day of the term. (1949, c. 419, s. 2.)

§ 1-169.3. Hearings out of term and in or out of the county or district.—Upon agreement of counsel for all parties to any civil case, the resident judge or the regular judge holding the courts in the district may hold pre-trial hearings out of term and in or out of the county or district. At any such hearing the authority of the judge shall be the same as at pre-trial hearings conducted at term time. (1949, c. 419, s. 3.)

§ 1-169.4. Disposition of pre-trial docket at mixed terms.—At terms of the superior court devoted to both civil and criminal matters, the pre-trial docket shall be the order of business after the criminal docket has been disposed of, or may be considered earlier in the discretion of the presiding judge. (1949, c. 419, s. 4.)

§ 1-169.5. Application of article.—The provisions of this article shall not apply to uncontested divorce cases or to proceedings after judgment by default, and shall apply to special proceedings only after transfer to the civil issue docket. (1949, c. 419, s. 5.)

§ 1-169.6. Hearings in county and municipal courts, etc.—Effective October 1, 1949, the judge of every court, other than the superior court, having jurisdiction to try civil cases beyond the jurisdiction of a justice of the peace, may in his discretion, upon not less than five days' notice, direct the attorneys in any civil case at issue in his court, including those in which issue was joined prior to October 1, 1949, to appear before him for a pre-trial hearing for consideration of the matters set forth in § 1-169.1. Upon request for pre-trial hearing by the attorney for any party to a civil case at issue in his court, the judge shall, upon not less than five days' notice to the attorneys for the other parties, order such a pre-trial hearing. After each such pre-trial hearing, the judge shall enter an order as contemplated by § 1-169.1. (1949, c. 419, s. 7.)

Art. 19. Trial.

§ 1-172. How issue tried.

Cited in Lockhart v. Lockhart, 223 N. C. 123, 25 S. E. (2d) 465.

§ 1-173. Issues of fact.—Every issue of fact joined on the pleadings, and inquiry of damages ordered to be tried by a jury, must be tried at the term of the court next ensuing the joinder of issue or order for inquiry, if the issue was joined or order made more than ten days before such term, but if not, they may be tried at the second term after the joinder or order: Provided, that uncontested cases in which no answer has been filed may be tried at any term after the time for filing answers has expired. (Rev., s. 528; Code, s. 400; C. C. P., s. 226; 1923, c. 54; 1925, c. 5; C. S. 557; 1945, c. 989.)

Editor's Note.—
The 1945 amendment added the proviso.

Cited in Long v. Love, 230 N. C. 535, 53 S. E. (2d) 661.

§ 1-176. Continuance during term.

Continuances are not favored, as a general rule, and ought not to be granted unless the reasons therefor are fully established. State v. Gibson, 229 N. C. 497, 50 S. E. (2d) 520.

Continuance Discretionary with Judge.—Ordinarily a motion for a continuance on the ground of a want of time for counsel for accused to prepare for trial is addressed to the sound discretion of the trial judge, and his ruling thereon is not subject to review on appeal in the absence of circumstances showing that he has grossly abused his discretionary power. State v. Gibson, 229 N. C. 497, 50 S. E. (2d) 520.

Continuance to Prepare Defense.—Where the record fails to show that a requested continuance would have enabled defendant and his counsel to obtain additional evidence or otherwise present a stronger defense, the denial of the motion is not prejudicial. State v. Gibson, 229 N. C. 497, 50 S. E. (2d) 520, discussed in 27 N. C. Law Rev. 544.

An application for a continuance should be supported by an affidavit showing sufficient grounds for the continuance,

and this section contemplates that this is to be done. State v. Gibson, 229 N. C. 497, 50 S. E. (2d) 520.

§ 1-180. Judge to explain law, but give no opinion on facts.—No judge, in giving a charge to the petit jury, either in a civil or criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury, but he shall declare and explain the law arising on the evidence given in the case. He shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto; provided the judge shall give equal stress to the contentions of the plaintiff and defendant in a civil action, and to the state and defendant in a criminal action. (Rev., s. 535; Code, s. 413; C. C. P., s. 237; R. C., c. 31, s. 130; 1796, c. 452; 1949, c. 107; C. S. 564.)

I. EDITOR'S NOTE.

The 1949 amendment rewrote this section. It did not alter the provision prohibiting the judge from stating an opinion on the facts. But it materially changed the rest of the section. See 27 N. C. Law Rev. 435 containing a discussion of the change made by the amendment. This change should be borne in mind in considering the cases referred to in this note.

II. OPINION OF JUDGE.

A. General Considerations.

Purposes and Effect of Section.—

In accord with 2nd paragraph in original. See State v. Woolard, 227 N. C. 645, 647, 44 S. E. (2d) 29.

This section was intended to keep inviolate the line between the functions of court and jury—the one as dispenser of the law, the other as triers of the facts—, and thus to preserve the integrity of trial by jury. But it does more. It provides a co-operative program by which these parts of the court may work together as a single intelligent agency in judicial investigation and determination. Morris v. Tate, 230 N. C. 29, 51 S. E. (2d) 892.

A Substantial Right of Litigants.—

This section confers a substantial legal right upon litigants, and "calls for instructions as to the law upon all substantial features of the case." McNeill v. McNeill, 223 N. C. 178, 182, 25 S. E. (2d) 615.

This section forbids the judge to intimate his opinion in any form whatever, it being the intent of the law to insure to each and every litigant a fair and impartial trial before the jury. State v. Owenby, 226 N. C. 521, 39 S. E. (2d) 378, 379.

Credibility of Witnesses Is for Jury.—No judge at any time during the trial of a cause is permitted to cast doubt upon the testimony of a witness or to impeach his credibility. The cold neutrality of an impartial judge should constantly be observed, as the slightest intimation from the bench will always have great weight with the jury. State v. Auston, 223 N. C. 203, 25 S. E. (2d) 613.

A statement of the court, made prior to the time the case was called for trial, indicating that he would not try the case until defendants were apprehended, does not violate this section, since this section relates only to the expression of opinion during the trial of the case. State v. Lippard, 223 N. C. 167, 25 S. E. (2d) 594.

Directing a Verdict.—

Even in cases where the evidence justifies an instructed verdict, the credibility of the evidence is for the sole determination of the jury, and therefore a recapitulation of the evidence may be necessary. Morris v. Tate, 230 N. C. 29, 51 S. E. (2d) 892.

The correct form of an instructed verdict is that if the jury "find from the evidence the facts to be as all the evidence tends to show you will answer the issue" rather than a direction as to how the jury should find the issue, since the credibility of the evidence remains the function of the jury. Morris v. Tate, 230 N. C. 29, 51 S. E. (2d) 892.

Evidence Insufficient to Justify Instructed Verdict. — In an action to quiet title, the evidence was not so unequivocal and not so clear in its inferences as to justify an instructed verdict in plaintiffs' favor. Morris v. Tate, 230 N. C. 29, 51 S. E. (2d) 892.

Record on Appeal Must Show Error.—

In accord with 2nd paragraph in original. See State v. Jones, 227 N. C. 402, 404, 42 S. E. (2d) 465.

Where there is no assignment of error in the record for failure of the court to state the evidence and declare and explain the law arising thereon, exceptions on this ground will not be considered on appeal. State v. Spivey, 230 N. C. 375, 53 S. E. (2d) 259.

Correctness of Instructions Will Be Presumed.—Upon review by certiorari of the denial of defendant's motion for a new trial on the ground that he was denied due process of law in the trial resulting in his conviction, it will be presumed that the trial court correctly instructed the jury as to the facts of the case, in the absence of suggestion to the contrary. State v. Chesson, 228 N. C. 259, 45 S. E. (2d) 563.

A broadside exception to the charge will not be considered, but appellant must point out wherein the charge failed to comply with the provisions of this section. State v. Sutton, 230 N. C. 244, 52 S. E. (2d) 921.

Applied in In re Evans' Will, 223 N. C. 206, 25 S. E. (2d) 556; Starnes v. Tyson, 226 N. C. 395, 38 S. E. (2d) 211; State v. Ellison, 226 N. C. 628, 39 S. E. (2d) 824; State v. Correll, 228 N. C. 28, 44 S. E. (2d) 334; State v. McMahan, 228 N. C. 293, 45 S. E. (2d) 340; Barringer v. Barringer, 228 N. C. 790, 46 S. E. (2d) 849; Wyatt v. Queen City Coach Co., 229 N. C. 340, 49 S. E. (2d) 650.

Cited in State v. DeGraffenreid, 223 N. C. 461, 27 S. E. (2d) 130; Daughtry v. Cline, 224 N. C. 381, 30 S. E. (2d) 322 (con. op.); State v. Harrill, 224 N. C. 477, 31 S. E. (2d) 353; Kearney v. Thomas, 225 N. C. 156, 33 S. E. (2d) 871; State v. Bullins, 226 N. C. 142, 36 S. E. (2d) 915; Perry v. First Citizens Nat. Bank, etc., Co., 226 N. C. 667, 40 S. E. (2d) 116; Brown v. Loftis, 236 N. C. 762, 40 S. E. (2d) 421.

B. What Constitutes an Opinion.

In General.—

The slightest intimation from a judge as to the strength of the evidence, or as to the credibility of the witness, will always have great weight with the jury, and, therefore, we must be careful to see that neither party is unduly prejudiced by any expression from the bench which is likely to prevent a fair and impartial trial. State v. Woolard, 227 N. C. 645, 44 S. E. (2d) 29, citing State v. Ownby, 146 N. C. 677, 61 S. E. 630.

The judge may indicate to the jury what impression the evidence has made on his mind, or what deductions he thinks should be drawn therefrom, without expressly stating his opinion in so many words. This may be done by his manner or peculiar emphasis or by his so arraying and presenting the evidence as to give one of the parties an undue advantage over the other; or, again the same result may follow the use of language or from an expression calculated to impair the credit which might not otherwise and under normal conditions be given by the jury to the testimony of one of the parties. State v. Woolard, 227 N. C. 645, 44 S. E. (2d) 29, citing State v. Benton, 226 N. C. 745, 40 S. E. (2d) 617.

No judge at any time during the trial of a cause is permitted to cast doubt upon the testimony of a witness or to impeach his credibility. State v. Owenby, 226 N. C. 521, 39 S. E. (2d) 378.

No assumption of fact or opinion expressed or fairly inferable from the charge respecting the credibility of the testimony can be made by the trial court without violating this section. State v. Love, 229 N. C. 99, 47 S. E. (2d) 712.

Evidence Tends to Show.—

The use of the convenient formula "the evidence tends to show" is not considered expression of an opinion upon the evidence in violation of the prohibition of this section. Thompson v. Davis, 223 N. C. 792, 798, 28 S. E. (2d) 556; State v. Jackson, 228 N. C. 656, 46 S. E. (2d) 858.

C. Illustrative Cases.

1. Remarks Held Not Erroneous.

b. Remarks Concerning Witnesses.

Statement That Other Evidence Corroborates Witness.—A charge that ". . . and the state contends that the evidence in the case" is sufficient to establish guilt beyond a reasonable doubt and that upon the testimony of the main witness for the state "and other evidence which corroborates this testimony" the jury should return a verdict of guilty, is not an expression of opinion that "the other evidence" did corroborate the witness since it is clear that both phrases related to the statement of contentions of the state. State v. McKnight, 226 N. C. 766, 40 S. E. (2d) 419.

Remark That Witness Has Fully Answered Question.—

Where court was of the opinion that state's witness on cross-examination by defendant's counsel had answered interrogations sufficiently, and that witness said she had tried to tell the truth and did not recall all the particulars of

the evidence given by her in the former trial, the remark was not an expression of opinion by the court as to the truthfulness of the witness, but was solely to suggest to counsel that her answers to his question were complete, in the discharge of the court's right and duty to control the cross-examination. State v. Stone, 226 N. C. 97, 36 S. E. (2d) 704, citing State v. Mansell, 192 N. C. 20, 133 S. E. 190.

d. Miscellaneous Remarks.

In a prosecution for manslaughter the use by the court of the word "killing," in referring to the degrees of homicide cognizable under the bill of indictment, is not harmful error where its use could not be interpreted as an expression of opinion by the court, considering the charge as a whole and the connection in which the word was used. State v. Scoggins, 225 N. C. 71, 33 S. E. (2d) 473.

Where Court Is Merely Identifying Exhibits.—A remark of the court that it would allow the introduction of fingerprints as found at the scene of the alleged offense and the fingerprints of defendant for the purpose of identification will not be held for error as an expression of opinion that the fingerprints were actually taken from the scene, it being obvious that the court was merely identifying the exhibits offered by the state. State v. Hooks, 228 N. C. 689, 47 S. E. (2d) 234.

Reference to Document as Will of Deceased.—In a caveat proceeding reference in the court's charge to a paper-writing as the will of the deceased was held not reversible error as an expression of opinion in contravention of this section where it appeared that the court was only following the example set by counsel for caveators in the examination of some of the witnesses, and the jury understood that they were trying a caveat filed to the paper-writing which had been probated in common form as the will of the deceased, and because of the caveat it was then being offered for probate in solemn form. In re Will of McDowell, 230 N. C. 259, 52 S. E. (2d) 807.

2. Remarks Held Error.

b. Remarks Concerning Witnesses.

Comments on Witnesses.—

In a prosecution for carnal knowledge of a female child over twelve and under sixteen years of age, the repeated remark of the court in directing the sheriff to quiet the spectators, made immediately after cross-examination of prosecutrix to impeach her testimony, that "you people cannot laugh at the predicament of this poor little girl; the only difference between you and she is that you have not been caught," was held to violate this section, as tending to invoke sympathy for prosecutrix and thereby bolster her testimony and as tending to impair the effect of defendant's plea of not guilty. State v. Woolard, 227 N. C. 645, 44 S. E. (2d) 29.

In prosecution for having carnal knowledge of female under sixteen years of age the disparagement of the defendant's witness and the expression of opinion that prosecutrix was not a delinquent, though inadvertently made in the presence of the jury, entitles defendant to another hearing. State v. Owenby, 226 N. C. 521, 39 S. E. (2d) 378, 379.

c. Remarks Concerning Weight and Credibility of Testimony.

Contentions of the Parties.—The manner of stating the contentions of the parties, if indicative of the court's opinion, is within the prohibition of this section, and where court in stating state's contentions in regard to the disinterestedness of officers who testified and the weight to be given the testimony of a doctor as an expert witness, together with a later statement that the evidence was "rather clear" was held error as an expression of opinion by court upon weight of the evidence. State v. Benton, 226 N. C. 745, 40 S. E. (2d) 617.

Remarks as to Testimony of Officer.—Where an officer purchased liquor in order to obtain evidence against a suspect, and voluntarily testified for the prosecution, an instruction which left the impression that his credibility was enhanced by the fact that he was an officer in the performance of his duty, and that he was protected from prosecution by § 18-8, was held erroneous as an expression of opinion on the credibility of the testimony. State v. Love, 229 N. C. 99, 47 S. E. (2d) 712.

d. Miscellaneous Remarks.

Instruction as to Uncorroborated Testimony in Perjury Trial.—While the uncorroborated testimony of one witness might convince the jury, beyond a reasonable doubt, of the guilt of accused in a criminal trial for perjury, it is not sufficient in law; and instructions, therefore, that if the jury is so satisfied from the evidence, beyond a reasonable doubt, they should return a verdict of guilty, is erroneous as failing to comply with this section. State v. Hill, 223 N. C. 711, 28 S. E. (2d) 100.

Instruction as to Title to Land.—Plaintiffs and defendant claimed the locus under respective state grants. Defendant contended that plaintiffs' grant could not be accurately located and that, if located, covered only a portion of the locus. The court held that an instruction that by the two grants introduced in evidence title had been shown out of the state, must be held for error as an expression of opinion that the grant under which plaintiffs claim was valid and that it had been located to cover the land in question. Davis v. Morgan, 228 N. C. 78, 80, 44 S. E. (2d) 593.

III. EXPLANATION OF LAW AND EVIDENCE.

A. General Considerations of the Charge.

The Object of Instructions.—

In accord with original. See State v. Friddle, 223 N. C. 258, 25 S. E. (2d) 751.

The chief purposes of the charge are clarification of the issues, elimination of extraneous matters, and declaration and application of the law arising upon the evidence. State v. Jackson, 228 N. C. 656, 46 S. E. (2d) 858.

The chief purpose of a charge is to aid the jury clearly to comprehend the case, and to arrive at a correct verdict, and this statute imposes upon the trial judge the positive duty of instructing the jury as to the law upon all of the substantial features of the case. If the mandatory requirements of this section are not observed, there can be no assurance that the verdict represents a finding by the jury under the law and the evidence presented. Lewis v. Watson, 229 N. C. 20, 47 S. E. (2d) 484.

Exception Must Be Specific.—

An exception to the court's charge, that it failed to state in a plain and correct manner the evidence and law arising thereon as provided in this section, is a broadside exception and presents no question for decision. Baird v. Baird, 223 N. C. 729, 28 S. E. (2d) 225.

Objection to a charge for not complying with this section must state specifically how the charge failed to measure up to the requirements of this section. Steele v. Coxe, 225 N. C. 726, 727, 36 S. E. (2d) 288.

And Based on Proper Assignment of Error.—An exception for the failure of the court to comply with the provisions of this section must be based upon a proper assignment of error on this ground. State v. Muse, 230 N. C. 495, 53 S. E. (2d) 529.

Exception and Assignment of Error.—An exception, for failure to charge the jury as required by this section, must be taken in the same manner as any other exception to the charge, and an assignment of error based thereon must particularize and point out specifically wherein the court failed to charge the law arising on the evidence—otherwise it becomes a mere broadside and will not be considered unless pointed out in some other exception. State v. Britt, 225 N. C. 364, 34 S. E. (2d) 408.

Errors Should Be Pointed Out before Verdict.—Any omission to state the evidence or to charge in any particular way should be called to the attention of the court before verdict, so that the judge may have an opportunity to correct the oversight. Ellis v. Wellons, 224 N. C. 269, 29 S. E. (2d) 884.

Any error or omission in the statement of the evidence by court must be called to the attention of the court at the trial to avail the defendant any relief on his appeal. State v. Thompson, 226 N. C. 651, 39 S. E. (2d) 823, 824.

Evidence towards Which Instruction Directed Must Appear.—The law requires the judge to "state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon." The function of the appellate court on review is to determine whether this has been adequately done, and it cannot perform that office in the absence of the evidence toward which the instruction was directed. Shepherd v. Dollar, 229 N. C. 736, 51 S. E. (2d) 311.

Where Record Shows Charge Was Correct and No Objection Made.—Where it was stipulated in the record that the court correctly charged the jury on all phases of the case in compliance with this section, and the issues submitted were not objected to by defendants, it was held that the verdict of the jury must be upheld. Ward v. Smith, 223 N. C. 141, 142, 25 S. E. (2d) 463.

B. Explanation Required.

1. In General.

Rule Stated.—

In accord with 1st paragraph in original. See State v. Friddle, 223 N. C. 258, 25 S. E. (2d) 751.

In accord with 4th paragraph in original. See State v. Biggs, 224 N. C. 722, 32 S. E. (2d) 352.

In accord with 6th paragraph in original. See McNeill v. McNeill, 223 N. C. 178, 25 S. E. (2d) 615.

It is the duty of the judge, under the provisions of this section, to state in a plain and correct manner the evidence given in the case and to declare and explain the law arising thereon, without expressing any opinion upon the facts. State v. Owenby, 226 N. C. 521, 39 S. E. (2d) 378, 379.

Discretion of the Court.—The manner in which the trial judge shall state the evidence and declare and explain the law arising thereon must necessarily be left in large measure to his sound discretion and good judgment, but he must charge on the different aspects presented by the evidence, and give the law applicable thereto. Van Gelder Yarn Co. v. Mauney, 228 N. C. 99, 44 S. E. (2d) 601.

Contention of Parties.—

It is not required by this section, or other statute, that the contentions of the litigants be stated at all although it is found to be a convenient method of integrating and presenting to the jury the subjects for consideration; and there is no rule making it mandatory. "When, however, the judge states the contentions of one of the parties, he must fairly charge also as to the contentions of the adversary litigant." In re Will of West, 227 N. C. 204, 209, 41 S. E. (2d) 838.

2. Statement of Evidence.

In General.—

This section sensibly requires, on the part of the judge, a statement of the evidence to which he is attempting to apply the law, though the decisions have rationalized the statute so that the statement of the evidence it requires may be dispensed with when the facts are simple. Morris v. Tate, 230 N. C. 29, 51 S. E. (2d) 892.

Recapitulation Unnecessary.—

In accord with 1st paragraph in original. See State v. Thompson, 226 N. C. 651, 39 S. E. (2d) 823, 824.

Failure of the court to charge the jury as to the degree of circumstantial proof required to convict is not error, charge that jury should be satisfied from the evidence beyond a reasonable doubt of defendant's guilt in order to justify conviction being sufficient on the degree of proof required. State v. Shoup, 226 N. C. 69, 36 S. E. (2d) 697.

Where Judge Was under Impression Certain Material Facts Were Introduced in Evidence.—Where the court in its charge called material facts to the attention of the jury, supported by the statement of the court, as well as of counsel, that it was under the impression that they were introduced in evidence, and they were not withdrawn but were to be rejected and not considered only in the event the jury did not so recall, it was held that this was not a statement "in a plain and correct manner" of "the evidence given in the case." Curlee v. Scales, 223 N. C. 788, 791, 28 S. E. (2d) 576.

3. Explanation of Law.

In General.—

In accord with 1st, 2nd and 3rd paragraphs in original. See Van Gelder Yarn Co. v. Mauney, 228 N. C. 99, 102, 44 S. E. (2d) 601.

The mandate of this section is not met by a statement of the general principles of law, without application to the specific facts involved in the issue. Lewis v. Watson, 229 N. C. 20, 47 S. E. (2d) 484.

Judge Must Explain Law as It Relates to Testimony.—The judge must declare and explain the law as it relates to the various aspects of the testimony offered. By this it is meant that this section requires the judge to explain the law of the case, to point out the essentials to be proved on the one side or the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved. Lewis v. Watson, 229 N. C. 20, 47 S. E. (2d) 484.

When a person is on trial for a statutory crime, it is not sufficient for the court merely to read the statute under which he stands indicted. The statute should be explained, the essential elements of the crime thereby created outlined and the law as thus defined should be applied to the evidence in the case. This "calls for instructions as to the law upon all substantial features of the case." State v. Sutton, 230 N. C. 244, 52 S. E. (2d) 921, citing Lewis v. Watson, 229 N. C. 20, 47 S. E. (2d) 484; State v. Fain, 229 N. C. 644, 50 S. E. (2d) 904.

Party Must Request.—

Where the court in its charge substantially complies with this section, if defendant desires further elaboration and explanation, he should tender prayers for instructions; otherwise, he cannot complain. State v. Gordon, 224 N. C. 304, 30 S. E. (2d) 43.

Where no special instructions were prayed and no omission of evidence, nor error in the stating thereof, was called to the attention of the court by defendant, and the court directed the attention of the jury to the principal questions which were under investigation and explained the law applicable thereto, it was held that this was all required of him by this section in the absence of prayers for special instructions. Ellis v. Wellons, 224 N. C. 269, 273, 29 S. E. (2d) 884.

An exception for failure of the court to charge upon the question of manslaughter, without exception to any portion of the charge or exception under this section, on the ground that the court failed to explain the law arising on the evidence and pointing out wherein the court failed to comply with this section does not properly present the question for review. State v. Brooks, 228 N. C. 68, 44 S. E. (2d) 482.

Effect of Failure to Request Special Instructions.—A litigant does not waive his statutory right to have the judge charge the jury as to the law upon all of the substantial features of the case by failing to present requests for special instructions. Lewis v. Watson, 229 N. C. 20, 47 S. E. (2d) 484.

C. Illustrative Cases.

Failure to Give Elaborate Definition of Slander.—In an action for damages for slander, where in his charge to the jury the trial judge properly and fairly stated the evidence pertinent to the issues, and the contentions of the parties, in compliance with this section, and it appeared that the jury sufficiently understood the elements of actionable defamation necessary to be found before any liability could attach to defendants, there was no error in the court's failure to give a more elaborate definition of slander. Gillis v. Great Atlantic, etc., Tea Co., 223 N. C. 470, 27 S. E. (2d) 283.

Instruction as to Fornication and Adultery.—

Upon trial in the superior court, after appeal by the male defendant only from a conviction of fornication and adultery in the recorder's court, a charge that, if the jury find from the evidence, beyond a reasonable doubt, that this defendant, not being married to the woman, did lewdly and lasciviously bed and cohabit with her and violated the statute, they should bring in a verdict of guilty, and if they should fail to so find, they should bring in a verdict of not guilty, substantially complies with this section in the absence of request for further instructions. State v. Davenport, 225 N. C. 13, 33 S. E. (2d) 136.

Age and Chastity of Prosecutrix in Prosecution for Carnal Knowledge.—Where defendant, in a prosecution for carnal knowledge of a girl over twelve and under sixteen years of age, offers evidence of the immoral character of the prosecutrix and denies his identity as the perpetrator of the offense, an instruction which omits the age and chastity of prosecutrix as elements of the offense fails to meet the mandatory requirements of this section, and an exception thereto will be sustained. State v. Sutton, 230 N. C. 244, 52 S. E. (2d) 921.

Force Used in Defense of Home—Eviction of Trespassers.—When, in the trial of a criminal action charging an assault or kindred crime, there is evidence from which it may be inferred that the force used by defendant was in defense of his home, he is entitled to have the evidence considered in the light of applicable principles of law. In such event, it becomes the duty of the court to declare and explain the law arising thereon, and failure to so instruct the jury on such substantive feature is prejudicial error. And the same rule applies to the right to evict trespassers from one's home. State v. Spruill, 225 N. C. 356, 34 S. E. (2d) 142.

Right of Self-Defense.—Where state's evidence tended to show a deliberate, premeditated killing with a deadly weapon, and there was no evidence that the killing was in self-defense, and defendant offered no evidence, the failure of court to instruct the jury upon the right of self-defense was not error. State v. Deaton, 226 N. C. 348, 38 S. E. (2d) 81.

Violent Character of Deceased.—Where defendant introduced evidence that deceased was a man of violent character, an instruction during the trial to the effect that such evidence was competent upon the plea of self-defense, without any instruction in the charge or elsewhere applying the evidence to the question of defendants' reasonable apprehension of death or great bodily harm from the attack which their evidence tended to show that deceased had made on them, is insufficient to meet the requirements of this section, notwithstanding the absence of a request for special instructions. State v. Riddle, 228 N. C. 251, 45 S. E. (2d) 366.

Specific Intent in Robbery.—In a prosecution for robbery the court should charge that the taking of the property

must be with a specific intent on the part of the taker to deprive the owner of his property permanently and to convert it to his own use, and an instruction merely that the taking must be with felonious intent is insufficient. State v. Lunsford, 229 N. C. 229, 49 S. E. (2d) 410.

Recommendation of Life Imprisonment.—In a prosecution for burglary in the first degree it is error for the court to fail to charge the jury that it may return a verdict of guilty of burglary in the first degree with recommendation of imprisonment for life. State v. Mathis, 230 N. C. 508, 53 S. E. (2d) 666.

Law of Circumstantial Evidence.—The duty imposed upon the trial court by this section to "declare and explain the law" arising in the case on trial does not require the court to instruct the jury upon the law of circumstantial evidence in a criminal action involving both direct and circumstantial testimony, where the state relies principally upon the direct evidence, and the direct evidence is sufficient, if believed, to warrant the conviction of the accused. State v. Hicks, 229 N. C. 345, 49 S. E. (2d) 639.

Legal Effect of Alibi.—Evidence of an alibi is substantive, and defendant is entitled to an instruction as to the legal effect of his evidence of alibi if believed by the jury. State v. Sutton, 230 N. C. 244, 52 S. E. (2d) 921.

Instruction to Disregard Previous Inconsistent Instructions.—The action of the trial court in prefacing a special instruction with a charge that the jury should disregard previous instructions if and to the extent of inconsistency with the instructions about to be given, is not approved, but in the instant case it was held not prejudicial. State v. Jackson, 228 N. C. 656, 46 S. E. (2d) 858.

Necessity for Defining Legal Status of Party.—The evidence disclosed that intestate was pushing a handcart on the right side of the highway, and that he was struck from the rear by defendant's vehicle traveling in the same direction. Plaintiff contended that the handcart was a vehicle and that §§ 20-146 and 20-149 applied. Defendant contended that intestate was a pedestrian and was required by § 20-174(d), to push the handcart along the extreme left-hand side of the highway. It was held that an instruction failing to define intestate's status and explain the law arising upon the evidence fails to meet the requirements of this section. Lewis v. Watson, 229 N. C. 20, 47 S. E. (2d) 484.

Inadvertently Omitting Issue as to Title in Charge in Replevin Action.—In action in replevin to recover possession of an automobile judge charged jury that if they were satisfied by the greater weight of the evidence of the truth of it, they should find in favor of the plaintiff or answer the first issue as to ownership "yes." It was held that charge inadvertently ignored the fact that title to the ownership of car was still at issue, and may be taken as assuming the fact that it was sufficiently proved or as expressing an opinion on the weight and sufficiency of the evidence. James v. James, 226 N. C. 399, 38 S. E. (2d) 168, 170.

Contradictory Evidence.—In civil action for damages resulting from collision between vehicles of plaintiff and defendant at street intersection, where the city maintained traffic signals, the evidence being sharply contradictory as to whether plaintiff or defendant violated the traffic signal by entering intersection on a red light, it was held that court erred, in its charge to jury, by failing to state in a plain and concise manner the evidence offered as to right of way between the parties and to declare and explain the law applicable thereto. Stewart v. Yellow Cab Co., 225 N. C. 654, 36 S. E. (2d) 256.

Burden of Proof.—Where defendant was seeking a monetary recovery of plaintiffs the burden of proving the right to such recovery was upon defendant, and failure to instruct jury as to this issue was error. Crain v. Hutchins, 226 N. C. 642, 39 S. E. (2d) 831, 832.

Negligence.—An instruction that if the jury should find certain specific facts from the greater weight of the evidence such conduct "would be negligence" instead of "would constitute negligence," was held not an expression of opinion in violation of this section, even when considered with a subsequent instruction applying the rule of the prudent man to the conduct of defendant when confronted by an emergency. Hoke v. Atlantic Greyhound Corp., 227 N. C. 412, 413, 42 S. E. (2d) 593.

Reckless Driving.—An instruction that if the jury is satisfied beyond a reasonable doubt that defendant is guilty of reckless driving to convict him, otherwise to acquit him, is insufficient in a prosecution under § 20-140, to meet the requirements of this section since it fails to explain the law or apply the law to the facts as the jury should find them to be. State v. Flinchem, 228 N. C. 149, 44 S. E. (2d) 724.

The charge, in a prosecution for reckless driving and driving at an excessive speed, both as to the statement of the evidence and the law arising on the essential features of the evidence, was held to be in substantial compliance with the requirements of this section. State v. Vanhoy, 230 N. C. 162, 52 S. E. (2d) 278.

Mere Reading of Speed Regulations Is Insufficient.—The mere reading of the statutory speed regulations, laid down in § 20-141, without separating the irrelevant provisions from those pertinent to the evidence and without application of the relevant provisions to the evidence adduced, is insufficient to meet the requirements of this section. Lewis v. Watson, 229 N. C. 20, 47 S. E. (2d) 484.

Respondeat Superior.—In Webb v. Statesville Theatre Corp., 226 N. C. 342, 38 S. E. (2d) 84, it was held that the failure of court to charge jury upon the principle of respondeat superior was not error as failing to declare and explain the law arising on the evidence where defendant admitted the relationship of master and servant and the case was tried throughout on that theory.

Requirement of Section Complied with.—The charge of the court in State v. Thompson, 227 N. C. 19, 40 S. E. (2d) 620, was held to have complied with the requirement of this section. See also, Glosson v. Trollinger, 227 N. C. 84, 40 S. E. (2d) 606.

Applied in State v. Fain, 229 N. C. 644, 50 S. E. (2d) 904.

§ 1-181. Request for instructions.

Time Limit for Request for Instructions.—Requests for special instructions must be in before the beginning of the argument. State v. Morgan, 225 N. C. 549, 35 S. E. (2d) 621.

Defendant's request for special instruction to jury while the solicitor was arguing the case and after counsel for defendant had completed his argument was too late to form a basis for a successful exceptive assignment of error. Id.

Section Mandatory.—It is within the sound discretion of the trial judge to give or to refuse prayer for instruction that is not in writing and signed as required by this section. State v. Spencer, 225 N. C. 608, 35 S. E. (2d) 887.

A Party Must Aptly Tender Written Request for Special Instructions.—If a litigant desires a fuller or more detailed charge by the court to the jury, it is incumbent upon him to ask therefor by presenting prayers for special instructions. Woods v. Roadway Express, 223 N. C. 269, 25 S. E. (2d) 856.

The court is at liberty to disregard oral requests for instructions which do not relate to a substantial and essential feature of the case. State v. Hicks, 229 N. C. 345, 49 S. E. (2d) 639.

The supreme court cannot indulge in speculation as to the form of an instruction, where no prayer for the instruction as required by this section appears in the record. Kearney v. Thomas, 225 N. C. 156, 33 S. E. (2d) 871.

§ 1-183. Motion for nonsuit.

Editor's Note.—In accord with 1st paragraph in original. See Avent v. Millard, 225 N. C. 40, 33 S. E. (2d) 123.

As to note on evidence to be considered on motion to nonsuit, see 23 N. C. Law Rev. 243.

This section is procedural and does not affect the principles of demurrer to the evidence as it existed at common law. Gregory v. Travelers Ins. Co., 223 N. C. 124, 128, 25 S. E. (2d) 398, 147 A. L. R. 283 (con. op.).

Section Strictly Followed.—Since the allowance of a motion for judgment as of nonsuit is based upon purely statutory grounds, the requirement of this section must be strictly followed. Avent v. Millard, 225 N. C. 40, 33 S. E. (2d) 123.

Effect of Motion.—By its motion for a compulsory nonsuit under this section, and its prayers for a directed verdict, the defendant challenges the sufficiency of the evidence to support the cause of action alleged. Potter v. National Supply Co., 230 N. C. 1, 51 S. E. (2d) 908.

Time to Make Motion to Nonsuit.—In accord with 2nd paragraph in original. See Avent v. Millard, 225 N. C. 40, 33 S. E. (2d) 123.

Failure to Renew Motion at Close of All the Evidence.—Defendant, by offering evidence and failing to renew his motion for judgment as in case of nonsuit at the close of all the evidence, as provided in this section, waives his exception to the denial of such motion entered when plaintiff first rested his case. Hawkins v. Dallas, 229 N. C. 561, 50 S. E. (2d) 561.

Motion to Nonsuit Is a Question of Law.—A motion to nonsuit tests the sufficiency of the evidence to carry the case to the jury and support a recovery. The question thus presented is a question of law and is always to be decided

by the court. Ward v. Smith, 223 N. C. 141, 25 S. E. (2d) 463.

Court Does Not Pass on Credibility or Weight of Evidence.—In ruling on a motion for nonsuit, the court does not pass on the credibility of the witnesses or the weight of the testimony. Bundy v. Powell, 229 N. C. 707, 51 S. E. (2d) 307.

Plaintiff's Evidence Is Taken as True.—In passing upon a motion for a compulsory nonsuit under this section, the court must assume the evidence in behalf of the plaintiff to be true and must extend to the plaintiff the benefit of every fair inference which can be reasonably drawn therefrom by the jury in favor of the plaintiff. Hughes v. Thayer, 229 N. C. 773, 51 S. E. (2d) 488.

The evidence favorable to plaintiffs is taken as true. Stokes v. Edwards, 230 N. C. 306, 52 S. E. (2d) 797.

And All Conflicts Resolved in His Favor.—In determining whether or not the trial court erred in denying the defendant's motion for an involuntary nonsuit or in refusing to direct a verdict for the defendant in conformity to its requests for instructions, the supreme court must take it for granted that the evidence tending to support the plaintiff's claim is true and must resolve all conflicts of testimony in his favor. Potter v. National Supply Co., 230 N. C. 1, 51 S. E. (2d) 908. See Bundy v. Powell, 229 N. C. 707, 51 S. E. (2d) 307.

Plaintiff Entitled to Benefit of Inferences.—

In accord with 1st paragraph in original. See Wingler v. Miller, 223 N. C. 15, 25 S. E. (2d) 160; Ross v. Atlantic Greyhound Corp., 223 N. C. 239, 25 S. E. (2d) 852; Lindsey v. Speight, 224 N. C. 453, 31 S. E. (2d) 371; Atkins v. White Transp. Co., 224 N. C. 688, 32 S. E. (2d) 209; Buckner v. Wheeldon, 225 N. C. 62, 33 S. E. (2d) 480.

When Demurrer Entered at Close of All the Evidence.—When considering defendant's demurrer to the evidence entered at the close of all the evidence, that is, motion for judgment as in case of nonsuit entered at that stage of the trial, pursuant to provisions of this section, the evidence is to be taken in the light most favorable to plaintiff, and he is to be given the benefit of every fact or inference of fact pertaining to the issues involved, which may be reasonably deduced from the evidence. Garrett v. Garrett, 229 N. C. 290, 49 S. E. (2d) 643.

Consideration of Defendant's Evidence.—

In accord with 1st paragraph in original. See Gregory v. Travelers Ins. Co., 223 N. C. 124, 25 S. E. (2d) 398, 147 A. L. R. 283; Pappas v. Crist, 223 N. C. 265, 25 S. E. (2d) 850; Buckner v. Wheeldon, 225 N. C. 62, 33 S. E. (2d) 480.

Upon a motion as of nonsuit so much of defendant's evidence as is favorable to the plaintiff or tends to explain or make clear that which has been offered by plaintiff may be considered, but that which tends to establish another and a different state of facts or which tends to contradict or impeach the evidence offered by plaintiff is to be disregarded. Atkins v. White Transp. Co., 224 N. C. 688, 690, 32 S. E. (2d) 209; Bundy v. Powell, 229 N. C. 707, 51 S. E. (2d) 307.

The court will consider only the evidence which tends to support plaintiff's claim upon a motion for judgment as of nonsuit at the close of all evidence. Stell v. First Citizens Bank, etc., Co., 223 N. C. 550, 27 S. E. (2d) 524.

Nonsuit in Favor of Party Having Burden of Proof.—A judgment of nonsuit is never permissible in favor of the party having the burden of proof upon evidence offered by him. MacClure v. Accident, etc., Ins. Co., 229 N. C. 305, 49 S. E. (2d) 742.

There is but one exception to this rule: When the plaintiff offers sufficient evidence to constitute a prima facie case in an action in which the defendant has set up an affirmative defense, and the evidence of the plaintiff establishes the truth of the affirmative defense as a matter of law, a judgment of nonsuit may be entered. Id.

In the absence of such evidence or admissions on the part of the plaintiff it does not matter how clearly the matter appears in the evidence of the defendant, decision is not thereby shifted to the court as a matter of law, since the question of credibility still remains. Id.

When Motion Should Be Disallowed.—

Upon a motion for judgment as of nonsuit, the whole evidence must be taken in the light most favorable for plaintiff and the motion disallowed if there is any reasonable inference of defendant's proximately causative negligence, unless, in plaintiff's own evidence, there is such a clear inference of contributory negligence that reasonable minds could not come to a contrary conclusion. Jackson v. Browning, 224 N. C. 75, 29 S. E. (2d) 21.

Where defendants failed to lodge their motion for dismissal of the action and for a judgment as in case of nonsuit when plaintiff had introduced his evidence and rested his case, the granting of such a motion after all the evidence on both sides was in was unauthorized and error. Avent v. Millard, 225 N. C. 40, 33 S. E. (2d) 123.

Where Only Some of Defendants Move for Nonsuit.—When the only defendants who have any interest adverse to plaintiff move for judgment of nonsuit, which is granted, objection and exception thereto, upon the theory that only some of defendants lodged the motion, are untenable. Daughtry v. Daughtry, 223 N. C. 528, 27 S. E. (2d) 446.

Exception Considered on Appeal.—

In accord with 2nd paragraph in original. See Atkins v. White Transp. Co., 224 N. C. 688, 32 S. E. (2d) 209.

Evidence Sufficient for Jury—Illustrative Cases.—

In an action for damages for personal injuries to plaintiff by negligence of defendant, where plaintiff's evidence tended to show that she was driving her car, at 20 to 25 miles per hour, south on a city street towards its intersection with another street running east and west, and that defendant's truck was approaching the intersection from the west and was 125 feet distant from the intersection when plaintiff entered same, and said truck, running at 45 miles per hour, struck plaintiff's car, which was within 4 feet of the curb on the south side of the intersection, knocking it 70 feet into a stone wall across the street, motion of nonsuit was properly denied. Crone v. Fisher, 223 N. C. 635, 27 S. E. (2d) 642.

In an action to recover damages for fraud where plaintiff, a woman 65 years of age and of no business experience and of limited education, sued defendant, a banker of large financial interests, and plaintiff's evidence tended to show that she consulted defendant, an old and intimate friend, about investing money and he invested her money in 1929 in a note secured by real estate mortgage, over four years past maturity, defendant assuring plaintiff that the note was "as good as gold," that he would look out for its collection and payment of taxes on the property and that the principal could be collected at any time, whereas the property was not worth the debt and defendant did not collect the interest regularly and allowed the realty securing the note to be sold for taxes in 1942, without notice to plaintiff, and plaintiff suffered a heavy loss from the investment, the allowance of motion for nonsuit was error. Small v. Dorsett, 223 N. C. 754, 28 S. E. (2d) 514.

In an action to recover damages for malpractice against a physician, where all the evidence tended to show that plaintiff, a patient in defendant's hospital and admittedly in an insane condition, got under her bed and could not be removed by the nurses, whereupon defendant took hold of her arm and pulled so hard that he heard the bone break, and failed to reduce or immobilize the fracture in a reasonable time, but sent for her father and delivered her to him, declining to treat her further, there was error in sustaining a motion for judgment as of nonsuit. Groce v. Myers, 224 N. C. 165, 29 S. E. (2d) 553.

Where plaintiff, a passenger in defendant's motor vehicle, brought an action to recover damages for personal injuries received from the alleged negligence of defendant's driver, when the car in which they were driving at about 35 to 40 miles per hour, on a paved highway, in fair weather, about seven-thirty a. m., suddenly left the road, ran down an embankment and turned over, causing the plaintiff's injuries, motion for judgment as of nonsuit, for lack of evidence of negligence, was held properly refused. Boone v. Matheny, 224 N. C. 250, 29 S. E. (2d) 687.

In an action for damages, based on abuse of process, where plaintiff's evidence tended to show that defendant procured the issuance of a warrant against plaintiff for disposing of mortgaged property and offered not to have it served if plaintiff would pay the amount claimed by defendant, and that, after plaintiff's arrest under the warrant and imprisonment, defendant offered to procure his release if plaintiff would pay or work out the amount claimed, there is sufficient evidence of motive and intent to carry the case to the jury and motion for judgment as of nonsuit was properly denied. Ellis v. Wellons, 224 N. C. 269, 29 S. E. (2d) 884.

In an action to recover damages for the wrongful death of plaintiff's intestate caused by a collision between the automobile of plaintiff's intestate and a truck of defendant, where plaintiff's evidence tended to show, though no eyewitness testified, that defendant's truck was being operated on its left-hand side of the highway and the coupe of plaintiff's intestate was being operated on its right-hand side of the highway, at the time of the collision between the two vehicles going in opposite directions, there was error in the allowance of a motion for judgment as of nonsuit at the close of plaintiff's evidence. Wyrick v. Ballard, etc., Co., 224 N. C. 301, 29 S. E. (2d) 900.

In divorce action, where evidence for plaintiff tends to show a living separate and apart for the statutory period and that plaintiff has resided in the state for six months, and defendant offered evidence of wrongful abandonment and recrimination, there is error in allowing a motion for judgment as of nonsuit. Taylor v. Taylor, 225 N. C. 80, 33 S. E. (2d) 492.

Upon a charge of fornication and adultery, it was held that there was sufficient evidence to support a conviction and motion for nonsuit was properly denied. State v. Davenport, 225 N. C. 13, 33 S. E. (2d) 136.

Upon a warrant charging defendant with violating § 60-136, which regulates the occupancy of seats by white and colored passengers in street cars or other passenger vehicles or motor buses, it was held that there was sufficient evidence for jury and motion for nonsuit was properly denied. State v. Brown, 225 N. C. 22, 33 S. E. (2d) 121.

In an action to recover damages for alleged injuries to plaintiff resulting from an admitted automobile collision, motion by defendants for judgment as of nonsuit held properly denied. Hobbs v. Queen City Coach Co., 225 N. C. 323, 34 S. E. (2d) 211.

When Nonsuit Proper—Illustrative Cases.—

Where defendant was confronted with an emergency, and the evidence did not disclose a failure on his part to exercise ordinary care in the operation of his automobile under the circumstances, defendant's motion for judgment as of nonsuit was held properly granted. O'Kelly v. Barbee, 223 N. C. 282, 284, 25 S. E. (2d) 750.

In an action to recover damages against defendant by plaintiff, who was an employee of a transportation company engaged in delivering caustic soda, a dangerous substance, by truck to defendant's mills, where plaintiff alleged negligence by defendant, it was held that defendant owed no duty to plaintiff to furnish a safe place, suitable appliances, and sufficient help, and since plaintiff on his own evidence, was guilty of contributory negligence, judgment of nonsuit was proper. Morrison v. Cannon Mills Co., 223 N. C. 387, 26 S. E. (2d) 857.

Where there was not sufficient evidence to be submitted to the jury of plaintiff being down or in an apparently helpless condition on the track, so that the engineer or fireman saw, or, by the exercise of ordinary care in keeping a proper lookout, could have seen such helpless condition of plaintiff in time to have stopped the train before striking him, there was no error in the ruling of the court, and the judgment as in case of nonsuit was properly entered. Battle v. Southern Ry. Co., 223 N. C. 395, 26 S. E. (2d) 859.

In an action for the negligent injury by defendant of plaintiff, who drove a tractor, to which were attached plows, on the railroad track of defendant, where it stalled and plaintiff remained on the track in an attempt to get the tractor and plows across, after he had seen defendant's train approaching, until injured, judgment of nonsuit was proper. Wilson v. Southern Ry. Co., 223 N. C. 407, 26 S. E. (2d) 900.

Where plaintiff was injured in an aeroplane crash, the pilot being negligent in not having a license, it was held that there was no evidence that this negligence was the proximate cause of the injury, the doctrine of res ipsa loquitur did not apply, and judgment as of nonsuit was proper. Smith v. Whitley, 223 N. C. 534, 27 S. E. (2d) 442.

Where in consideration of an agreement by his son and daughter to support him, plaintiff executed a fee simple deed, conveying all of his real estate to such son and daughter and about a year thereafter changed his mind and wanted his land back, and there was no evidence of fraud or undue influence, motion for judgment as of nonsuit was properly allowed. Gerringer v. Gerringer, 223 N. C. 818, 28 S. E. (2d) 501.

Where the evidence tended to show that defendant's servant, contrary to orders and without his master's knowledge, took deceased and other boys, also employees of defendant, at their request, on a pleasure ride in the master's truck, and, while so engaged on the public highway, the truck struck a hole and plaintiff's intestate was thrown out and killed, defendant's demurrer to the evidence should have been sustained. Rogers v. Black Mountain, 224 N. C. 119, 29 S. E. (2d) 203.

In action by owner of automobile against operator of a parking lot to recover for theft of the car upon the theory of bailment, where evidence tended to show that contract signed by plaintiff obligated defendant to permit the vehicle to occupy parking space in the lot, that ordinarily driver parked and removed car herself, taking the keys with her, but that on the occasion in question the driver left vehicle at the gas pumps on the lot with the keys in the car, and that car was taken by a person unknown, it was held the evidence was insufficient to show a bailment and motion for judgment as of nonsuit was proper. Freeman v. Myers Automobile Service Co., 226 N. C. 736, 40 S. E. (2d) 365.

Motion for judgment as of nonsuit held proper in action for injuries to plaintiff caused by defendant's "magic eye" doors, Watkins v. Taylor Furnishing Co., 224 N. C. 674, 31 S. E. (2d) 917; in action to recover double indemnity on insurance policy. McLain v. Shenandoah Life Ins. Co., 224 N. C. 837, 32 S. E. (2d) 592; in action to set up and foreclose alleged lost mortgage, Downing v. Dickson, 224 N. C. 455, 31 S. E. (2d) 378; in action for wrongful death, Eldridge v. Church Oil Co., 224 N. C. 457, 31 S. E. (2d) 381; in action for damages from negligent operation of defendant's automobile, Ray v. Post, 224 N. C. 665, 32 S. E. (2d) 168; in divorce action, Dudley v. Dudley, 225 N. C. 83, 33 S. E. (2d) 489; Moody v. Moody, 225 N. C. 89, 33 S. E. (2d) 491; in broker's action for commission, Bolich-Hall Realty, etc., Co. v. Disher, 225 N. C. 345, 34 S. E. (2d) 200.

Contributory Negligence.—

In accord with 3rd paragraph in original. See Crone v. Fisher, 223 N. C. 635, 27 S. E. (2d) 642; Atkins v. White Transp. Co., 224 N. C. 688, 32 S. E. (2d) 209.

In accord with 3rd and 7th paragraphs in original. See Daughtry v. Cline, 224 N. C. 381, 30 S. E. (2d) 322; Bundy v. Powell, 229 N. C. 707, 51 S. E. (2d) 307.

"It is the prevailing and permissible rule of practice to enter judgment of nonsuit in a negligence case, when it appears from the evidence offered on behalf of the plaintiff that his own negligence was the proximate cause of the injury, or one of them." Bailey v. North Carolina R. Co., 223 N. C. 244, 247, 25 S. E. (2d) 833, quoting Godwin v. Atlantic Coast Line R. Co., 220 N. C. 281, 17 S. E. (2d) 137.

Contributory negligence is an affirmative defense which the defendant must plead and prove (§ 1-139). Nevertheless, a defendant may take advantage of his plea of contributory negligence by a motion for a compulsory judgment of nonsuit under this section when the facts necessary to show the contributory negligence are established by the plaintiff's own evidence. Bundy v. Powell, 229 N. C. 707, 51 S. E. (2d) 307.

The court cannot allow a motion for judgment of nonsuit on the ground of contributory negligence on the part of the plaintiff in actions for personal injury or of the decedent in actions for wrongful death if it is necessary to rely either in whole or in part on testimony offered by the defense to sustain the plea of contributory negligence. Id.

Same—Evidence Sufficient to Sustain Nonsuit.—

Where the driver of plaintiff's loaded truck, trailing defendants' bus at 25 to 30 miles per hour and within 20 feet, on a street 25 to 30 feet wide with an open space on the left of from 12 to 17 feet, saw the bus begin to stop and "slammed on his brakes," as he was too near to turn aside or stop, hitting the bus with such force that the front of the truck was practically demolished and the bus was badly damaged, defendants' motion for judgment as of nonsuit on the ground of contributory negligence should have been sustained. Atkins v. White Transp. Co., 224 N. C. 688, 32 S. E. (2d) 209.

Evidence Sufficient to Deny Nonsuit.—

In an action for alleged damages to plaintiff's stock of goods by the willful, wanton, and malicious negligence of defendants, employees of the state highway commission, where the plaintiff's evidence tended to show that defendants, in charge of a sweeper and blower in working the highway near plaintiff's store, without warning, so used the sweeper and blower as to throw such a cloud of dirt and filth through the open windows and doors of the store that the merchandise therein was badly damaged, there is ample evidence for the jury and allowance of motion for judgment as of nonsuit, was erroneous. Miller v. Jones, 224 N. C. 783, 32 S. E. (2d) 594.

Plaintiff's evidence was to the effect that intestate had an unobstructed view along the track upon which the train approached for only 600 feet, that intestate looked and listened immediately before traveling onto the crossing, that the crossing was in bad repair and the car stalled on the track, and was hit by the speeding train seven seconds after its approach could have been reasonably apprehended. It was held that defendant railroad company's motion to nonsuit on the ground of contributory negligence should have been denied notwithstanding defendants' testimony that plaintiff drove upon the track in the path of the oncoming train and defendants' photographic evidence showing an entirely different situation at the crossing. Bundy v. Powell, 229 N. C. 707, 51 S. E. (2d) 307.

Setting Aside after Refusal of Motion.—
In accord with original. See Watkins v. Grier, 224 N. C. 334, 30 S. E. (2d) 219.

Refusal of defendant's motion for nonsuit and his failure to offer evidence should not be considered as conclusively establishing the credibility of plaintiff's evidence. Grady v. Faison, 224 N. C. 567, 31 S. E. (2d) 760.

Applied, in action for loss of services and consortium of wife as result of taxi accident, in Watkins v. Grier, 224 N. C. 339, 30 S. E. (2d) 223; in action for wrongful death of child by drowning in pond created by a stopped drain, in Hedgepath v. Durham, 223 N. C. 822, 28 S. E. (2d) 503; in action for damages sustained from falling on step down from lobby into defendant's store, in Benton v. United Bank Bldg. Co., 223 N. C. 809, 28 S. E. (2d) 491; in action to set aside deed on ground of incompetency, duress and undue influence, in Goodson v. Lehmon, 225 N. C. 514, 35 S. E. (2d) 623, 164 A. L. R. 510. For other cases applying section, see Bourne v. Southern Ry. Co., 225 N. C. 43, 33 S. E. (2d) 239; Chason v. Marley, 224 N. C. 844, 32 S. E. (2d) 652; Stafford v. Yale, 228 N. C. 220, 44 S. E. (2d) 872; Sisson v. Royster, 228 N. C. 298, 45 S. E. (2d) 351; Penland v. Southern R. Co., 228 N. C. 528, 46 S. E. (2d) 303; Bethune v. Bridges, 228 N. C. 623, 46 S. E. (2d) 711; Hahn v. Perkins, 228 N. C. 727, 46 S. E. (2d) 854.

Cited in Montgomery v. Blades, 223 N. C. 331, 26 S. E. (2d) 567; Nebel v. Nebel, 223, N. C. 676, 28 S. E. (2d) 207; Perry v. Herrin, 225 N. C. 601, 35 S. E. (2d) 883; McCullen v. Durham, 229 N. C. 418, 50 S. E. (2d) 511.

§ 1-184. Waiver of jury trial.

Judge's Findings of Fact Are Conclusive.—Where the parties consent to trial by the court without a jury, the findings of the court are as conclusive as a verdict of the jury if supported by competent evidence. Poole v. Gentry, 229 N. C. 266, 49 S. E. (2d) 464.

When an action is tried by the court without a jury pursuant to the provisions of this section, the findings of fact of the trial judge are conclusive, and are not subject to review on appeal, in the absence of exceptions that they are not supported by evidence. Cannon v. Blair, 229 N. C. 606, 50 S. E. (2d) 732.

Applied in Griggs v. Stoker Service Co., 229 N. C. 572, 50 S. E. (2d) 914.

§ 1-185. Findings of fact and conclusions of law by judge.

Findings of Judge Conclusive.—
Findings of fact by the court, when a jury trial has been waived by consent, will not be disturbed on appeal, if based upon competent evidence. Fish v. Hanson, 223 N. C. 143, 25 S. E. (2d) 461.

Art. 20. Reference.

§ 1-189. Compulsory.

II. GENERAL CONSIDERATION.

How Right of Trial by Jury Preserved.—In order to preserve the right to trial by jury in a compulsory reference, a party must object to the order of reference at the time it is made, file exceptions to particular findings of fact made by the referee, tender appropriate issues based on the facts pointed out by the exceptions and raised by the pleadings, and demand a jury trial on each of the issues thus tendered. Simmons v. Lee, 230 N. C. 216, 53 S. E. (2d) 79.

Right Waived by Failure to Follow Appropriate Procedure.—The right to trial by jury in civil cases may be waived, and in reference cases the failure to except to the findings of the referee or properly to preserve the right to jury trial has been uniformly held to constitute a waiver. Chesson v. Kieckhefer Container Co., 223 N. C. 378, 26 S. E. (2d) 904.

While a compulsory reference, under this section, does not deprive either party of his constitutional right to trial by jury on the issues of fact arising on the pleadings, such right is waived by failure to follow the appropriate procedure. Simmons v. Lee, 230 N. C. 216, 53 S. E. (2d) 79.

Party Should Tender Issues of Fact Arising on Pleadings.—A party should not tender issues as to questions of fact presented by his exceptions to the findings of the referee, but should tender issues of fact arising on the pleadings and relate his issues of fact to his exceptions and to the findings of fact by number, and demand a jury trial as to each of such issues. Simmons v. Lee, 230 N. C. 216, 53 S. E. (2d) 79, wherein compulsory reference was ordered in special proceeding to establish boundary line.

Jury Trial on Issues.—
In reference cases the trial by jury is restricted by this section to the written evidence taken before the referee, which sufficiently complies with the constitutional mandate, if the testimony is taken under oath in the manner prescribed by law, with opportunity to cross-examine. Chesson v. Kieckhefer Container Co., 223 N. C. 378, 26 S. E. (2d) 904.

When Findings of Referee Are Conclusive.—On a reference without objection, the findings of the referee, when approved by the trial court, are conclusive on appeal, unless there be no evidence to support them or some error of law has been committed in the hearing of the cause. Williamson v. Spivey, 224 N. C. 311, 30 S. E. (2d) 46.

Pleas of Estoppel, Laches and Adverse Possession.—Where in an action to redeem land sold under foreclosure under order of court and for an accounting, defendants plead estoppel, laches and title by adverse possession for seven years under color (§ 1-38), it is error for the court to resolve the pleas in bar against defendant and order a compulsory reference, since defendants are entitled to an adequate hearing on their pleas in bar before reference can properly be ordered. Grady v. Parker, 230 N. C. 166, 52 S. E. (2d) 273.

III. ILLUSTRATIVE CASES.

Cited in Leach v. Quinn, 223 N. C. 27, 25 S. E. (2d) 170.

§ 1-193. Testimony reduced to writing.

Cited in Bakami Constr., etc., Co. v. Thomas, 230 N. C. 516, 53 S. E. (2d) 519.

§ 1-194. Report; review and judgment.

When Decisions Reviewable.—
In accord with 2nd paragraph in original. See Lindsay v. Brawley, 226 N. C. 468, 38 S. E. (2d) 528.

Upon appeal in a consent reference the superior court has the power to confirm the findings of the referee in whole or in part, to set aside the findings in whole or in part and substitute other findings supported by the evidence. Ramsey v. Nebel, 226 N. C. 590, 39 S. E. (2d) 616.

§ 1-195. Report, contents and effect.

Cited in Lindsay v. Brawley, 226 N. C. 468, 38 S. E. (2d) 528.

Art. 21. Issues.

§ 1-198. Of fact.

Error to Submit Issue Not Raised by Pleadings.—
It is error for the court to submit to the jury issues not arising on the pleadings. McCullen v. Durham, 229 N. C. 418, 50 S. E. (2d) 511.

§ 1-200. Form and preparation.

Editor's Note.—
In accord with 2nd paragraph in original. See Griffin v. United Services Life Ins. Co., 225 N. C. 684, 686, 36 S. E. (2d) 225.

Ordinarily the form and number of issues in a civil action are left to the sound discretion of the judge and a party cannot complain because a particular issue was not submitted to jury in the form tendered. Griffin v. United Services Life Ins. Co., 225 N. C. 684, 686, 36 S. E. (2d) 225.

When Sufficient.—
The issues submitted together with the answers thereto must be sufficient to support a judgment disposing of the whole case. Griffin v. United Services Life Ins. Co., 225 N. C. 684, 686, 36 S. E. (2d) 225, citing Tucker v. Satterthwaite, 120 N. C. 118, 27 S. E. 45.

Case Remanded for Insufficient Issues.—In an action to recover on policy of life insurance, where there were issues squarely raised by the pleadings, supported by evidence, as to valid delivery and payment of first premium, and court declined to submit such issues or to submit others of similar import, which would be determinative of questions presented, supreme court will remand for new trial. Griffin v. United Services Life Ins. Co., 225 N. C. 684, 36 S. E. (2d) 225.

Art. 22. Verdict and Exceptions.

§ 1-201. General and special.

Applied in State v. Lovelace, 228 N. C. 186, 45 S. E. (2d) 48.

§ 1-206. Exceptions.

3. In any trial or hearing no exception need be

taken to any ruling upon an objection to the admission of evidence. Such objection shall be deemed to imply an exception by the party against whom the ruling was made. (Rev., s. 554; Code, s. 412; C. C. P., s. 236; 1949, c. 150; C. S. 590.)

Editor's Note.—The 1949 amendment added subsection 3. As subsections 1 and 2 were not changed they are not set out. For brief comment on amendment, see 27 N. C. Law Rev. 435.

§ 1-207. Motion to set aside.

Discretion of the Judge.—

In accord with 1st paragraph in original. See Ziglar v. Ziglar, 226 N. C. 102, 36 S. E. (2d) 657; King v. Byrd, 229 N. C. 177, 47 S. E. (2d) 856; Carolina Coach Co. v. Central Motor Lines, 229 N. C. 650, 50 S. E. (2d) 909.

In accord with 6th paragraph in original. See Alligood v. Shelton, 224 N. C. 754, 32 S. E. (2d) 350.

Where motion to set aside a verdict involves no question of law or legal inference, the motion is addressed to the sound discretion of the trial court, and its ruling thereon is not subject to review in the absence of abuse of discretion. Pruitt v. Ray, 230 N. C. 322, 52 S. E. (2d) 876.

Stated in Watkins v. Grier, 224 N. C. 334, 30 S. E. (2d) 219.

Cited in Gregory v. Travelers Ins. Co., 223 N. C. 124, 25 S. E. (2d) 398, 147 A. L. R. 283 (con. op.).

Art. 23. Judgment.

§ 1-208. Defined.

Cited in Moore v. Moore, 224 N. C. 552, 31 S. E. (2d) 690.

§ 1-209. Judgments authorized to be entered by clerk; sale of property; continuance pending sale; writs of assistance and possession.

Judgment of Voluntary Nonsuit.—

Under this section, conferring on the clerks of the superior court authority to enter judgments of nonsuit, the authority is limited to judgments of voluntary nonsuit. Moore v. Moore, 224 N. C. 552, 555, 31 S. E. (2d) 690.

In wife's action against husband for separate maintenance and counsel fees, judgment entered by clerk, upon findings of fact that parties had resumed marital relations, dismissing the action as of voluntary nonsuit, was a nullity and void upon its face, as it was manifestly not voluntary. Id.

Jurisdiction of clerk of superior court to order foreclosure of mortgages is given by this section, in connection with § 1-211, and is an incidental jurisdiction conditioned upon the rendition by the clerk of a judgment by default for the debt secured by the mortgage in favor of the mortgage creditor and against the mortgage debtor. Johnston County v. Ellis, 226 N. C. 268, 38 S. E. (2d) 31, 38.

Cited in Johnson v. Sidbury, 225 N. C. 208, 34 S. E. (2d) 67.

§ 1-211. By default final.

I. IN GENERAL.

A. Failure to File Answer.

Effect of Failure Promptly to Take Judgment by Default.—

In action on note and to foreclose trust deed failure of plaintiffs to move promptly for judgment after they are entitled by lapse of prescribed time or the expiration of the time allowed by consent order does not work a discontinuance. King v. Rudd, 226 N. C. 156, 37 S. E. (2d) 116.

Applied in Hodges v. Hodges, 227 N. C. 334, 42 S. E. (2d) 82.

Cited in Whitaker v. Raines, 226 N. C. 526, 39 S. E. (2d) 266; Scott & Co. v. Jones, 230 N. C. 74, 52 S. E. (2d) 219.

II. NATURE AND ESSENTIALS.

A. Definite Debt.

Sum Certain or Computable.—

Under this section, default judgment can be made only upon a failure to answer a verified pleading where the sum due is "capable of being ascertained by computation," and where it is necessary to hear evidence to ascertain title to mortgage debt and the amount of the debt, clerk is without jurisdiction to order foreclosure. Johnston County v. Ellis, 226 N. C. 268, 38 S. E. (2d) 31, 38.

VI. SETTING ASIDE.

Sections 1-272, 1-273 and 1-274 Are Inapplicable.—Sections 1-272, 1-273 and 1-274, regulating appeals from the clerk of the superior court to the judge, are inapplicable to appeals from orders or judgments entered by the clerk pursuant to this section or § 1-212, since the jurisdiction of the judge under this and the following section is original as well as appellate. Moody v. Howell, 229 N. C. 198, 49 S. E. (2d) 233.

For Jurisdiction of Judge to Set Aside Default Judgment Is Original.—The judge of a superior court has concurrent jurisdiction with the clerk of the court to enter judgments by default, and to vacate such judgments, and the jurisdiction of the judge on motion to set aside a default judgment entered by the clerk is original as well as appellate. Moody v. Howell, 229 N. C. 198, 49 S. E. (2d) 233.

Judgment Is Valid Lien When No Attack Made.—Where a judgment by default final instead of by default and inquiry has been rendered for goods sold and delivered on open account, the judgment is not void but is merely irregular, and when no attack is made upon it at the hearing, it constitutes a valid lien upon the lands of the judgment debtor. Scott & Co. v. Jones, 230 N. C. 74, 52 S. E. (2d) 219.

§ 1-212. By default and inquiry.

The effect of the failure of the defendants to appear in response to the summons and complaint personally served upon them was to establish pro confesso in the plaintiff a right of action of the kind properly pleaded in the complaint and thereupon the plaintiff became entitled as a matter of law to recover on the cause of action set out in his complaint. Presnell v. Beshears, 227 N. C. 279, 280, 41 S. E. (2d) 835.

Appeals from Judgments Entered by Clerk. — Sections 1-272, 1-273 and 1-274, regulating appeals from the clerk of the superior court to the judge, are inapplicable to appeals from orders or judgments entered by the clerk pursuant to this section or § 1-211, since the jurisdiction of the judge under this and the preceding section is original as well as appellate. Moody v. Howell, 229 N. C. 198, 49 S. E. (2d) 233.

Jurisdiction of Judge Is Concurrent and Original.—The judge of a superior court has concurrent jurisdiction with the clerk of the court to enter judgments by default, and to vacate such judgments, and the jurisdiction of the judge on motion to set aside a default judgment entered by the clerk is original as well as appellate. Moody v. Howell, 229 N. C. 198, 49 S. E. (2d) 233.

Cited in Johnson v. Sidbury, 225 N. C. 208, 34 S. E. (2d) 67; Russell v. Edney, 227 N. C. 203, 41 S. E. (2d) 585; Scott & Co. v. Jones, 230 N. C. 74, 52 S. E. (2d) 219.

§ 1-214. Judgment by default where no answer filed; record; force; docket.

Cited in Presnell v. Beshears, 227 N. C. 279, 41 S. E. (2d) 835.

§ 1-215. Time for rendering judgments and orders.

Under the former statute, providing that no judgment shall be entered by the clerk except on Monday, unless otherwise provided, a judgment rendered by the clerk on any other day was void. Ange v. Owens, 224 N. C. 514, 31 S. E. (2d) 521.

§ 1-215.1. Judgments or orders not rendered on Mondays validated.

Legislature Cannot Validate Void Judgment.—This section was directly intended to validate judgments not rendered on Monday as required by the former statute. However, it is well understood that the legislature has no power to validate a void judgment. Ange v. Owens, 224 N. C. 514, 31 S. E. (2d) 521.

§ 1-218. Rendered in vacation.—In all cases where the superior court in vacation has jurisdiction, and all of the parties unite in the proceedings, they may apply for relief to the superior court in vacation, or in term time, at their election. (Rev., s. 559; Code, s. 230; 1871-2, c. 3; 1937, c. 361; 1949, c. 719, s. 2; C. S. 598.)

Editor's Note.—The 1949 amendment, effective Jan. 1, 1950, struck out the former second paragraph relating to confirmation of judicial sales.

Cited in Grady v. Parker, 228 N. C. 54, 44 S. E. (2d) 449.

§ 1-220. Mistake, surprise, excusable neglect.

I. IN GENERAL.

Editor's Note.—See notes to §§ 1-211, 1-212.

As to opening default judgment for negligence of attorney, see 26 N. C. Law Rev. 84.

Applies Only to Matters of Fact.—

The relief given under this section, on the ground of "mistake, inadvertence, surprise or excusable neglect" refers to mistake of fact and not of law. Rierson v. York, 227 N. C. 575, 578, 42 S. E. (2d) 902.

However, the larger part of the court's jurisdiction under this section is invoked under "excusable neglect" where there is neither mistake of law nor fact. Id.

So a judgment may be set aside for excusable neglect irrespective of whether the neglect is induced by mistake of fact or law. Id.

Excusable Neglect and Meritorious Defense.—

Court held without discretion to vacate default judgment except upon a finding of fatal irregularity or excusable neglect and meritorious defense. Wilson v. Thaggard, 225 N. C. 348, 34 S. E. (2d) 140.

Excusable Neglect Alone Is Insufficient.—A party, moving in apt time under the provisions of this section, to set aside a judgment taken against him, on the ground of excusable neglect, not only must show excusable neglect, but also must make it appear that he has a meritorious defense to the plaintiff's cause of action. Hanford v. McSwain, 230 N. C. 229, 53 S. E. (2d) 84.

Existence of a meritorious cause of action is a prerequisite to relief on motion to vacate former judgment. Craver v. Spaugh, 226 N. C. 450, 38 S. E. (2d) 525, 527.

Meritorious Defense Must Be Shown.—

Where defendant was indicted for breaking and entering, and upon his failure to appear judgment nisi was entered against him and his surety, and sci. fa. issued and served upon defendant surety, and upon return of the sci. fa. judgment absolute was entered against defendant and his surety, and subsequently, defendants made a motion to set the judgment aside because of surprise and excusable neglect alleging that they had been misled because the motion for judgment absolute did not appear for hearing on the printed calendar of cases to be heard at that term, it was held that the motion was properly denied since defendants made no allegation that they had any meritorious defense, and none was presented on the hearing of their motion. State v. O'Connor, 223 N. C. 469, 27 S. E. (2d) 88.

The question of meritorious defense becomes immaterial in the absence of sufficient showing of excusable neglect. Johnson v. Sidbury, 225 N. C. 208, 210, 34 S. E. (2d) 67; Whitaker v. Raines, 226 N. C. 526, 39 S. E. (2d) 266, 267.

Surprise at the action of the court did not constitute ground for setting aside judgment under this section. This section does not afford relief from a judgment on the ground of mistake of law. Crissman v. Palmer, 225 N. C. 472, 35 S. E. (2d) 422.

Where deed with the notary's certificate showed his commission expired before date of deed and grantee had been in possession thereof approximately twenty years, and the plaintiff in his reply, on file some time before the trial, had denied that there had been a valid registration of the deed under which defendant claimed mineral interests, and the record of the commissioning of notaries was at all times available to grantee, he could not claim surprise or inadvertence because record showed notary's commission had not expired. Id.

Applied in Craver v. Spaugh, 226 N. C. 450, 38 S. E. (2d) 525.

Cited in Tomlins v. Cranford, 227 N. C. 323, 42 S. E. (2d) 100.

II. THE RELIEF.

Discretionary with the Judge.—

The discretionary power of the trial court to set aside a default judgment for mistake, inadvertence, surprise or excusable neglect is a legal discretion and reviewable. Rierson v. York, 227 N. C. 575, 42 S. E. (2d) 902.

III. APPLICATION OF THE PRINCIPLES.

A. Neglect of Party.

Where Summons Regularly Served.—

Where, notwithstanding the summons and complaint in a civil action were duly served on defendant and copies left with him, defendant failed for a period of thirty days to acquaint himself with their contents and to file an answer or other defense, attributing his inattention and neglect to the similarity of the title of the case to a former action and to his preoccupation in the duties of his profession, there is no evidence in law to constitute such excusable neglect as would relieve an intelligent and active businessman from the consequences of his conduct as against diligent suitors proceeding in accordance with the statute. Johnson v. Sidbury, 225 N. C. 208, 34 S. E. (2d) 67.

Failure to File Proper Answer.—Where there are no findings of fact which would show excusable neglect on the part of defendants, or that the failure to file proper answer and undertaking was due to excusable neglect, it is error for court to allow defendant's motion to set aside judgment. Whitaker v. Raines, 226 N. C. 526, 39 S. E. (2d) 266, 267.

Sickness of Attorney.—Findings that the neglect of the defendant was due to the incapacity of her lawyer induced by serious illness, that she had used due diligence and that the attorney's neglect should not be imputed to her, and that defendant has a meritorious defense, is sufficient to support the court's order setting aside a default judgment under this section. Rierson v. York, 227 N. C. 575, 42 S. E. (2d) 902.

B. Neglect of Counsel.

Failure of Defendant's Attorney to File Answer.—

Excusable neglect of an attorney, who fails to file an answer for the defendants, may not be attributable to his clients. Gunter v. Dowdy, 224 N. C. 522, 31 S. E. (2d) 524.

Where plaintiff issued summons and filed complaint, serving both on defendant, who in apt time employed an attorney to make answer and resist the suit, and judgment by default was taken by plaintiff, no answer having been filed in consequence of the illness and death of the wife of defendant's attorney and the prolonged illness of the attorney himself, such circumstances constitute excusable neglect under this section. Id.

IV. PLEADING AND PRACTICE.

Appeal from Order of Clerk.—

The clerk of the superior court has authority to relieve a party from an irregular judgment or one taken against him by mistake, inadvertence, surprise, or excusable neglect; and, on appeal in such cases from the clerk, the judge shall hear and pass upon the matter de novo, finding the facts and entering his judgment accordingly. Gunter v. Dowdy, 224 N. C. 522, 31 S. E. (2d) 524.

Discretion of Judge Not Reviewable on Appeal.—

Where, on a motion to set aside a default judgment under this section the trial court finds facts sufficient to support the conclusion that the litigant's neglect was excusable, objection to the order setting aside the default judgment on the ground that the facts were insufficient to show a mistake of fact, is untenable, the finding of excusable neglect and meritorious defense being sufficient to support the judgment, and the supreme court being bound by the findings when supported by evidence. Rierson v. York, 227 N. C. 575, 576, 42 S. E. (2d) 902.

Findings of Court Conclusive.—Upon motion to set aside a judgment under this section, the findings of the court as to excusable neglect and meritorious defense are conclusive on appeal when supported by evidence, but such findings are not conclusive if made under a misapprehension of the law, in which instance the cause will be remanded to the end that the evidence be considered in its true legal light. Hanford v. McSwain, 230 N. C. 229, 53 S. E. (2d) 84.

§ 1-226. When limited by demand in complaint.

Relief Limited to That Demanded Where No Answer Filed.—

Superior court had power, by a default judgment, to declare debtor's deed conveying realty to wife fraudulent and void as to suing creditors, but court acted in excess of its jurisdiction when it ordered wife to reconvey the lands to her husband and attempted to make the judgment effective as a transfer of title, where there was nothing in the cause of action stated by the creditors which rendered such action either necessary, or upon which it could be properly based. Lane v. Becton, 225 N. C. 457, 35 S. E. (2d) 334, 336.

§ 1-228. Regarded as a deed and registered.

Section Is Partially Superseded by § 47-27.—The provision of this section that judgments in which transfers of title are declared shall be registered under the same rules prescribed for deeds is superseded, as to judgments in eminent domain proceedings, by the later enactment of chap. 148, Public Laws of 1917 (§ 47-27), exempting decrees of courts of competent jurisdiction in condemnation proceedings from the requirement as to registration. Carolina Power, etc., Co. v. Bowman, 228 N. C. 319, 45 S. E. (2d) 531. See also note to § 40-19.

§ 1-234. Where and how docketed; lien.

I. IN GENERAL.

Order of Resale of Realty Does Not Prolong Life of Lien.—Where the bid for real estate, offered at a sale held under authority of an execution within the period of ten years next after the date of rendition of the judgment upon which the execution issued, is raised and resales are ordered successively under the provision of § 45-28 by which the final sale so ordered takes place on a date after the expiration of said period of ten years, such orders do not have the effect of prolonging the statutory life of lien of the judgment within the provisions and meaning of this section. Cheshire v. Drake, 223 N. C. 577, 27 S. E. (2d) 627. For comment on this decison, see 22 N. C. Law Rev. 146.

II. CREATION OF THE LIEN AND PRIORITIES.

A. Sufficiency.

1. Realty.

A docketed judgment fixes the lien and the debtor cannot escape it. Moore v. Jones, 226 N. C. 149, 36 S. E. (2d) 920, 922.

B. Priorities.

Between Judgment and Subsequent Mortgage.—A docketed judgment has priority over a subsequently recorded mortgage. Moore v. Jones, 226 N. C. 149, 36 S. E. (2d) 920, 922.

III. PROPERTY SUBJECT TO THE LIEN.

A. Property Located in County Where Judgment Docketed.

In General.—The owner of a docketed judgment has a lien on all the real estate of his debtor within his county. Moore v. Jones, 226 N. C. 149, 36 S. E. (2d) 920, 922.

V. LOSS OF THE LIEN.

In General.—The lien of a judgment, created upon real estate by the provisions of this section, is for a period of ten years from the date of the rendition of the judgment and such lien ceases to exist at the end of that time, unless suspended in the manner set out in the statute. It is in the interest of public policy that this statue should be strictly construed. Cheshire v. Drake, 223 N. C. 577, 27 S. E. (2d) 627.

Lien Is Lost if Sale Not Made in Ten Years.—This section and § 1-306 clearly manifest the legislative intent that the process to enforce the judgment lien and to render it effectual must be completed by a sale within the prescribed time. Hence, it follows that the lien upon lands of a docketed judgment is lost by the lapse of ten years from the date of the docketing, and this notwithstanding execution was begun, but not completed, before the expiration of the ten years. The only office of an execution is to enforce the lien of the judgment by a sale of the lands, and this must be done before the lien is lost. The execution adds nothing by way of prolongation to the life of the lien. McCullen v. Durham, 229 N. C. 418, 50 S. E. (2d) 511.

Effect of § 45-28.—An execution sale held less than ten days before the expiration of ten years after the rendition of the judgment was held ineffective, since under former § 45-28, the sale under execution could "not be deemed to be closed under ten days," in order to afford opportunity for an increase in the bid, and thus the sale could not be consummated within the ten year period. The contentions that the sheriff's deed related back to the day of the sale, and that delay on the part of the sheriff in executing the deed or making formal return could not adversely affect the rights of the purchaser, were inapposite. McCullen v. Durham, 229 N. C. 418, 50 S. E. (2d) 511.

§ 1-240. Payment by one of several; transfer to trustee for payor.

Editor's Note.—For a discussion of this section in connection with Federal Rules of Civil Procedure, see 25 N. C. Law Rev. 245.

This Section Creates a New Right.—At common law no right of action for contribution existed between or among joint tort-feasors who were in pari delicto, thus the right is statutory, and its use necessarily depends upon the terms of this section. Godfrey v. Tidewater Power Co., 223 N. C. 647, 649, 27 S. E. (2d) 736.

Its Purpose.—The intent and purpose of this section is to permit a defendant, who has been sued in a tort action, to bring into the action for purpose of enforcing contribution, any joint tort-feasor, against whom the plaintiff could have originally brought suit in the same action. Wilson v. Massagee, 224 N. C. 705, 713, 32 S. E. (2d) 335.

The purpose of the statute is to permit defendants in tort actions to litigate mutual contingent liabilities before they have accrued, so that all matters in controversy growing out of the same subject of action may be settled in one action, though the plaintiff in the action may be thus delayed in securing his remedy. Evans v. Johnson, 225 N. C. 238, 34 S. E. (2d) 73.

But it was not the purpose and it is not the effect of this section to create a cause of action in contribution between joint tort-feasors when the lex loci delicti gives none. Charnock v. Taylor, 223 N. C. 360, 26 S. E. (2d) 911, 148 A. L. R. 1126.

Right Must be Enforced According to Form of Section.—The right to contribution comes from this section, and it is to be enforced according to the form of this section. Tarkington v. Rock Hill Printing, etc., Co., 230 N. C. 354, 53 S. E. (2d) 269.

What Must Be Alleged and Proved to Enforce Contribution.—Where a judgment has been obtained, arising out of a joint tort, and only one of the joint tort-feasors was a party and judgment against him alone, to enable such judgment debtor to recover, under this section, against the other joint tort-feasor, he must allege and prove, in an action de novo, the negligence of his alleged joint tort-feasor, the defendant, and his duty of contribution. Charlotte v. Cole, 223 N. C. 106, 25 S. E. (2d) 407.

Right Is Not One of Subrogation.—This section gives to one joint tort-feasor, who is sued, the right to bring in others jointly liable with him and to require them to contribute proportionately to the payment of any judgment which the plaintiff may recover, but this would not include the right to step into the plaintiff's shoes and prosecute any claim which he might have against them. The right sought to be enforced is one of contribution, and not one of subrogation. Tarkington v. Rock Hill Printing, etc., Co., 230 N. C. 354, 53 S. E. (2d) 269.

It Is Not Dependent on Plaintiff's Continued Right to Sue.—The right of one joint tort-feasor to enforce contribution against another is said to spring from the plaintiff's suit. This right of contribution, however, projects itself beyond the plaintiff's suit, and is not dependent upon the plaintiff's continued right to sue both or all the joint tort-feasors. Godfrey v. Tidewater Power Co., 223 N. C. 647, 27 S. E. (2d) 736, 149 A. L. R. 1183. It is the joint tort and common liability to suit which gives rise to the right to "enforce contribution" under this section. Tarkington v. Rock Hill Printing, etc., Co., 230 N. C. 354, 53 S. E. (2d) 269.

Enforcement of Right of Contribution after Payment of Judgment.—The right of contribution may be enforced after the liability to the injured party has been extinguished by payment of the judgment and its transfer to a trustee for the benefit of the paying judgment debtor. Godfrey v. Tidewater Power Co., 223 N. C. 647, 27 S. E. (2d) 736.

Assignment to Third Party Necessary to Claim Subrogation.—See Stewart v. Parker, 225 N. C. 551, 35 S. E. (2d) 615.

Plaintiff Cannot Be Compelled to Sue Joint Tort-Feasors.—In so far as plaintiff is concerned, when he has elected to sue only one of joint tort-feasors, the others are not necessary parties and plaintiff cannot be compelled to pursue them; nor can the original defendant avail himself of this section to compel plaintiff to join issue with a defendant he has elected not to sue. Original defendant cannot rely on the liability of the party brought in to the original plaintiff, but must recover, if at all, upon the liability of such party to him. Charnock v. Taylor, 223 N. C. 360, 26 S. E. (2d) 911, 148 A. L. R. 1126.

Original Defendant Cannot Bring in Injured Third Persons.—This section neither directly nor by implication authorizes the bringing in of persons who are apprehended to have been damaged or injured, at the convenience of the tort-feasor in determining the right to contribution in one trial. Fleming v. Carolina Power, etc., Co., 229 N. C. 397, 50 S. E. (2d) 45.

On Allegation That Plaintiff Was Joint Tort-Feasor.—This section provides that a tort-feasor sued by the injured person may bring in joint tort-feasors as parties defendant, but it does not authorize a party sued for negligent injury to join injured third persons upon its allegation that plaintiff was a joint tort-feasor in causing the calamity resulting in injury to himself and such third parties, and thus force such injured third parties to prosecute their claims in plaintiff's action. Fleming v. Carolina Power, etc., Co., 229 N. C. 397, 50 S. E. (2d) 45.

Presumption as to Authority of Attorney to Transfer Judgment.—Upon the transfer on the judgment docket of a

judgment by an attorney of record, acting under authority expressly granted by this section, nothing appearing to indicate that the attorney received less than full value, there is a presumption that such attorney acted within the scope of his authority, and the burden is on the party seeking to set the transfer aside to prove that no such authority existed. Harrington v. Buchanan, 224 N. C. 123, 29 S. E. (2d) 344.

Defendants May File Cross Action to Join Others as Joint Tort-Feasors.—

This section means that in an action arising out of a joint tort wherein judgment may be rendered against two or more persons or corporations, who are jointly and severally liable, and not all who are so jointly and severally liable as joint tort-feasors have been made parties defendant, those who are sued may at any time before judgment, upon motion, have the other such joint tort-feasors brought in and made parties defendant in order to determine and enforce contribution. Wilson v. Massagee, 224 N. C. 705, 710, 32 S. E. (2d) 335.

Burden Is on Original Defendant to Prove Cross Action.—Where plaintiff does not demand any relief against a codefendant joined by the original defendant as a joint tort-feasor, the burden is on the original defendant to prove his cross action for contribution, and upon motion of the codefendant for nonsuit on the cross action the evidence must be considered in the light most favorable to the original defendant upon that cause. Pascal v. Burke Transit Co., 229 N. C. 435, 50 S. E. (2d) 534.

Joint and Several Judgment in Favor of Plaintiff Held Error.—Where plaintiffs seeks no affirmative relief against a codefendant joined by the original defendant for the purpose of enforcing contribution against it as a joint tort-feasor, it is error for the court to enter joint and several judgments in favor of plaintiffs against both defendants upon the jury's finding that both were guilty of actionable negligence, since the liability of the codefendant is solely to the original defendant on its claim for contribution. Pascal v. Burke Transit Co., 229 N. C. 435, 50 S. E. (2d) 534.

Res Judicata.—The owner and driver of a car recovered judgment against the driver and owner of a truck for damages sustained in a collision upon verdict of the jury establishing, inter alia, that the plaintiff therein was not guilty of contributory negligence. Thereafter the passengers in the car sued the owner and driver of the truck for injuries sustained in the same collision. It was held that as between the parties thereto the prior judgment was res judicata on the question of whether the driver of the car was guilty of negligence contributing to the collision, and bars the right of the owner and driver of the truck from joining the driver of the car as a joint tort-feasor in the second action, § 1-240, notwithstanding that the plaintiffs in the second action were not parties thereto or bound by the judgment, and could have joined the driver of the car as a party defendant had they so elected. Tarkington v. Rock Hill Printing, etc., Co., 230 N. C. 354, 53 S. E. (2d) 269.

Interstate Commerce.—Where plaintiff sues a defendant under § 28-173, alleging that her intestate was killed by the negligence of the defendant, the defendant cannot join as a joint tort-feasor under this section, a railway company by which the plaintiff's intestate was employed in interstate commerce. Wilson v. Massagee, 224 N. C. 705, 709, 32 S. E. (2d) 335.

Cited in Godfrey v. Tidewater Power Co., 224 N. C. 657, 32 S. E. (2d) 27; McIntyre v. Monarch Elevator, etc., Co., 230 N. C. 539, 54 S. E. (2d) 45.

§ 1-246. Assignment of judgment to be entered on judgment docket, signed and witnessed.—No assignment of judgment shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor, or assignor, but from the entry of such assignment on the margin of the judgment docket opposite the said judgment, signed by the owner of said judgment, or his attorney under power of attorney or his attorney of record, and witnessed by the clerk or the deputy clerk of the superior court of the county in which said judgment is docketed: Provided, that when an assignment of judgment is duly executed by the owner or owners of the judgment and recorded in the office of the clerk of the superior court of the county in which the judgment is docketed and a specific reference thereto is made on the margin of the judgment docket opposite the judgment to be assigned, it shall operate as a complete and valid transfer and assignment of the judgment. (1941, c. 61; 1945, c. 154.)

Editor's Note.—
The 1945 amendment added the proviso.

Art. 24. Confession of Judgment.

§ 1-247. When and for what.—A judgment by confession may be entered without action either in or out of term, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this article.

A judgment by confession may be entered for alimony or for support of minor children, and when the same shall have been entered as provided by this article, such judgment shall be binding upon the defendant, and the failure of the defendant to make any payments, as required by such judgment, shall, upon proper cause shown to the court, subject him to such penalties as may be adjudged by the court as in any other case of contempt of its orders, subject to authority of the court to modify said judgment thereafter for proper cause shown as provided by law in case of adverse judgments in proceedings for such alimony or support. (Rev., s. 580; Code, s. 570; C. C. P., s. 325; 1947, c. 95; C. S. 623.)

Editor's Note.—The 1947 amendment added the second paragraph. The apparent purpose of the amendment is expressly to authorize a simplified method for converting an agreement between the parties into a judgment enforceable by contempt. Under prior case law, such an agreement, if made a part of a consent judgment in the sense that the judgment itself orders the payments to be made, can give rise to contempt proceedings; but if the consent judgment merely approves the agreement, without expressly ordering the payments to be made, it is enforceable only as a contract. 25 N. C. Law Rev. 389.

Art. 25. Submission of Controversy without Action.

§ 1-250. Submission, affidavit, and judgment.

Applied in Blades v. Norfolk Southern Ry. Co., 224 N. C. 32, 29 S. E. (2d) 148, with reference to sufficiency of deed to convey title; Prince v. Barnes, 224 N. C. 702, 32 S. E. (2d) 224; Schaeffer v. Haseltine, 228 N. C. 484, 46 S. E. (2d) 463.
Cited in State Distributing Corp. v. Travelers Indemnity Co., 224 N. C. 370, 30 S. E. (2d) 377 (dis. op.).

Art. 26. Declaratory Judgments.

§ 1-253. Courts of record permitted to enter declaratory judgments of rights, status and other legal relations.

In General.—
While proceedings under this article have been given a wide latitude, nevertheless they are not without limitation, and it can hardly be said the court is expected to lend its general equity jurisdiction to such proceedings. Brandis v. Trustees of Davidson College, 227 N. C. 329, 331, 41 S. E. (2d) 833.

Question of Insurer's Liability.—Insurer who issued liability policy insuring defendant's truck for "business-pleasure" use could invoke the provisions of Uniform Declaratory Judgment Act to determine whether the truck was being used at time of accident within exception clause of policy. Lumber Mut. Cas. Ins. Co. v. Wells, 225 N. C. 547, 35 S. E. (2d) 631.

Action to Determine Right to Easement.—An action to obtain a judicial declaration of plaintiffs' right to an easement appurtenant and by necessity over the lands of defendants is authorized by this article, and the superior court has jurisdiction, it not being a special proceeding to establish a cartway which must be instituted before the clerk. Carver v. Leatherwood, 230 N. C. 96, 52 S. E. (2d) 1.
Applied in Oxford Orphanage v. Kittrell, 223 N. C. 427,

27 S. E. (2d) 133; Williams v. Rand, 223 N. C. 734, 28 S. E. (2d) 247; In re Battle, 227 N. C. 672, 44 S. E. (2d) 212; Buffaloe v. Barnes, 226 N. C. 313, 38 S. E. (2d) 222; Patterson v. Brandon, 226 N. C. 89, 36 S. E. (2d) 717, 163 A. L. R. 1150; First Security Trust Co. v. Henderson, 226 N. C. 649, 39 S. E. (2d) 804; Williams v. Johnson, 228 N. C. 732, 47 S. E. (2d) 24; Ward v. Black, 229 N. C. 221, 49 S. E. (2d) 413.

§ 1-254. Courts given power of construction of all instruments.

In action by executor under Declaratory Judgment Act for construction of will and to determine validity of assignment of interest in legacy, motion to dismiss for want of jurisdiction denied where the controversy over the validity of assignment was originally brought into court by executor, as it is entitled to have matter determined in present proceeding. First Security Trust Co. v. Henderson, 226 N. C. 649, 39 S. E. (2d) 804.

Cited in First Security Trust Co. v. Henderson, 225 N. C. 567, 35 S. E. (2d) 694.

§ 1-255. Who may apply for a declaration.

A proceeding may not be maintained under this and other sections of this article by trustees under a will to invoke the general equitable powers of the court to authorize them to sell, mortgage or lease a part of the trust property for benefit and preservation of the trust, since such remedy goes far beyond a mere declaration of plaintiffs' rights or a mere obtaining of direction to plaintiffs to do or refrain from doing any act in their fiduciary capacity. Brandis v. Trustees of Davidson College, 227 N. C. 329, 41 S. E. (2d) 833. For comment upon the decision in this case, see 26 N. C. Law Rev. 69.

Applied in Citizens Nat. Bank v. Corl, 225 N. C. 96, 33 S. E. (2d) 613.

§ 1-256. Enumeration of declarations not exclusive.

The purpose of this section is to grant "declaratory relief" and remove uncertainties when properly presented. Brandis v. Trustees of Davidson College, 227 N. C. 329, 331, 41 S. E. (2d) 833.

§ 1-261. Jury trial.

Question of Insurer's Liability.—Where insurer alleged exclusion from liability on policy and insured alleged coverage, and coverage was conceded unless use of vehicle was within exception clause in policy, the issue of exclusion was an issue of fact which should have been determined by jury and rendering judgment on pleadings was error. Lumber Mut. Cas. Ins. Co. v. Wells, 225 N. C. 547, 35 S. E. (2d) 631.

Art. 27. Appeal.

§ 1-269. Certiorari, recordari, and supersedeas.

II. CERTIORARI.

B. General Consideration.

Substitute for Appeal.—

"As no appeal lay, a certiorari as a substitute therefor cannot be granted." State v. Todd, 224 N. C. 776, 32 S. E. (2d) 313, quoting Guilford County v. Georgia Co., 109 N. C. 310, 13 S. E. 861.

D. Requirements of Application.

Mere Allegation of Fraud Is Insufficient.—In Hunsucker v. Winborne, 223 N. C. 650, 657, 27 S. E. (2d) 817, it was held that conceding the complaint to be a petition for writ of certiorari to review the ruling of the Municipal Board of Control in respect to the sufficiency of the signatures to a petition to change the name of a town, it fails to make proper showing of merit, upon which alone certiorari will issue, since the mere allegation in a pleading that an act was induced by fraud is insufficient.

§ 1-271. Who may appeal.

Only the party aggrieved may appeal from the Superior Court to the Supreme Court. Watkins v. Grier, 224 N. C. 334, 30 S. E. (2d) 219.

Where no error is found on plaintiff's appeal from a judgment in defendant's favor, defendant's appeal on the ground that the entire proceeding was void will be dismissed, since only the party aggrieved may appeal. In re Westover Canal, 230 N. C. 91, 52 S. E. (2d) 225.

Appeals for Purposes of Delay.—One who challenges neither the proceeding nor the judgment below and appeals only for purposes of delay, is not the "party aggrieved" within the meaning of this section. Stephenson v. Watson, 226 N. C. 742, 40 S. E. (2d) 351.

Appeal by Garnishee and Delinquent Taxpayer.—Where a proceeding to garnishee funds in a bank account belonging to a delinquent taxpayer, under § 105-242, is dismissed for want of jurisdiction, neither the garnishee nor the alleged delinquent taxpayer is the "party aggrieved," within the meaning of this section and neither may prosecute an appeal. Gill v. McLean, 227 N. C. 201, 41 S. E. (2d) 514.

Where defendant was granted new trial in superior court on two of his exceptions, he could not have the rulings upon his other exceptions reviewed unless reversible error appeared on plaintiff's appeal, as defendant was not the "party aggrieved" within the meaning of this section. Starnes v. Tyson, 226 N. C. 395, 38 S. E. (2d) 211, 213.

§ 1-272. Appeal from clerk to judge.

Section Does Not Apply Where Judge and Clerk Have Concurrent Jurisdiction.—This section and §§ 1-273 and 1-274, regulating appeals from the clerk of the superior court to the judge, have no application in regard to appeals from orders and decrees in proceedings over which the judge of the superior court has concurrent jurisdiction. Moody v. Howell, 229 N. C. 198, 49 S. E. (2d) 233.

Review of Ruling Where Clerk Had Original Jurisdiction.—In order to entitle the judge of the Superior Court to review a ruling of the clerk in a matter in which the latter has original jurisdiction the procedure prescribed by this section must be followed. Muse v. Edwards, 223 N. C. 153, 25 S. E. (2d) 460.

An appeal from a void order of the clerk of the superior court cannot be dismissed as frivolous. In re Sale of Land of Sharpe, 230 N. C. 412, 53 S. E. (2d) 302.

§ 1-273. Clerk to transfer issues of fact to civil issue docket.

Cross Reference.—As to procedure where judge and clerk have concurrent jurisdiction, see note to § 1-272.

§ 1-274. Duty of clerk on appeal.

Cross Reference.—As to procedure where judge and clerk have concurrent jurisdiction, see note to § 1-272.

§ 1-276. Judge determines entire controversy; may recommit.

Judge May Determine Entire Controversy.—

Where the clerk of the superior court exceeds his authority or is without jurisdiction to make the decree, if the cause comes within the general jurisdiction of the superior court and invokes the proper exercise of its power, by virtue of this section the judge upon appeal may proceed to consider and determine the matter as if originally before him. McDaniel v. Leggett, 224 N. C. 806, 32 S. E. (2d) 602.

Appeal from Action of Clerk in Probate Proceedings.—Upon appeal to the superior court from action of the clerk taken in the exercise of his probate jurisdiction, the jurisdiction of the superior court is derivative, and this section does not apply. In re Will of Hine, 228 N. C. 405, 45 S. E. (2d) 526.

Thus where a clerk is without jurisdiction to make an order in probate proceedings, by reason of the filing of a caveat and the transfer of the cause to the civil issue docket, the error is not cured by the order of the resident judge of the superior court who heard the motion on appeal and affirmed the order of the clerk. Id.

Applied in Garner v. Phillips, 229 N. C. 160, 47 S. E. (2d) 845.

§ 1-277. Appeal from superior court judge.

II. APPEAL IN GENERAL.

B. From What Decisions, Orders, etc., Appeal Lies.

Final Judgment.—

In accord with 2nd paragraph in original. See Privette v. Privette, 230 N. C. 52, 51 S. E. (2d) 925.

Interlocutory Orders.—

In accord with 2nd paragraph in original. See Privette v. Privette, 230 N. C. 52, 51 S. E. (2d) 925.

In accord with 8th paragraph in original. See Privette v. Privette, 230 N. C. 52, 51 S. E. (2d) 925.

Motions to Strike Allegations from Pleadings and Motions.—While the supreme court may entertain an appeal from an order denying a motion to strike allegations from the pleadings, since the pleadings are read to the jury and chart the course of the trial and determine in large measure the competency of the evidence, and therefore denial of the motion may impair or imperil substantial rights, this reasoning does not apply to motions to strike

allegations from a motion before the court, since no substantial right is likely to be impaired or seriously imperiled by the denial of the motion. Privette v. Privette, 230 N. C. 52, 51 S. E. (2d) 925.

Exceptions to and Motion to Strike Referee's Report.—An appeal from the overruling of exceptions to the report of the referee and to the overruling of the motion that the entire evidence reported by the referee be stricken because not signed by the witnesses, § 1-193, will be dismissed as premature. Bakami Constr., etc., Co. v. Thomas, 230 N. C. 516, 53 S. E. (2d) 519.

C. What Supreme Court Will Consider.

Moot Question.—

Appellate courts will not hear and decide what may prove to be only a moot case, or review a judgment at the instance of appellants who represent that compliance will be forthcoming only in the event of a favorable decision. In re Morris' Custody, 225 N. C. 48, 50, 33 S. E. (2d) 243.

§ 1-279. When appeal taken.

Applied in Mason v. Moore County Board of Com'rs, 229 N. C. 626, 51 S. E. (2d) 6.

§ 1-280. Entry and notice of appeal.

Record Must Show Appeal by Party Seeking Review.—Appeal by the party seeking review is necessary to give the supreme court jurisdiction, and this fact must appear by appeal entry of record, and in the absence of appeal entry of record the purported appeal must be dismissed. The supreme court is without power to correct the record, since it can have no jurisdiction of the cause, nor may counsel correct the record proper by stipulation. Mason v. Moore County Board of Com'rs, 229 N. C. 626, 51 S. E. (2d) 6.

§ 1-282. Case on appeal; statement, service and return.

II. GENERAL CONSIDERATIONS—COUNTERCASE.

Where Record Constitutes Case on Appeal.—Upon exception and appeal from judgment denying a motion upon facts found and incorporated in the judgment, the record constitutes the case on appeal, and appellant is not required to serve a statement of case on appeal, and motion to dismiss for his failure to do so will be denied. Privette v. Allen, 227 N. C. 164, 41 S. E. (2d) 364.

When Case on Appeal Essential.—In Russos v. Bailey, 228 N. C. 783, 47 S. E. (2d) 22, it is said: "Exceptions which point out alleged errors occurring during the progress of a trial in which oral testimony is offered can be presented only through a 'case on appeal' or 'case agreed' * * * This is the sole statutory means of vesting this court with jurisdiction to hear the appeal." Western North Carolina Conference v. Talley, 229 N. C. 1, 47 S. E. (2d) 467.

Applied in State v. Cannon, 227 N. C. 336, 42 S. E. (2d) 343; Hoke v. Atlantic Greyhound Corp., 227 N. C. 374, 42 S. E. (2d) 407.

VI. RELIEF GRANTED.

Exceptions Relating to Oral Testimony Treated as Nullity.—Where there is no case on appeal, exceptions relating to the oral testimony must be treated as a nullity, leaving only the exception to the judgment, which presents the sole question whether upon the facts found and admitted the court correctly applied the law. Russos v. Bailey, 228 N. C. 783, 47 S. E. (2d) 22.

Court Can Reverse Only for Error on Face of Record.—Where there is no proper statement of case on appeal the supreme court can determine only whether there is error on the face of the record proper. Western North Carolina Conference v. Talley, 229 N. C. 1, 47 S. E. (2d) 467.

§ 1-283. Settlement of case on appeal.

Appellant's Duty When Case Settled.—

Where the trial court adopts appellant's statement of case with modifications, appellant is under duty to have the statement of case as modified redrafted and submitted to the judge for signature, and upon failure to do so there is no "case on appeal." Western North Carolina Conference v. Talley, 229 N. C. 1, 47 S. E. (2d) 467.

Duty of Judge.—

The trial judge alone has jurisdiction to modify, amend or strike out entries of appeal or extension of time for service of case on appeal and countercase, or motion to strike out purported case on appeal. Hoke v. Atlantic Greyhound Corp., 227 N. C. 374, 42 S. E. (2d) 407.

He Cannot Settle Case by Anticipatory Order.—When oral evidence is offered, the judge cannot settle the case on appeal by an anticipatory order. Russos v. Bailey, 228 N. C. 783, 47 S. E. (2d) 22; Western North Carolina Conference v. Talley, 229 N. C. 1, 47 S. E. (2d) 467.

A recitation by the court in the entries of appeal that the evidence should be included in the case on appeal is insufficient as a settlement of case on appeal where oral evidence has been offered, since such anticipatory order cannot settle or determine what evidence was adduced at the hearing. Russos v. Bailey, 228 N. C. 783, 47 S. E. (2d) 22.

Judge May Act Only Where Counsel Disagree.—The trial court is without authority to settle a case on appeal until and unless there is a disagreement of counsel. Russos v. Bailey, 228 N. C. 783, 47 S. E. (2d) 22.

Failure of Judge to Settle Case.—Under this section, the judge is given power to settle the case on appeal, and ordinarily, the only supervision which may be exercised over the judge charged with this duty is to see that it is performed. Lindsay v. Brawley, 226 N. C. 468, 38 S. E. (2d) 528, 530.

Effect of Absence of Judge from District.—

In accord with 1st paragraph in original. See Hoke v. Atlantic Greyhound Corp., 227 N. C. 374, 42 S. E. (2d) 407.

Retirement of Judge.—

In accord with 1st paragraph in original. See Hoke v. Atlantic Greyhound Corp., 227 N. C. 374, 42 S. E. (2d) 407.

Errors and omissions in the case on appeal are corrected upon certiorari and cannot be brought upon exception taken at the time the case is settled. Lindsay v. Brawley, 226 N. C. 468, 38 S. E. (2d) 528, 530.

Applied in State v. Cannon, 227 N. C. 336, 42 S. E. (2d) 343.

§ 1-284. Clerk to prepare transcript.

Motion to Dismiss Allowed.—On appeal to supreme court from order dismissing motion to have respondent subjected to contempt order for refusal to pay amounts due under prior judgment, where pleadings in action in which judgment was entered were not brought up as a part of the record and such pleadings were a necessary part of the record as determining the character of the action and jurisdiction and power of the court, motion to dismiss appeal was allowed. Campbell v. Campbell, 226 N. C. 653, 39 S. E. (2d) 812.

Cited in Lindsay v. Brawley, 226 N. C. 468, 38 S. E. (2d) 528.

§ 1-288. Appeals in forma pauperis; clerk's fees.

The 1937 amendment to this section does not permit the filing of an affidavit of the party appealing or certificate of counsel when no such certificate or affidavit was filed within the time prescribed by this section. Clark v. Clark, 225 N. C. 687, 689, 36 S. E. (2d) 261.

Purpose of Section.—The statutory provision for appeals in forma pauperis is to preserve the right of appeal to those who, by reason of their poverty, are unable to make a reasonable deposit or give security for the payment of costs incurred on appeal to the supreme court. It is not to be used as a subterfuge to escape payment of costs which otherwise might be taxed against the appellant. Perry v. Perry, 230 N. C. 515, 53 S. E. (2d) 457.

Section Mandatory.—

Requirements of this section, relating to appeals to supreme court from the superior court in a civil action, without making the deposit or giving the security required by law for such appeals, are mandatory and jurisdictional, and unless this section is complied with, the supreme court will take no cognizance of the case, except to dismiss it. Clark v. Clark, 225 N. C. 687, 36 S. E. (2d) 261.

The requirements of this section, allowing appeals in forma pauperis, are mandatory, not directory, and a failure to comply with the requirements deprives the supreme court of any appellate jurisdiction. Williams v. Tillman, 229 N. C. 434, 50 S. E. (2d) 33.

Affidavit Is Essential.—Where the order allowing the appeal in forma pauperis is not supported by the statutory affidavit, there can be no authority for granting the appeal in forma pauperis, and the supreme court acquires no jurisdiction and can take no cognizance of the case except to dismiss it from the docket. Williams v. Tillman, 229 N. C. 434, 50 S. E. (2d) 33.

Right of Party to Appeal In Forma Pauperis. — On the hearing of an order to show cause why defendant should not be attached for contempt for willful failure to comply with an order that he make monthly subsistence payments to his wife, the court entered an order upon its finding that defendant was earning $300.00 per month, and permitted defendant to appeal from the order in forma pauperis. The cause was remanded to the end that the court may determine whether defendant was in fact entitled to

appeal in forma pauperis. Perry v. Perry, 230 N. C. 515, 53 S. E. (2d) 457.

§ 1-294. Scope of stay; security limited for fiduciaries.

An appeal from an interlocutory order stays all further proceedings in the lower court in regard to matters relating to the specific order appealed from, but the action remains in the lower court and it may proceed upon any other matter included in the action upon which action was reserved or which was not affected by the judgment appealed from. Safie Mfg. Co. v. Arnold, 228 N. C. 375, 45 S. E. (2d) 577.

§ 1-299. Appeal from justice heard de novo; judgment by default; appeal dismissed.

II. GENERAL CONSIDERATIONS.

Trial De Novo.—
When an appeal is taken from the judgment of a justice of the peace to a superior court, it shall be reheard, that is, heard de novo. Brake v. Brake, 228 N. C. 609, 46 S. E. (2d) 643.

On appeal to the Superior Court from a judgment of a justice of the peace, defendants are entitled to a trial de novo, even when they are called and fail to appear. Globe Poster Corp. v. Davidson, 223 N. C. 212, 25 S. E. (2d) 557.

V. DISMISSAL FOR FAILURE TO DOCKET—RECORDARI.

When Appeal Not Dismissed.—
The statute relating to the Greensboro municipal-county court prescribed that appeals therefrom should be governed by the rules governing appeals from justices of the peace. Through no fault of appellant, its appeal was not filed within ten days after notice of appeal in open court, but was filed during the next succeeding term of the superior court. If it had been filed within the ten-day period, it would not have been on the superior court docket for ten days prior to the beginning of the term. It was held that appellee is not entitled to dismissal of the appeal at such term of the superior court notwithstanding appellant's failure to apply for recordari. Starr Elec. Co. v. Lipe Motor Lines, 229 N. C. 86, 47 S. E. (2d) 848.

§ 1-300. Appeal from justice docketed for trial de novo.

Cited in Starr Elec. Co. v. Lipe Motor Lines, 229 N. C. 86, 47 S. E. (2d) 848.

Art. 28. Execution.

§ 1-302. Judgment enforced by execution.

The issuance of an execution does not prolong the life of a lien, nor stop the running of the statute of limitation. Cheshire v. Drake, 223 N. C. 577, 583, 27 S. E. (2d) 627.

§ 1-305. Clerk to issue, in six weeks; penalty.

Payment of Fees, etc.—
In accord with original. See State Board of Education v. Gallop, 227 N. C. 599, 606, 44 S. E. (2d) 44.

§ 1-306. Enforcement as of course.

Sale Must Be Completed within Ten Years.—This section and § 1-234 clearly manifest the legislative intent that the process to enforce the judgment lien and to render it effectual must be completed by a sale within the prescribed time. Hence, it follows that the lien upon lands of a docketed judgment is lost by the lapse of ten years from the date of the docketing, and this notwithstanding execution was begun, but not completed, before the expiration of the ten years. The only office of an execution is to enforce the lien of the judgment by a sale of the lands, and this must be done before the lien is lost. The execution adds nothing by way of prolongation to the life of the lien. McMullen v. Durham, 229 N. C. 418, 50 S. E. (2d) 511.

Execution Sale Held Less than Ten Days before Expiration of Ten Years.—See notes to § 1-234.

Effect of Enjoining Execution.—A party may not enjoin execution on a judgment until the statute of limitations has run and then plead the bar of the statute against the judgment. Holden v. Totten, 228 N. C. 204, 44 S. E. (2d) 874.

§ 1-307. Issued from and returned to court of rendition.—Executions and other process for the enforcement of judgments can issue only from the court in which the judgment for the enforcement of the execution or other final process was rendered; and the returns of executions or other final process shall be made to the court of the county from which it issued. In all cases prior to the first day of March, one thousand nine hundred and forty-five, where a judgment has been rendered in the superior court of one county and the transcript thereof has been docketed in the office of the clerk of the superior court of some other county or counties, all executions heretofore issued on such docketed transcript of judgment and all homestead proceedings, execution sales, judicial sales and assignments related thereto and based thereon are hereby declared to be lawful, legal and binding upon all purchasers, judgment debtors, judgment creditors, assignors and assignees, and on all parties to the original action and on all parties to or affected by any proceedings related to or based upon such execution, and all such sales, purchases, proceedings and assignments are hereby validated. (Rev., s. 623; Code, s. 444; 1871-2, c. 74; 1881, c. 75; 1945, c. 773; C. S. 669.)

Editor's Note.—The 1945 amendment added the second sentence.

§ 1-310. When dated and returnable.

By this statute the legislature has fixed the life of an execution. It begins on the day of the issuance of the execution, and by limitation terminates ninety days from the date of it. It may not be returned in less than forty days but must be returned in ninety days. Hence, under this statute an execution should be made returnable "not less than forty nor more than ninety days" from its date. And while failure to follow the statute makes an execution irregular, the life of it as fixed by the statute is not affected. Gardner v. McDonald, 223 N. C. 555, 557, 27 S. E. (2d) 522.

Applied in State Board of Education v. Gallop, 227 N. C. 599, 44 S. E. (2d) 44.

§ 1-311. Against the person.

Provided, that where the facts are found by a jury, the verdict shall contain a finding of facts establishing the right to execution against the person; and where jury trial is waived and the court finds the facts, the court shall find facts establishing the right to execution against the person. (Rev., s. 625; Code, s. 447; 1891, c. 541, s. 2; C. C. P., s. 260; 1947, c. 781; C. S. 673.)

Editor's Note.—The 1947 amendment added the above proviso at the end of this section. As the rest of the section was not affected by the amendment it is not set out. The 1947 amendment is apparently simply a recognition of existing case law. 25 N. C. Law Rev. 390.

§ 1-321. Entry of returns on judgment docket; penalty.

Applied in State Board of Education v. Gallop, 227 N. C. 599, 44 S. E. (2d) 44.

§ 1-324: Repealed by Session Laws 1949, c. 719, s. 2.

Editor's Note.—Section 6 of the repealing act made it effective Jan. 1, 1950. The repealed section had been amended by chapter 781 of 1947 Session Laws.

Art. 29. Execution and Judicial Sales.

§§ 1-325 to 1-328: Repealed by Session Laws 1949, c. 719, s. 2.

Editor's Note.—Section 6 of the repealing act made it effective Jan. 1, 1950.

§ 1-329: Transferred to § 1-339.72 by Session Laws 1949, c. 719, s. 3.

Editor's Note.—The transferring act is effective as of Jan. 1, 1950.

§ 1-330: Repealed by Session Laws 1949, c. 719, s. 2.

Editor's Note.—Section 6 of the repealing act made it effective Jan. 1, 1950.

§ 1-331: Transferred to § 1-339.73 by Session Laws 1949, c. 719, s. 3.

Editor's Note.—The transferring act is effective as of Jan. 1, 1950.

§ 1-332: Transferred to § 1-339.74 by Session Laws 1949, c. 719, s. 3.

Editor's Note.—The transferring act is effective as of Jan. 1, 1950.

§§ 1-333, 1-334: Repealed by Session Laws 1949, c. 719, s. 2.

Editor's Note.—Section 6 of the repealing act made it effective Jan. 1, 1950.

§ 1-335: Transferred to § 1-339.75 by Session Laws 1949, c. 719, s. 3.

Editor's Note.—The transferring act is effective as of Jan. 1, 1950.

§ 1-336: Repealed by Session Laws 1949, c. 719, s. 2.

Editor's Note.—Section 6 of the repealing act made it effective Jan. 1, 1950.

§ 1-337: Transferred to § 1-339.49 by Session Laws 1949, c. 719, s. 2.

Editor's Note.—The transferring act is effective as of Jan. 1, 1950.

§ 1-338: Transferred to § 1-339.50 by Session Laws 1949, c. 719, s. 2.

Editor's Note.—The transferring act is effective as of Jan. 1, 1950.

§ 1-339: Repealed by Session Laws 1949, c. 719, s. 2.

Editor's Note.—Section 6 of the repealing act made it effective Jan. 1, 1950.

Art. 29A. Judicial Sales.

Part 1. General Provisions.

§ 1-339.1. Definitions.—(a) A judicial sale is a sale of property made pursuant to an order of a judge or clerk in an action or proceeding in the superior court, including a sale pursuant to an order made in an action in court to foreclose a mortgage or deed of trust, but is not

(1) A sale made pursuant to a power of sale
   a. Contained in a mortgage, deed of trust, or conditional sale contract, or
   b. Granted by statute with respect to a mortgage, deed of trust, or conditional sale contract, or

(2) A resale ordered with respect to any sale described in subsection (a) (1), where such original sale was not held under a court order, or

(3) An execution sale, or

(4) A sale ordered in a criminal action, or

(5) A tax foreclosure sale, or

(6) A sale made pursuant to article 4 of chapter 35 of the General Statutes, relating to sales of estates held by the entireties when one or both spouses are mentally incompetent, or

(7) A sale made in the course of liquidation of a bank pursuant to G. S. § 53-20, or

(8) A sale made in the course of liquidation of an insurance company pursuant to article 17A of chapter 58 of the General Statutes, or

(9) Any other sale the procedure for which is specially provided by any statute other than this article.

(b) As hereafter used in this article, "sale" means a judicial sale. (1949, c. 719, s. 1.)

Editor's Note.—Section 6 of the act inserting this article makes it effective as of Jan. 1, 1950. Section 4 of the act provides that it shall not apply to any judicial sale when the original order of sale has been issued prior to such effective date, and § 5 provides that the present law shall remain in effect for the completion of judicial sales to which the act, under § 4, does not apply.

For a brief discussion of this article, see 27 N. C. Law Rev. 479.

§ 1-339.2. Application of Part 1.—The provisions of Part 1 of this article apply to both public and private sales except where otherwise indicated. (1949, c. 719, s. 1.)

§ 1-339.3. Application of article to sale ordered by clerk; by judge; authority to fix procedural details.—(a) The procedure prescribed by this article applies to all sales ordered by a clerk of the superior court.

(b) The procedure prescribed by this article applies to all sales ordered by a judge of the superior court, except that the judge having jurisdiction may, upon a finding and a recital in the order of sale of the necessity or advisability thereof, vary the procedure from that herein prescribed, but not inconsistently with G. S. § 1-339.6 restricting the place of sale of real property, and not inconsistently with G. S. § 1-339.27 (a) and G. S. § 1-339.36 requiring that a resale be ordered when an upset bid is submitted.

(c) The judge or clerk of the superior court having jurisdiction has authority to fix and determine all necessary procedural details with respect to sales in all instances in which this article fails to make definite provisions as to such procedure. (1949, c. 719, s. 1.)

§ 1-339.4. Who may hold sale.—An order of sale may authorize the persons designated below to hold the sale:

(1) In any proceeding, a commissioner specially appointed therefor; or

(2) In a proceeding to sell property of a decedent, the administrator, executor or collector of such decedent's estate;

(3) In a proceeding to sell property of a minor, the guardian of such minor's estate;

(4) In a proceeding to sell property of an incompetent, the guardian or trustee of such incompetent's estate;

(5) In a proceeding to sell property of an absent or missing person, the administrator, collector, conservator, or guardian of the estate of such absent or missing person;

(6) In a proceeding to foreclose a deed of trust, the trustee named in the deed of trust;

(7) In a receivership proceeding, the receiver. (1949, c. 719, s. 1.)

§ 1-339.5. Days on which sale may be held.—A sale may be held on any day except Sunday. (1949, c. 719, s. 1.)

§ 1-339.6. Place of public sale.—(a) Every public sale of real property shall be held in the county where the property is situated unless the property consists of a single tract situated in two or more counties.

(b) A public sale of a single tract of real property situated in two or more counties may be held

in any one of the counties in which any part of the tract is situated. For the purposes of this section, a "single tract" means any tract which has a continuous boundary, regardless of whether parts thereof may have been acquired at different times or from different persons, or whether it may have been subdivided into separate units or lots or whether it is sold as a whole or in parts.

(c) A public sale of personal property may be held at any place in the state designated in the order. (1949, c. 719, s. 1.)

§ 1-339.7. Presence of personal property at public sale required.—The person holding a public sale of personal property shall have the property present at the place of sale unless the order of sale provides otherwise as authorized by G. S. § 1-339.13 (c). (1949, c. 719, s. 1.)

§ 1-339.8. Public sale of separate tracts in different counties.—(a) When an order of public sale directs the sales of separate tracts of real property situated in different counties, exclusive jurisdiction over such sale remains in the superior court of the county where the proceeding, in which the order of sale was issued, is pending, but there shall be a separate advertisement, sale and report of sale with respect to the property in each county. In any such sale proceeding, the clerk of the superior court of the county where the original order of sale was issued, has jurisdiction with respect to the resale of separate tracts of property situated in other counties as well as in the clerk's own county, and an upset bid may be filed only with such clerk, except in those cases where the judge retains resale jurisdiction pursuant to G. S. § 1-339.27.

(b) The report of sale with respect to all sales of separate tracts situated in different counties shall be filed with the clerk of the superior court of the county in which the order of sale was issued, and is not required to be filed in any other county.

(c) The sale, and each subsequent resale, or each such separate tract shall be subject to a separate upset bid; and to the extent deemed necessary by the judge or clerk of the superior court of the county where the original order of sale was issued, the sale of each tract, after an upset bid thereon, shall be treated as a separate sale for the purpose of determining the procedure applicable thereto.

(d) When real property is sold in a county other than the county where the proceeding, in which the sale was ordered, is pending, the person authorized to hold the sale shall cause a certified copy of the order of sale to be recorded in the office of the register of deeds of the county where such property is situated. (1949, c. 719, s. 1.)

§ 1-339.9. Sale as a whole or in parts.—(a) When real property to be sold consists of separate lots or other units or when personal property consists of more than one article, the judge or clerk of the superior court having jurisdiction may direct specifically

(1) That it be sold as a whole, or

(2) That it be sold in designated parts, or

(3) That it be offered for sale by each method, and then sold by the method which produces the highest price.

(b) When real property to be sold has not been subdivided but is of such nature that it may be advantageously subdivided for sale, the judge or clerk having jurisdiction may authorize the subdivision thereof and the dedication to the public of such portions thereof as are necessary or advisable for public highways, streets, alleys, or other public purposes.

(c) When an order of sale of such real or personal property as is described in subsection (a) of this section makes no specific provision for the sale of the property as a whole or in parts, the person authorized to make the sale has authority in his discretion to sell the property by whichever method described in subsection (a) of this section he deems most advantageous. (1949, c. 719, s. 1.)

§ 1-339.10. Bond of person holding sale.—(a) Whenever a commissioner specially appointed or a trustee in a deed of trust is ordered to sell property, the judge or clerk of the superior court having jurisdiction

(1) May in any case require the commissioner or trustee, before receiving the proceeds of the sale, to furnish bond to cover such proceeds, and

(2) Shall require the commissioner or trustee to furnish such bond when the commissioner or trustee is to hold the proceeds of the sale other than for immediate disbursement upon confirmation of the sale.

(b) Whenever any administrator or collector of a decedent's estate, or guardian or trustee of a minor's or incompetent's estate, or administrator, collector, conservator or guardian of an absent or missing person's estate, is ordered to sell property, the judge or clerk having jurisdiction shall require such fiduciary, before receiving the proceeds of the sale, to furnish bond or to increase his then existing bond, to cover such proceeds.

(c) Whenever an executor is ordered to sell real property, the judge or clerk having jurisdiction shall require such executor, before receiving the proceeds of the sale, to furnish bond to cover such proceeds, unless the will provides otherwise, in which case the judge or clerk may require such bond.

(d) Whenever a receiver is ordered to sell real property, the judge having jurisdiction may, when he deems it advisable, require the receiver to furnish bond, or to increase his then existing bond, to cover such proceeds.

(e) The bond required by this section need not be furnished when the property is to be sold by a duly authorized trust company acting as commissioner or fiduciary.

(f) The bond shall be executed by one or more sureties and shall be subject to the approval of the judge or clerk having jurisdiction.

(g) If the bond is to be executed by personal sureties, the amount of the bond shall be double the amount of the proceeds of the sale to be received by the commissioner or fiduciary, if such amount can be determined in advance, and, if not, such amount as the judge or clerk may determine to be approximately double the amount of the proceeds to be received. If the bond is to be executed by a duly authorized surety company, the amount of the bond shall be one and one-fourth times the amount of the proceeds determined as set out in this subsection.

(h) The bond shall be payable to the state of North Carolina for the use of the parties in interest. A bond furnished by a commissioner or by a trustee in a deed of trust shall be conditioned that the principal in the bond shall comply with the orders of the court made in the proceeding with respect to the funds received and shall properly account for the proceeds of the sale received by him. A bond furnished by any other fiduciary shall be conditioned as required by law for the original bond required, or which might have been required, of such fiduciary at the time of his qualification.

(i) The premium on any bond furnished pursuant to this section is a part of the costs of the proceeding, to be paid out of the proceeds of the sale. (1949, c. 719, s. 1.)

§ 1-339.11. Compensation of person holding sale.—(a) If the person holding a sale is a commissioner specially appointed or a trustee in a deed of trust, the judge or clerk of the superior court having jurisdiction shall fix the amount of his compensation and order the payment thereof out of the proceeds of the sale.

(b) If the person holding a sale is any other person, the judge or clerk may, but is not required to, fix his compensation and order the payment thereof out of the proceeds of the sale; when compensation is not fixed in this manner, compensation may be fixed and paid in the usual manner provided with respect to such fiduciary for receiving and disbursing funds. (1949, c. 719, s. 1.)

§ 1-339.12. Clerk's authority to compel report or accounting; contempt proceeding.—Whenever any person fails to file any report or account, as provided by this article, or files an incorrect or incomplete report or account, the clerk of the superior court, having jurisdiction, on his own motion or on motion of any interested party, may issue an order directing such person to file a correct and complete report or account within twenty days after service of the order on him. If such person fails to comply with the order, the clerk may issue an attachment against him for contempt, and may commit him to jail until he files such correct and complete report or account. (1949, c. 719, s. 1.)

Part 2. Procedure for Public Sales of Real and Personal Property.

§ 1-339.13. Public sale; order of sale.—(a) Whenever a public sale is ordered, the order of sale shall

(1) Designate the person authorized to hold the sale;

(2) Direct that the property be sold at public auction to the highest bidder;

(3) Describe real property to be sold, by reference or otherwise, sufficiently to identify it;

(4) Describe personal property to be sold, by reference or otherwise, sufficiently to indicate its nature and quantity;

(5) Designate, consistently with G. S. § 1-339.6, the county and the place therein at which the sale is to be held; and

(6) Prescribe the terms of sale, specifying the amount of the cash deposit, if any, to be made by the highest bidder at the sale.

(b) The order of public sale may also, but is not required to

(1) State the method by which the property shall be sold, pursuant to G. S. § 1-339.9;

(2) Direct any posting of the notice of sale or any advertisement of the sale, in addition to that required by G. S. § 1-339.17 in the case of real property or G. S. § 1-339.18 in the case of personal property, which the judge or clerk of the superior court deems advantageous.

(c) The order of public sale may provide that personal property need not be present at the place of sale when the nature, condition or use of the property is such that the judge or clerk ordering the sale deems it impractical or inadvisable to require the presence of the property at the sale. In such event, the order shall provide that reasonable opportunity be afforded prospective bidders to inspect the property prior to the sale, and that notice as to the time and place for inspection shall be set out in the notice of sale. (1949, c. 719, s. 1.)

§ 1-339.14. Public sale; judge's approval of clerk's order of sale.—An order of public sale of personal property in which a minor or incompetent has an interest, which is made by a clerk of the superior court, shall not be effective, except in the case of perishable property as provided by G. S. § 1-339.19, unless and until such order is approved by the resident judge or the judge regularly holding the courts of the district. (1949, c. 719, s. 1.)

§ 1-339.15. Public sale; contents of notice of sale.—The notice of public sale shall

(1) Refer to the order authorizing the sale;

(2) Designate the date, hour and place of sale;

(3) Describe real property to be sold, by reference or otherwise, sufficiently to identify it, and may add such further description as will acquaint bidders with the nature and location of the property;

(4) Describe personal property to be sold sufficiently to indicate its nature and quantity, and may add such further description as will acquaint bidders with the nature of the property;

(5) State the terms of the sale, specifying the amount of the cash deposit, if any, to be made by the highest bidder at the sale; and

(6) Include any other provisions required by the order of sale to be included therein. (1949, c. 719, s. 1.)

§ 1-339.16. Public sale; time for beginning advertisement.—An order of sale may provide for the beginning of the advertisement of sale at any time after the order is issued. If the order does not specify such time, the advertisement may be begun at any time after the order is issued. (1949, c. 719, s. 1.)

§ 1-339.17. Public sale; posting and publishing notice of sale of real property.—(a) The notice of public sale of real property shall

(1) Be posted, at the courthouse door in the county in which the property is situated, for thirty days immediately preceding the sale,

(2) And in addition thereto,

a. If a newspaper qualified for legal advertising is published in the county, the notice shall be published in such

a newspaper once a week for at least four successive weeks, but

b. If no such newspaper is published in the county, the notice shall be posted at three other public places in the county for thirty days immediately preceding the sale.

(b) When the notice of public 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 not be more than seven days preceding the date of sale.

(c) When the real property to be sold is situated in more than one county, the provisions of subsections (a) and (b) shall be complied with in each county in which any part of the property is situated.

(d) In addition to the foregoing, the notice of public sale shall be otherwise posted or the sale shall be otherwise advertised as may be required by the judge or clerk pursuant to the provisions of G. S. § 1-339.13 (b) (2). (1949, c. 719, s. 1.)

§ 1-339.18. Public sale; posting notice of sale of personal property.—(a) The notice of public sale of personal property, except in the case of perishable property as provided by G. S. § 1-339.19, shall be posted, at the courthouse door, in the county in which the sale is to be held, for ten days immediately preceding the date of sale.

(b) In addition to the foregoing, the notice of public sale shall be otherwise advertised as may be required by the judge or clerk of the superior court pursuant to the provisions of G. S. § 1-339.13 (b) (2). (1949, c. 719, s. 1.)

§ 1-339.19. Public sale; exception; perishable property.—If personal property to be sold at public sale is determined by the judge or clerk of the superior court having jurisdiction to be perishable property because subject to rapid deterioration, he may order the sale thereof to be held at such time and place and upon such notice to be given in such manner and for such length of time as he deems advisable. The order of sale of such perishable property of a minor or incompetent when made by the clerk need not be approved by the judge. Confirmation of any sale of such perishable property is not necessary unless required by the order of sale. (1949, c. 719, s. 1.)

§ 1-339.20. Public sale; postponement of sale.—(a) A person authorized to hold a public sale may postpone the sale to a day certain not later than six days, exclusive of Sunday, after the original date for the sale

(1) When there are no bidders, or

(2) When, in his judgment, the number of prospective bidders at the sale is substantially decreased by inclement weather or by any casualty, or

(3) When there are so many other sales advertised to be held at the same time and place as to make it inexpedient and impracticable, in his judgment, to hold the sale on that day, or

(4) When he is unable to hold the sale because of illness or for other good reason, or

(5) When other good cause exists.

(b) Upon postponement of public sale the person authorized to hold the 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. § 1-339.17 in the case of real property or G. S. § 1-339.18 in the case of personal property, a notice of the postponement.

(c) The posted notice of postponement shall

(1) State that the sale is postponed,

(2) State the hour and date to which the sale is postponed,

(3) State the reason for the postponement, and

(4) Be signed by the person authorized to hold the sale, or by his agent or attorney.

(d) If a public sale is not held at the time fixed therefor and is not postponed as provided by this section, or if a postponed sale is not held at the time fixed therefor, the person authorized to make the sale shall report the facts with respect thereto to the judge or clerk of the superior court having jurisdiction, who shall thereupon make an order for the public sale of the property to be held at such time and place and upon such notice to be given in such manner and for such length of time as he deems advisable. (1949, c. 719, s. 1.)

§ 1-339.21. Public sale; time of sale.—(a) A public sale shall begin at the time designated in the notice of sale or as soon thereafter as practicable, but not later than one hour after the time fixed therefor unless it is delayed by other sales held at the same place.

(b) No public sale shall commence before 10:00 o'clock A. M. or after 4:00 o'clock P. M.

(c) No public sale shall continue after 4:00 o'clock P. M., except that in cities or towns of more than 5000 inhabitants, as shown by the most recent federal census, sales of personal property may continue until 10:00 o'clock P. M. (1949, c. 719, s. 1.)

§ 1-339.22. Public sale; continuance of uncompleted sale.—A public sale commenced but not completed within the time allowed by G. S. § 1-339.21 shall be continued by the person holding the sale to a designated time between 10:00 o'clock A. M. and 4:00 o'clock P. M. the next following day, other than Sunday. In case such continuance becomes necessary, the person holding the sale shall publicly announce the time to which the sale is continued. (1949, c. 719, s. 1.)

§ 1-339.23. Public sale; when confirmation of sale of personal property necessary; delivery of property; bill of sale.—(a) When any person interested as a creditor, legatee, distributee, or otherwise, in the proceeds of a public sale of personal property, objects at the sale to the completion of the sale of any article of property on account of the insufficiency of the amount bid, title to such property shall not pass and possession of the property shall not be delivered until the sale of such property is reported and is confirmed by the judge or clerk of the superior court having ju-

risdiction; but such objection to the completion of the sale of any article of property shall not prevent the completion of the sale of articles of property to which no objection is made where the same have been separately sold. When a judge or clerk having jurisdiction fails or refuses to confirm a sale of property which has thus been objected to, the procedure for a new sale of such property, including a new order of sale, shall be the same as if no such attempted sale has been held. This subsection shall not apply to perishable property sold pursuant to G. S. § 1-339.19.

(b) Except as provided in subsection (a), the person holding a public sale of personal property shall deliver the property to the purchaser immediately upon compliance by the purchaser with the terms of the sale.

(c) The person holding a public sale may execute and deliver a bill of sale or other muniment of title for any personal property sold, and, upon application of the purchaser, shall do so when required by the judge or clerk of the superior court having jurisdiction. (1949, c. 719, s. 1.)

§ 1-339.24. Public sale; report of sale; when final as to personal property.—(a) The person holding a public sale shall, within five days after the date of the sale, file a report thereof with the clerk of the superior court of the county where the proceeding for the sale is pending.

(b) The report shall be signed by the person authorized to hold the sale, or by his agent or attorney and shall show

(1) The title of the action or proceeding;

(2) The authority under which the person making the sale acted;

(3) The date, hour and place of the sale;

(4) A description of real property sold, by reference or otherwise, sufficient to identify it, and, if sold in parts, a description of each part so sold; and

(5) A description of personal property sold, sufficient to indicate the nature and quantity of the property sold to each purchaser;

(6) The names of the purchasers;

(7) The price at which the property, or each part thereof, was sold and that such price was the highest bid therefor; and

(8) The date of the report.

(c) The report of sale of personal property, when confirmation of the sale is not required, may include such additional information as is required by G. S. § 1-339.31 or G. S. § 1-339.32, whichever is applicable, and when such additional information is included, the report shall constitute the final report of sale of personal property. If the report does not include the additional information required by G. S. § 1-339.31 or G. S. § 1-339.32, the final report required by those sections shall be subsequently filed. (1949, c. 719, s. 1.)

§ 1-339.25. Public sale; upset bid on real property; compliance bond.—(a) An upset bid is an advanced, increased or raised bid whereby a person offers to purchase real property theretofore sold, for an amount exceeding the reported sale price by ten per cent (10%) of the first $1000 thereof plus five per cent (5%) of any excess above $1000, but in any event with a minimum increase of $25, such increase being deposited in cash 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. 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 a 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, conditioned on compliance with the upset bid. 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, conditioned on compliance with his bid. 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. 719, s. 1.)

Editor's Note.—The second "is" in the third line from the end of subsection (a) appears in the printed act as "if", being in all probability a typographical error.

§ 1-339.26. Public sale; separate upset bids when real property sold in parts; subsequent procedure.—When real property is sold at public sale in parts, as provided by G. S. § 1-339.9, the sale, and each subsequent resale, of any such part shall be subject to a separate upset bid; and, to the extent the judge or clerk of the superior court having jurisdiction deems advisable, the sale of each such part shall thereafter be treated as a separate sale for the purpose of determining the procedure applicable thereto. (1949, c. 719, s. 1.)

§ 1-339.27. Public sale; resale of real property; jurisdiction; procedure.—(a) When an upset bid is submitted to the clerk of the superior court, together with a compliance bond if one is required, a resale shall be ordered.

(b) In any case in which a judge has jurisdiction of the original sale, he may provide by order that jurisdiction is retained for resale purposes, and in such case when an upset bid is submitted, the judge having jurisdiction shall make the order of resale. In all cases where the judge does not retain jurisdiction of a sale for resale purposes, and in all cases where a sale is originally ordered by a clerk, the clerk shall make the order of resale and shall have jurisdiction of the proceeding for resale purposes. Whenever the original order of sale is made by the judge, the terms of any resale ordered by the clerk shall be consistent with terms of the original order, and the final order of confirmation shall be made by the judge having jurisdiction of the proceeding.

(c) Notice of any resale to be held because of an upset bid shall

(1) Be posted, at the courthouse door in the

county in which the property is situated, for fifteen days immediately preceding the sale,

(2) And in addition thereto,

a. If a newspaper qualified for legal advertising is published in the county, the notice shall be published in such a newspaper once a week for at least two successive weeks, but

b. If no such newspaper is published in the county, the notice shall be posted at three other public places in the county for fifteen days immediately preceding the sale.

(d) When the notice of resale 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 eight days, including Sunday, and

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

(e) When the real property to be resold is situated in more than one county, the provisions of subsection (c) of this section shall be complied with in each county in which any part of the property is situated.

(f) The person making a resale shall report the resale in the same manner as required by G. S. § 1-339.24.

(g) When there is no bid at a resale other than the upset bid resulting in such resale, the person who made the upset bid is deemed the highest bidder at the resale. Such sale remains subject to a further upset bid and resale pursuant to this article.

(h) Resales may be had as often as upset bids are submitted in compliance with this article.

(i) Except as otherwise provided in this section, all the provisions of this article applicable to an original sale are applicable to resales. (1949, c. 719, s. 1.)

§ 1-339.28. Public sale; confirmation of sale.—(a) No public sale of real property may be consummated until confirmed

(1) By the resident judge of the district or the judge regularly holding the courts of the district, in those cases in which the sale was originally ordered by a judge, or

(2) By the clerk of the superior court in those cases in which the sale was originally ordered by the clerk.

(b) No public sale of real property of a minor or incompetent originally ordered by a clerk may be consummated until confirmed both by the clerk and by the resident judge of the district or the judge regularly holding the courts of the district.

(c) No public sale of real property may be confirmed until the time for submitting an upset bid, pursuant to G. S. § 1-339.25, has expired.

(d) Confirmation of the public sale of personal property is necessary only in the case set out in G. S. § 1-339.23 (a), or when the order of sale provides for such confirmation. (1949, c. 719, s. 1.)

§ 1-339.29. Public sale; real property; deed; order for possession.—(a) Upon confirmation of a public sale of real property, the person authorized to hold the sale, or such other person as may be designated by the judge or clerk of the superior court having jurisdiction, shall prepare and tender to the purchaser a duly executed deed for the property sold and, upon compliance by the purchaser with the terms of sale, shall deliver the deed to the purchaser.

(b) A person executing a deed to real property being conveyed pursuant to a public sale may recite in the deed, in addition to the usual provisions, substantially as follows

(1) The authority for making the sale,

(2) The title of the action or proceeding in which the sale was had,

(3) The name of the person authorized to make the sale,

(4) The fact that the sale was duly advertised,

(5) The date of the sale,

(6) The name of the highest bidder and the price bid,

(7) That the sale has been confirmed,

(8) That the terms of the sale have been complied with, and

(9) That the person executing the deed has been authorized to execute it.

(c) The judge or clerk of the superior court having jurisdiction of the proceeding in which the property is sold may grant an order for possession of real property so sold and conveyed, as against all persons in possession who are parties to the proceeding. (1949, c. 719, s. 1.)

§ 1-339.30. Public sale; failure of bidder to make cash deposit or to comply with bid; resale.—(a) If an order of public sale requires the highest bidder to make a cash deposit at the sale, and he fails to make such required deposit, the person holding the sale shall at the same time and place again offer the property for sale.

(b) When the highest bidder at a public sale of personal property not required to be confirmed fails to make the cash payment, if any, required by the terms of the sale, the person holding the sale shall at the same time and place again offer the property for sale. In the event no other bid is received, a new sale may be advertised in the regular manner provided by this article for an original sale.

(c) When the highest bidder at a public sale of personal property required to be confirmed fails to comply with his bid within ten days after notice given by the person holding the sale or after a bona fide attempt to give such notice that the sale has been confirmed, the judge or clerk having jurisdiction may order a resale. The procedure for such resale is the same in every respect as is provided by this article in the case of an original public sale of personal property.

(d) When the highest bidder at a public sale or resale of real property fails to comply with his bid within ten days after the tender to him of a deed for the property or after a bona fide attempt to tender such deed, the judge or clerk having jurisdiction may order a resale. The procedure for such resale of real property is the same in every respect as is provided by this article in the case of an original public sale of real property except that the provisions of G. S. § 1-339.27 (c), (d) and (e) apply with respect to the posting and publishing of the notice of such resale.

(e) A defaulting bidder at any sale or resale is liable on his bid, and in case a resale is had because of such default, he shall remain liable to

the extent that the final sale price is less than his bid plus all costs of such resale or resales.

(f) Nothing in this section deprives any person of any other remedy against the defaulting bidder. (1949, c. 719, s. 1.)

§ 1-339.31. Public sale; report of commissioner or trustee in deed of trust.—(a) A commissioner or a trustee in a deed of trust, authorized pursuant to G. S. § 1-339.4 to hold a public sale of property, shall, in addition to all other reports required by this article, file with the clerk of the superior court an account of his receipts and disbursements as follows:

(1) When the sale is for cash, a final report shall be filed within thirty days after receipt of the proceeds of the sale;

(2) When the sale is wholly or partly on time and the commissioner or trustee is not required to collect deferred payments, a final report shall be filed within thirty days after receipt of the cash payment, if any is required, and the receipt of all securities for the purchase price;

(3) When the commissioner or trustee is required to collect deferred payments,

a. He shall file a preliminary report within thirty days after receipt of the cash payment, if any is required, and the receipt of all securities for the purchase price, and

b. If the period of time during which he is required to collect deferred payments extends over more than one year, he shall file an annual report of his receipts and disbursements, and

c. After collecting all deferred payments, he shall file a final report.

(b) The clerk shall audit and record the reports and accounts required to be filed pursuant to this section. (1949, c. 719, s. 1.)

§ 1-339.32. Public sale; final report of person, other than commissioner or trustee in deed of trust.—An administrator, executor or collector of a decedent's estate, or a receiver, or a guardian or trustee of a minor's or incompetent's estate, or an administrator, collector, conservator or guardian of an absent or missing person's estate, is not required to file a special account of his receipts and disbursements for property sold at public sale pursuant to this article unless so directed by the judge or clerk of the superior court having jurisdiction of the sale proceeding, but shall include in his next following account or report, either annual or final, an account of such receipts and disbursements. (1949, c. 719, s. 1.)

Part 3. Procedure for Private Sales of Real and Personal Property.

§ 1-339.33. Private sale; order of sale.—Whenever a private sale is ordered, the order of sale shall

(1) Designate the person authorized to make the sale;

(2) Describe real property to be sold, by reference or otherwise, sufficiently to identify it;

(3) Describe personal property to be sold, by reference or otherwise, sufficiently to indicate its nature and quantity; and

(4) Prescribe such terms of sale as the judge or clerk of the superior court ordering the sale deems advisable. (1949, c. 719, s. 1.)

§ 1-339.34. Private sale; exception; certain personal property.—(a) Notwithstanding any provisions of this article, property described below may be sold at private sale at the current market price after first obtaining an order of sale:

(1) Property consisting of stocks, bonds or other securities the current market value of which is established by sales on any stock or securities exchange supervised or regulated by the United States government or any other of its agencies or departments, or

(2) Property consisting of stocks, bonds or other securities which are not sold on any stock or securities exchange supervised or regulated by the United State government or any other of its agencies or departments, but which are found by the judge or clerk having jurisdiction to have a known or readily ascertainable market value, or

(3) Property consisting of cattle, hogs, or other livestock, or cotton, corn, tobacco, peanuts or other farm commodities or produce, found by the judge or clerk having jurisdiction to have a known or readily ascertainable market value.

(b) Property determined by the judge or clerk having jurisdiction to be perishable property because subject to rapid deterioration may be sold at private sale after first obtaining an order of sale.

(c) Any sale made pursuant to this section is not subject to an upset bid, and is not required to be confirmed, but such sale is final. (1949, c. 719, s. 1.)

§ 1-339.35. Private sale; report of sale.—(a) The person holding a private sale shall, within five days after the date of the sale, file a report with the clerk of the superior court of the county where the proceeding for the sale is pending.

(b) The report shall be signed and shall show

(1) The title of the action or proceeding;

(2) The authority under which the person making the sale acted;

(3) A description of real property sold, by reference or otherwise, sufficient to identify it, and, if sold in parts, a description of each part so sold;

(4) A description of personal property sold, sufficient to indicate the nature and quantity of the property sold to each purchaser;

(5) The name or names of the person or persons to whom the property was sold;

(6) The price at which the property, or each part thereof, was sold, and the terms of the sale; and

(7) The date of the report. (1949, c. 719, s. 1.)

§ 1-339.36. Private sale; upset bid; subsequent procedure.—(a) Every private sale of real or personal property, except a sale of personal property as provided by G. S. § 1-339.34, is subject to an upset bid on the same conditions and in the same manner as is provided by G. S. § 1-339.25.

(b) When an upset bid is made for property sold at private sale, subsequent procedure with respect thereto shall be the same as for the public sale of real property for which an upset bid

has been submitted, except that the notice of resale of personal property need not be published in a newspaper, but shall be posted as provided by G. S. § 1-339.17. (1949, c. 719, s. 1.)

§ 1-339.37. Private sale; confirmation.—If no upset bid for property sold at private sale is submitted within ten days after the report of sale is filed, the sale may then be confirmed, and the provisions of G. S. § 1-339.28 (a) and (b) are applicable to such confirmation whether the property sold is real or personal. Unless otherwise provided in the order of sale, no confirmation is required or any sale held as provided by G. S. § 1-339.34. (1949, c. 719, s. 1.)

§ 1-339.38. Private sale; real property; deed; order for possession.—(a) Upon confirmation of a private sale of real property, the person authorized to hold the sale, or such other person as may be designated by the judge or clerk of the superior court having jurisdiction, shall prepare and tender to the purchaser a duly executed deed for the property sold and, upon compliance by the purchaser with the terms of the sale, shall deliver the deed to the purchaser.

(b) The judge or clerk of the superior court having jurisdiction of the proceeding in which the property is sold may grant an order for possession of real property so sold and conveyed, as against all persons in possession who are parties to the proceeding. (1949, c. 719, s. 1.)

§ 1-339.39. Private sale; personal property; delivery; bill of sale.—Upon compliance by the purchaser with the terms of a private sale of personal property, and upon confirmation of the sale when confirmation is required by G. S. § 1-339.37, the person authorized to hold the sale, or such other person as may be designated by the judge or clerk of the superior court having jurisdiction, shall deliver the property to the purchaser, and may execute and deliver a bill of sale or other muniment of title, and, upon application of the purchaser, shall do so when required by the judge or clerk having jurisdiction. (1949, c. 719, s. 1.)

§ 1-339.40. Private sale; final report.—(a) A commissioner or a trustee in a deed of trust authorized pursuant to G. S. § 1-339.4 to hold a private sale of property shall make such a final report as is specified in G. S. § 1-339.31.

(b) Any other person authorized pursuant to G. S. § 1-339.4 to hold a private sale of property shall make such a final report as is specified in G. S. § 1-339.32. (1949, c. 719, s. 1.)

Art. 29B. Execution Sales.

Part 1. General Provisions.

§ 1-339.41. Definitions.—(a) An execution sale is a sale of property by a sheriff or other officer made pursuant to an execution.

(b) As used in this article,

(1) "Sale" means an execution sale;

(2) "Sheriff" means a sheriff or any officer authorized to hold an execution sale. (1949, c. 719, s. 1.)

Editor's Note.—Section 6 of the act inserting this article makes it effective as of Jan. 1, 1950. Section 4 of the act provides that it shall not apply to any execution sale held pursuant to any execution issued prior to such effective date, and § 5 provides that the present law shall remain in effect for the completion of execution sales to which the act, under § 4, does not apply.

For a brief discussion of this article, see 27 N. C. Law Rev. 479.

§ 1-339.42. Clerk's authority to fix procedural details.—The clerk of the superior court who issues an execution has authority to fix and determine all necessary procedural details with respect to sales in all instances in which this article fails to make definite provisions as to such procedure. (1949, c. 719, s. 1.)

§ 1-339.43. Days on which sale may be held.—A sale may be held on any day except Sunday. (1949, c. 719, s. 1.)

§ 1-339.44. Place of sale.—(a) Every sale of real property shall be held at the courthouse door in the county where the property is situated unless the property consists of a single tract situated in two or more counties.

(b) A sale of a single tract of real property situated in two or more counties may be held at the courthouse door in any one of the counties in which any part of the tract is situated, but no sheriff shall hold any sale outside his own county. As used in this section, a "single tract" means any tract which has a continuous boundary, regardless of whether parts thereof may have been acquired at different times or from different persons or whether it may have been subdivided into other units or lots, or whether it is sold as a whole or in parts.

(c) A sale of personal property may be held at any place in his county designated by the sheriff in the notice of sale. (1949, c. 719, s. 1.)

§ 1-339.45. Presence of personal property at sale required.—A sheriff holding a sale of personal property shall have the property present at the place of sale. (1949, c. 719, s. 1.)

§ 1-339.46. Sale as a whole or in parts.—When real property to be sold consists of separate lots or other units or when personal property consists of more than one article, the sheriff may sell such real or personal property as a whole or in designated parts, or may offer the property for sale by each method, and then sell the property by the method which produces the highest price; but regardless of which method is followed, the sheriff shall not sell more property than is reasonably necessary to satisfy the judgment together with the costs of the execution and the sale. (1949, c. 719, s. 1.)

§ 1-339.47. Sale to be made for cash.—Every sale shall be made for cash. (1949, c. 719, s. 1.)

§ 1-339.48. Life of execution.—If an execution is issued on a judgment, within the time provided by G. S. § 1-306, and a sale, by authority of that execution, is commenced within the time provided by G. S. § 1-310, the sale, including any resale, may be had and completed even though such sales, resales or other procedure are had after the time when the execution is required to be returned by G. S. § 1-310, or after the time within which an execution could be issued with respect to such judgment pursuant to the provisions of G. S. § 1-306. For the purpose of this section, a sale is commenced when the notice of sale is first published in the case of real property as required by G. S. § 1-339.52, or first posted in the case of personal property as required by G. S. § 1-339.53. (1949, c. 719, s. 1.)

§ 1-339.49. Penalty for selling contrary to law.—A sheriff or other officer who makes any sale contrary to the true intent and meaning of this article shall forfeit two hundred dollars to any person suing for it, one-half for his own use and the other half to the use of the county where the offense is committed. (Rev., s. 649; Code, s. 461; R. C., c. 45, s. 18; 1820, c. 1066, s. 2; 1822, c. 1153, s. 3; 1949, c. 719, s. 2; C. S. 696.)

Editor's Note.—The 1949 act, effective Jan. 1, 1950, transferred this section from § 1-337.

§ 1-339.50. Officer's return of no sale for want of bidders; penalty.—When a sheriff or other officer returns upon an execution that he has made no sale for want of bidders, he must state in his return the several places he has advertised and offered for sale the property levied on; and an officer failing to make such statement is on motion subject to a fine of forty dollars; and every constable, for a like omission of duty, is subject to a fine of ten dollars, for the use and benefit of the plaintiff in the execution; for which, on motion of the plaintiff, judgment shall be granted by the court to which, or by justice to whom, the execution shall be returned. Nothing in, nor any recovery under, this section is a bar to any action for a false return against the sheriff or other officer. (Rev., s. 650; Code, s. 462; R. C., c. 45, s. 19; 1815, c. 887; 1949, c. 719, s. 2; C. S. 697.)

Editor's Note.—The 1949 act, effective Jan. 1, 1950, transferred this section from § 1-338.

Part 2. Procedure for Sale.

§ 1-339.51. Contents of notice of sale.—The notice of sale shall

(1) Refer to the execution authorizing the sale;

(2) Designate the date, hour and place of sale;

(3) Describe real property to be sold, by reference or otherwise, sufficiently to identify it, and may add such further description as will acquaint bidders with the nature and location of the property;

(4) Describe personal property to be sold sufficiently to indicate its nature and quantity, and may add such further description as will acquaint bidders with the nature of the property; and

(5) State that the sale will be made to the highest bidder for cash. (1949, c. 719, s. 1.)

§ 1-339.52. Posting and publishing notice of sale of real property.—(a) The notice of sale of real property shall

(1) Be posted, at the courthouse door in the county in which the property is situated, for thirty days immediately preceding the sale,

(2) And in addition thereto,

a. If a newspaper qualified for legal advertising is published in the county, the notice shall be published in such a newspaper once a week for at least four successive weeks; but

b. If no such newspaper is published in the county, the notice shall be posted at three other public places in the county for thirty days immediately preceding the sale.

(b) 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 not be more than seven days preceding the date of sale.

(c) When the real property to be sold is situated in more than one county, the provisions of subsections (a) and (b) shall be complied with in each county in which any part of the property is situated. (1949, c. 719, s. 1.)

§ 1-339.53. Posting notice of sale of personal property.—The notice of sale of personal property, except in the case of perishable property as specified in G. S. § 1-339.56, shall be posted, at the courthouse door in the county in which the sale is to be held, for ten days immediately preceding the date of sale. (1949, c. 719, s. 1.)

§ 1-339.54. Notice to judgment debtor of sale of real property.—In addition to complying with G. S. § 1-339.52, relating to posting and publishing the notice of sale, the sheriff shall, at least ten days before the sale of real property,

(1) If the judgment debtor is found in the county, serve a copy of the notice of sale on him personally, or

(2) If the judgment debtor is not found in the county,

a. Send a copy of the notice of sale by registered mail to the judgment debtor at his last address known to the sheriff, and

b. Serve a copy of the notice of sale on the judgment debtor's agent, if there is in the county a person known to the sheriff to be an agent who has custody or management of, or who exercises control over, any property in the county belonging to the judgment debtor. (1949, c. 719, s. 1.)

§ 1-339.55. Notification of governor and attorney general.—When the state is a stockholder in any corporation whose property is to be sold under execution, notice in writing shall be given by the sheriff by registered mail to the governor and the attorney general at least thirty days before the sale, stating the time and place of the sale and including a copy of the process under the authority of which such sale is to be made. Any sale held without complying with the provisions of this section is invalid with respect to the state. (1949, c. 719, s. 1.)

§ 1-339.56. Exception; perishable property.—If, in the opinion of the sheriff, any personal property levied on under execution is perishable because subject to rapid deterioration, he shall forthwith report such levy, together with a description of the property, to the clerk of the superior court, and request instructions as to the sale of such property. If the clerk then determines that the property is such perishable property, he shall thereupon order a sale thereof to be held at such time and place and upon such notice to be given in such manner and for such length of time as he deems advisable. If the clerk determines that the property is not perishable, he shall order it to be sold in the same manner as other nonperishable property. (1949, c. 719, s. 1.)

§ 1-339.57. Satisfaction of judgment before sale completed.—If, prior to the time fixed for a sale, or prior to the expiration of the time allowed for submitting any upset bid, payment is made or tendered to the sheriff of the judgment and costs with respect to which the execution was issued, and the sheriff's fees, commissions and expenses which have accrued, together with any expenses incurred on account of the sale or proposed sale including costs incurred in caring for the property levied on, then any right to effect a sale pursuant to the execution ceases. (1949, c. 719, s. 1.)

§ 1-339.58. Postponement of sale.—(a) The sheriff may postpone the sale to a day certain not later than six days, exclusive of Sunday, after the original date for the sale.

(1) When there are no bidders, or

(2) When, in his judgment, the number of prospective bidders at the sale is substantially decreased by inclement weather or by any casualty, or

(3) When there are so many other sales advertised to be held at the same time and place as to make it inexpedient and impracticable, in his judgment, to hold the sale on that day, or

(4) When he is unable to hold the sale because of illness or for other good reason, or

(5) When other good cause exists.

(b) Upon postponement of a sale, the sheriff shall

(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. § 1-339.52 in the case of real property or G. S. § 1-339.53 in the case of personal property, a notice of the postponement.

(c) The posted notice of postponement shall

(1) State that the sale is postponed,

(2) State the hour and date to which the sale is postponed,

(3) State the reason for the postponement, and

(4) Be signed by the sheriff.

(d) If a sale is not held at the time fixed therefor and is not postponed as provided by this section, or if a postponed sale is not held at the time fixed therefor, the sheriff shall report the facts with respect thereto to the clerk of the superior court, who shall thereupon make an order for the sale of the property to be held at such time and place and upon such notice to be given in such manner and for such length of time as he deems advisable, but nothing herein contained shall be deemed to relieve the sheriff of liability for the nonperformance of his official duty. (1949, c. 719, s. 1.)

§ 1-339.59. Procedure upon dissolution of order restraining or enjoining sale.—(a) When, before the date fixed for a sale, a judge dissolves an order restraining or enjoining the sale, he may, if the required notice of sale has been given, provide by order that the sale shall be held without additional notice at the time and place originally fixed therefor, or he may, in his discretion, make an order with respect thereto as provided in subsection (b).

(b) When, after the date fixed for a sale, a judge dissolves an order restraining or enjoining the sale, he shall by order fix the time and place for the sale to be held upon notice to be given in such manner and for such length of time as he deems advisable. (1949, c. 719, s. 1.)

§ 1-339.60. Time of sale.—(a) A sale shall begin at the time designated in the notice of sale or as soon thereafter as practicable, but not later than one hour after the time fixed therefor unless it is delayed by other sales held at the same place.

(b) No sale shall commence before 10:00 o'clock A. M. or after 4:00 o'clock P. M.

(c) No sale shall continue after 4:00 o'clock P. M., except that in cities or towns of more than five thousand inhabitants, as shown by the most recent federal census, sales of personal property may continue until 10:00 o'clock P. M. (1949, c. 719, s. 1.)

§ 1-339.61. Continuance of uncompleted sale.—A sale commenced but not completed within the time allowed by G. S. § 1-339.60 shall be continued by the sheriff to a designated time between 10:00 o'clock A. M. and 4:00 o'clock P. M. the next following day, other than Sunday. In case such continuance becomes necessary, the sheriff shall publicly announce the time to which the sale is continued. (1949, c. 719, s. 1.)

§ 1-339.62. Delivery of personal property; bill of sale.—A sheriff holding a sale of personal property shall deliver the property to the purchaser immediately upon receipt of the purchase price. The sheriff may also execute and deliver a bill of sale or other muniment of title for any personal property sold, and, upon application of the purchaser, shall do so when required by the clerk of the superior court of the county where the property is sold. (1949, c. 719, s. 1.)

§ 1-339.63. Report of sale.—(a) The sheriff shall, within five days after the date of the sale, file a report thereof with the clerk of the superior court.

(b) The report shall be signed and shall show

(1) The title of the action or proceeding;

(2) The authority under which the sheriff acted;

(3) The date, hour and place of the sale;

(4) A description of real property sold, by reference or otherwise, sufficient to identify it, and, if sold in parts, a description of each part so sold;

(5) A description of personal property sold, sufficient to indicate the nature and quantity of the property sold to each purchaser;

(6) The name or names of the person or persons to whom the property was sold;

(7) The price at which the property, or each part thereof, was sold and that such price was the highest bid therefor; and

(8) The date of the report. (1949, c. 719, s. 1.)

§ 1-339.64. Upset bid on real property; compliance bond.—(a) An upset bid is an advanced, increased or raised bid whereby a person offers to purchase real property theretofore sold, for an amount exceeding the reported sale price by ten per cent (10%) of the first $1000 thereof plus five per cent (5%) of any excess above $1000, but in any event with a minimum increase of $25, such increase being deposited in cash 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. 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 in 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, conditioned on compliance with the upset bid. 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, conditioned on compliance with his bid. 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. 719, s. 1.)

§ 1-339.65. Separate upset bids when real property sold in parts; subsequent procedure.—When real property is sold in parts, as provided by G. S. § 1-339.46, the sale, and each subsequent resale, of any such part shall be subject to a separate upset bid; and to the extent the clerk of the superior court having jurisdiction deems advisable, the sale of each such part shall thereafter be treated as a separate sale for the purpose of determining the procedure applicable thereto. (1949, c. 719, s. 1.)

§ 1-339.66. Resale of real property; jurisdiction; procedure.—(a) When an upset bid on real property is submitted to the clerk of the superior court, together with a compliance bond if one is required, the clerk shall order a resale.

(b) Notice of any resale to be held because of an upset bid shall

(1) Be posted, at the courthouse door in the county in which the property is situated, for fifteen days immediately preceding the sale,

(2) And in addition thereto,

a. If a newspaper qualified for legal advertising is published in the county, the notice shall be published in such a newspaper once a week for at least two successive weeks; but

b. If no such newspaper is published in the county, the notice shall be posted at three other public places in the county for fifteen days immediately preceding the sale.

(c) When the notice of resale 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 eight days, including Sunday, and

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

(d) When the real property to be resold is situated in more than one county, the provisions of subsections (b) and (c) shall be complied with in each county in which any part of the property is situated.

(e) The sheriff shall report the resale in the same manner as required by G. S. § 1-339.63.

(f) When there is no bid at a resale other than the upset bid resulting in such resale, the person who made the upset bid is deemed the highest bidder at the resale. Such sale remains subject to a further upset bid and resale pursuant to this article.

(g) Resales may be had as often as upset bids are submitted in compliance with this article.

(h) Except as otherwise provided in this section, all the provisions of this article applicable to an original sale are applicable to resales. (1949, c. 719, s. 1.)

Order for Resale Does Not Prolong Life of Judgment.—Where the bid for real estate offered at a sale held under authority of an execution within the period of ten years next after the date of rendition of the judgment, upon which the execution issued, was raised and resales were ordered successively under the provisions of a former statute of similar import, by which the final sale so ordered took place on a date after the expiration of said period of ten years, such orders did not have the effect of prolonging the statutory life of lien of the judgment within the provisions and the meaning of § 1-234. Cheshire v. Drake, 223 N. C. 577, 27 S. E. (2d) 627.

§ 1-339.67. Confirmation of sale of real property.—No sale of real property may be consummated until the sale is confirmed by the clerk of the superior court. No order of confirmation may be made until the time for submitting an upset bid, pursuant to G. S. § 1-339.65, has expired (1949, c. 719, s. 1.)

§ 1-339.68. Deed for real property sold; property subject to liens.—(a) Upon confirmation of a sale of real property, the sheriff, upon order of the clerk of the superior court, shall prepare and tender to the purchaser a duly executed deed for the property sold and, upon compliance by the purchaser with the terms of the sale, shall deliver the deed to the purchaser.

(b) Any real property sold under execution remains subject to all liens which became effective prior to the lien of the judgment pursuant to which the sale is held, in the same manner and to the same extent as if no such sale had been held. (1949, c. 719, s. 1.)

§ 1-339.69. Failure of bidder to comply with bid; resale.—(a) When the highest bidder at a sale of personal property fails to pay the amount of his bid, the sheriff shall at the same time and place immediately resell the property. In the event no other bid is received, a new sale may be advertised in the regular manner provided by this article for an original sale.

(b) When the highest bidder at a sale or resale of real property fails to comply with his bid within ten days after the tender to him of a deed for the property or after a bona fide attempt to tender such deed, the clerk of the superior court who issued the execution may order a resale. The procedure for such resale is the same in every respect as is provided by this article in the case of an original sale of real property except that the

provisions of G. S. § 1-339.66 (b), (c) and (d) apply with respect to the posting and publishing of the notice of such resale.

(c) A defaulting bidder at any sale or resale is liable on his bid, and in case a resale is had because of such default, he shall remain liable to the extent that the final sale price is less than his bid plus all costs of such resale or resales.

(d) Nothing in this section deprives any person of any other remedy against the defaulting bidder. (1949, c. 719, s. 1.)

§ 1-339.70. Disposition of proceeds of sale.—(a) After deducting all sums due him on account of the sale, including the expenses incurred in caring for the property so long as his responsibility for such care continued, the sheriff shall pay the proceeds of the sale to the clerk of the superior court who issued the execution, and the clerk shall furnish the sheriff a receipt therefor.

(b) The clerk shall apply the proceeds of the sale so received to the payment of the judgment upon which the execution was issued.

(c) Any surplus shall be paid by the clerk to the person legally entitled thereto if the clerk knows who such person is. If the clerk is in doubt as to who is entitled to the surplus, or if adverse claims are asserted thereto, the clerk shall hold such surplus until rights thereto are established in a special proceeding pursuant to G. S. § 1-339.71. (1949, c. 719, s. 1.)

§ 1-339.71. Special proceeding to determine ownership of surplus.—(a) A special proceeding may be instituted before the clerk of the superior court by any person claiming any money, or part thereof, paid into the clerk's office under G. S. § 1-339.70, to determine who is entitled thereto.

(b) All other persons who have filed with the clerk notice of their claim to the money or any part thereof, or who, as far as the petitioner or petitioners know, assert any claim to the money or any part thereof, shall be made defendants in the proceeding.

(c) If any answer is filed raising issues of fact as to the ownership of the money, the proceedings shall be transferred to the civil issue docket of the superior court for trial. When a proceeding is so transferred, the clerk may require any party to the proceeding who asserts a claim to the fund by petition or answer to furnish a bond for costs in the amount of $200.00, or otherwise comply with the provisions of G. S. § 1-109.

(d) The court may, in its discretion, allow a reasonable attorney's fee for any attorney appearing in behalf of the party or parties who prevail, to be paid out of the funds in controversy, and shall tax all costs against the losing party or parties who asserted a claim to the fund by petition or answer. (1949, c. 719, s. 1.)

Art. 29C. Validating Sections.

§ 1-339.72. Validation of certain sales.—All sales of real property under execution, deed of trust, mortgage or other contracts made since February 21, 1929, where the original sale was published for four successive weeks, and any re-sale published for two successive weeks shall be and the same are in all respects validated as to publication of notice. (1933, c. 96, s. 3; 1949, c. 719, s. 3.)

Editor's Note.—The 1949 act, effective Jan. 1, 1950, transferred this section from section 1-329.

§ 1-339.73. Ratification of certain sales held on days other than the day required by statute.—All sales made prior to March 2, 1939, under execution or by order of court on any day other than the first Monday in any month, or the first three days of a term of the superior court of said county are hereby validated, ratified and confirmed.

All sales or resales of real property made prior to March 30, 1939, under order of court on the premises or at the courthouse door in the county in which all, or any part of the property, is situated, on any day other than Monday in any month, are hereby validated, ratified and confirmed. (Rev., s. 643; Code, s. 454; 1876-7, c. 216, ss. 2, 3; 1883, c. 94, ss. 1, 2; 1931, c. 23; 1937, c. 26; 1939, cc. 71, 256; 1949, c. 719, s. 3; C. S. 690.)

Editor's Note.—The 1949 act, effective Jan. 1, 1950, after striking out the first two paragraphs of former § 1-331 transferred it to this section.

§ 1-339.74. Sales on other days validated.—All sales of real or personal property made prior to February 27, 1933, by a sheriff of any county in North Carolina, in the manner provided by law for sale of real or personal property under execution, on any day other than the day now provided by law are hereby validated.

All sales of real and personal property made prior to February 14, 1939, by a sheriff under execution, or by commissioner under order of court, in the manner provided by law for sale of real or personal property, on any day other than the days now provided by law are hereby validated.

All sales of real or personal property made prior to March 10, 1939, by a sheriff of any county in North Carolina, in the manner provided by law for sale of real or personal property under execution, on any day other than the day now provided by law, are hereby validated. (1933, c. 79; 1939, cc. 24, 94; 1949, c. 719, s. 3.)

Editor's Note.—The 1949 act, effective Jan. 1, 1950, transferred § 1-332 to this section.

§ 1-339.75. Certain sales validated.—All sales of realty made under executions issued prior to March the fifteenth, one thousand nine hundred and one, on judgments regularly obtained in courts of competent jurisdiction, are hereby validated, whether such sales were continued from day to day or for a longer period, not exceeding ten days: Provided, that such executions and sales are in all other respects regular: Provided further, that purchasers and their assigns shall have held continuous and adverse possession under a sheriff's deed for three years: Provided further, that the rights of minors and married women shall in nowise be prejudiced hereby. (Rev., s. 646; 1901, c. 742; 1949, c. 719, s. 3; C. S. 693.)

Editor's Note.—The 1949 act, effective Jan. 1, 1950, transferred § 1-335 to this section.

§ 1-339.76. Validation of sales when payment deferred more than two years.—All sales of land conducted prior to February 10, 1927, under authority of G. S. § 28-93, in which the deferred payments were extended over a period longer than two years, are hereby validated. (1917, c. 127, s. 2; 1927, c. 16; 1949, c. 719, s. 3; C. S. 86.)

Editor's Note.—Prior to the 1949 amendment, effective Jan. 1, 1950, this section appeared as the former last sentence of § 28-93.

Art. 30. Betterments.

§ 1-340. Petition by claimant; execution suspended; issues found.

Rule Stated.—One, who in good faith under colorable title, enters into possession of land under a mistaken belief that his title is good, and who is subsequently ejected by the true owner, is entitled to compensation for the enhanced value of the land due to improvements placed on the land by him. Rogers v. Timberlake, 223 N. C. 59, 25 S. E. (2d) 167.

Plaintiff is not confined to a common law action for improvements, if indeed such right may be enforced by independent action. Rhyne v. Sheppard, 224 N. C. 734, 736, 32 S. E. (2d) 316.

§ 1-341. Annual value of land and waste charged against defendant.

Where defendants disclaim all right and title to a part of the locus, in an action of ejectment, plaintiffs are entitled to recover the reasonable rental value of that part for the three years next preceding the institution of the action. Hughes v. Oliver, 228 N. C. 680, 47 S. E. (2d) 6.

Rents and Rental Values as Related to Betterments.—Under this section, in an action involving betterments, rents and rental values of the lands, which were obtained by defendants solely by reason of the improvements put on the lands by themselves, cannot be used to offset compensation to defendants for these improvements. Harrison v. Darden, 223 N. C. 364, 26 S. E. (2d) 860.

Art. 31. Supplemental Proceedings.

§ 1-352. Execution unsatisfied, debtor ordered to answer.

Nature of Proceedings, etc.—
The proceedings under this section are in the nature of equitable proceedings. Johnson Cotton Co. v. Reaves, 225 N. C. 436, 35 S. E. (2d) 408, 413.

The court has the power to order production of proper papers pertinent to the issue to be tried, and in possession of the opposite party. Johnson Cotton Co. v. Reaves, 225 N. C. 436, 35 S. E. (2d) 408, 413.

Where the examination of the debtor in supplementary proceedings shows that his books of accounts contain evidence material to the investigation he should be required to produce them. Id.

Accounting of Partnership Affairs.—In order to ascertain if there are any assets of the partnership remaining, a full accounting of the partnership affairs is appropriate, and should be had. Johnson Cotton Co. v. Reaves, 225 N. C. 436, 35 S. E. (2d) 408.

§ 1-358. Disposition of property forbidden.

Section Refers to Property of Debtor at Time of Order.—When this section and § 1-360 are read either singly or as a component part of this article, it is plain that a supplemental proceeding against a third person is designed to reach and apply to the satisfaction of the judgment property of the judgment debtor in the hands of the third person or debts due to judgment debtor by the third person at the time of the issuance and service of the order for the examination of the third person. Motor Finance Co. v. Putnam, 229 N. C. 555, 50 S. E. (2d) 670.

Prospective Earnings Are Not Property. — Prospective earnings of the judgment debtor are neither property nor a debt, and may not be reached in supplemental proceedings against the employer of the judgment debtor. Motor Finance Co. v. Putnam, 229 N. C. 555, 50 S. E. (2d) 670.

§ 1-360. Debtors of judgment debtor, summoned.

Section Applies Only to Debts Due at Time of Order.—When this section and § 1-358 are read either singly or as a component part of this article it is plain that a supplemental proceeding against a third person is designed to reach and apply to the satisfaction of the judgment property of the judgment debtor in the hands of the third person or debts due to the judgment debtor by the third person at the time of the issuance and service of the order for the examination of the third person. Motor Finance Co. v. Putnam, 229 N. C. 555, 50 S. E. (2d) 670.

Prospective Earnings Are neither Property nor Debt.—Prospective earnings of the judgment debtor are neither property nor a debt, and may not be reached in supplemental proceedings against the employer of the judgment debtor. Motor Finance Co. v. Putnam, 229 N. C. 555, 50 S. E. (2d) 670.

§ 1-362. Debtor's property ordered sold.

Earnings for Sixty Days.—
In the 1st paragraph in the original the last line should read, "debts and not for taxes due."

§ 1-368. Disobedience of orders punished as for contempt.

Paying Salary Accruing after Issuance of Order.—An employer cannot be held in contempt for paying salary accruing to a judgment debtor after issuance and service on the employer of an order in proceedings supplemental to execution, since the order, properly construed, speaks as of the date of its issuance, and since in law the order could not apply to prospective earnings of the judgment debtor. Motor Finance Co. v. Putnam, 229 N. C. 555, 50 S. E. (2d) 670.

Art. 32. Property Exempt from Execution.

§ 1-369. Property exempted.

I. IN GENERAL.

Cited in Sample v. Jackson, 225 N. C. 380, 382, 35 S. E. (2d) 236.

A. Nature of Homestead.

Homestead Is Not Offspring of Judgment Debt.—The homestead, whether allotted on the voluntary petition of the owner or by the sheriff under execution, is not the offspring of and does not draw its life blood from a judgment debt. It stems from the constitution and "it is not the condition of the homesteader that creates the homestead condition, but the force of the constitution, attaching to and acting upon the land." Thomas v. Fulford, 217 N. C. 667, 23 S. E. 635; Williams v. Johnson, 230 N. C. 338, 53 S. E. (2d) 670.

II. CONSTITUTIONAL PROVISIONS AND PURPOSE.

A. In General.

Purpose of Homestead Provision.—
The purpose of the homestead provision of the constitution is to surround the family home with certain protection against the demands of urgent creditors. It carries the right of occupancy free from levy or sale under execution so long as the claimant may live unless alienated or abandoned. It is the place of residence which the homesteader may improve and make comfortable and where his family may be sheltered and live, beyond the reach of those financial misfortunes which even the most prudent and sagacious cannot always avoid. Williams v. Johnson, 230 N. C. 338, 53 S. E. (2d) 277.

Homestead Is Vested Right.—
Title to the homestead is vested in the owner by the constitution and no allotment by the sheriff is necessary to create the right or vest the title. Williams v. Johnson, 230 N. C. 338, 53 S. E. (2d) 277.

III. JUDGMENTS AND LIENS—SUSPENSION OF LIMITATIONS.

Statute Is Not Tolled in Respect to Debt as Such.—The allotment of homestead suspends the running of the statute of limitations against the judgment as a lien upon the property embraced in the homestead, but does not toll the statute in respect to the debt as such or the personal liability of the debtor for the payment thereof. Williams v. Johnson, 230 N. C. 338, 53 S. E. (2d) 277.

Payment of Judgment Does Not Extinguish Homestead.—Payment of the judgment under which homestead has been allotted does not extinguish the homestead, and does not start the running of the statute against judgments then of record or thereafter docketed. Williams v. Johnson, 230 N. C. 338, 53 S. E. (2d) 277.

§ 1-371. Sheriff to summon and swear appraisers.

Purpose of Allotment by Sheriff.—No sale can be had until the homestead is first ascertained and set apart to the judgment debtor. The allotment by the sheriff is only for the purpose of ascertaining whether there be any excess of property over the homestead which is subject to sale under execution. Lambert v. Kinnery, 74 N. C. 348; Gheen v. Summey, 80 N. C. 187; Littlejohn v. Egerton, 77 N. C. 379. The issuance of the execution and the levy thereunder merely set in motion the machinery through which the homestead is valued and set apart to the owner. Williams v. Johnson, 230 N. C. 338, 53 S. E. (2d) 277.

Allotment Does Not Create Homestead Right.—When a sheriff is seeking to collect a judgment under execution issued to him, he must, before levying upon the real prop-

erty of the debtor, proceed to have the debtor's homestead allotted as required by this section. But this does not create the homestead right. Williams v. Johnson, 230 N. C. 338, 53 S. E. (2d) 277.

§ 1-372. Duty of appraisers; proceedings on return.

Provided, that the return of the appraisers of their proceedings as described in this section shall be invalid, void, and of no effect as to the rights of third persons or parties or as to the rights of persons, firms or corporations who are not parties to the judgment or proceeding unless said return is filed with the judgment roll in the action, and the minutes of the same entered on the judgment docket, and a certified copy thereof under the hand of the clerk shall be registered in the office of the register of deeds for the county. (Rev., ss. 688, 689; Code, ss. 503-4; 1868-9, c. 137, ss. 3-4; 1877, c. 272; 1945, c. 912; C. S. 731.)

Editor's Note.—The 1945 amendment added the above proviso at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

Same—When Registration Not Necessary.—

The registration of a certified copy of the report of the appraisers is indispensable only when the allotment is made on petition of the homesteader; when the homestead is laid off by the sheriff, failure to register report of the appraisers is an irregularity insufficient to invalidate the allotment. For statutory change on this aspect, see amendment of this section. Williams v. Johnson, 230 N. C. 338, 53 S. E. (2d) 277.

§ 1-373. Reallotment for increase of value.

Where in bankruptcy proceedings homestead was allotted in certain lands, subject to a specified judgment the court held that as against this judgment there was no determination of the extent of debtor's homestead in the lands, and the judgment creditor was not remitted to reallotment of homestead either by suit in equity or by application to the clerk under this section, but could proceed by levy of execution and allotment of homestead. Sample v. Jackson, 226 N. C. 408, 38 S. E. (2d) 155.

§ 1-386. Allotted on petition of owner.

Insolvency or the need for protection against sale is not a prerequisite to a homestead's allotment. While the homestead may have real beneficial value only when the owner is in debt and pressed by final process of the court, it is ever operative. A resident occupant of real property, though free from debt and possessed of great wealth, may, if he so elects, have it set apart to him on his own voluntary petition. Williams v. Johnson, 230 N. C. 338, 53 S. E. (2d) 277.

Art. 33. Special Proceedings.

§ 1-394. Contested special proceedings; commencement; summons.

Cited in Green v. Chrismon, 223 N. C. 723, 28 S. E. (2d) 215.

§ 1-399. Defenses pleaded; transferred to civil issue docket; amendments.

Boundary Disputes.—

Where in a special proceeding under chapter 38 of General Statutes, to establish a boundary line, the defendant, by his answer, denies the petitioner's title and pleads the twenty years' adverse possession under § 1-40, as a defense, the proceeding is assimilated to an action to quiet title (§ 41-10) and the clerk, as directed by this section, should "transfer the cause to the civil issue docket for trial during term upon all issues raised by pleadings," in accordance with rules of practice applicable to such actions originally instituted in that court. Simmons v. Lee, 230 N. C. 216, 53 S. E. (2d) 79.

Applied in Jernigan v. Jernigan, 226 N. C. 204, 37 S. E. (2d) 493.

§ 1-404. Reports of commissioners and jurors.—Every order or judgment in a special proceeding imposing a duty on commissioners or jurors must prescribe the time within which the duty must be performed, except in cases where the time is prescribed by statute. The commissioners or jurors shall within twenty days after the performance of the duty file their report with the clerk of the superior court, and if no exception is filed to it within ten days, the court may proceed to confirm the same on motion of any party and without special notice to the other parties. (Rev., s. 723; 1893, c. 209; 1945, c. 778; C. S. 763.)

Editor's Note.—The 1945 amendment substituted "ten" for "twenty" in line nine.

Art. 34. Arrest and Bail.

§ 1-410. In what cases arrest allowed.

Complaint May Allege Facts Necessary to Support Provisional Remedy.—In an action for assault and battery in which the provisional remedy of arrest and bail is invoked, it is appropriate for plaintiff to allege in the complaint the facts necessary to support the provisional remedy of arrest and bail, notwithstanding that such facts were also set out in the affidavit filed as a basis for the provisional remedy. Long v. Love, 230 N. C. 535, 53 S. E. (2d) 661.

Thus a motion to strike allegations that the injury was willful, wanton or malicious is properly denied, since plaintiff is entitled to allege facts necessary to support the provisional remedy. Id.

Art. 35. Attachment.

Part 1. General Provisions.

§ 1-440.1. Nature of attachment.—(a) Attachment is a proceeding ancillary to a pending principal action, is in the nature of a preliminary execution against property, and is intended to bring property of a defendant within the legal custody of the court in order that it may subsequently be applied to the satisfaction of any judgment for money which may be rendered against the defendant in the principal action.

(b) No personal judgment, even for costs, may be rendered against a defendant unless

(1) Personal service within the state is had on
   a. The defendant, or
   b. A process agent authorized by him, or
   c. A process agent authorized expressly or impliedly by law, or unless

(2) The defendant makes a general appearance.

(c) Although there is no personal service on the defendant, or on an agent for him, and although he does not make a general appearance, judgment may be rendered in an action in which property of the defendant has been attached which judgment shall provide for the application of the attached property, by the method set out in § 1-440.46, to the satisfaction of the plaintiff's claim as established in the principal action. If plaintiff's claim is not thereby satisfied in full, subsequent actions for the unsatisfied balance are not barred. (1947, c. 693, s. 1.)

Editor's Note.—

The 1947 amendment rewrote this article, which formerly consisted of §§ 1-440 to 1-471 appearing in the original volume, to read as set forth herein. Therefore the named sections have been superseded.

For a brief account of the 1947 amendment, see 25 N. C. Law Rev. 386.

Applied in Whitaker v. Wade, 229 N. C. 327, 49 S. E. (2d) 627.

§ 1-440.2. Actions in which attachment may be had.—Attachment may be had in any action the purpose of which, in whole or in part, or in the alternative, is to secure a judgment for money, or in any action by a wife for alimony or for mainte-

nance and support, but not in any other action. (1947, c. 693, s. 1.)

§ 1-440.3. Grounds for attachment.—In those actions in which attachment may be had under the provisions of § 1-440.2, an order of attachment may be issued when the defendant is

(1) A nonresident, or

(2) A foreign corporation, or

(3) A domestic corporation, whose president, vice-president, secretary or treasurer cannot be found in the state after due diligence, or

(4) A resident of the state who, with intent to defraud his creditors or to avoid service of summons,

a. Has departed, or is about to depart, from the state, or

b. Keeps himself concealed therein, or

(5) A person or domestic corporation which, with intent to defraud his or its creditors,

a. Has removed, or is about to remove, property from this state, or

b. Has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, property. (1947, c. 693, s. 1.)

Section Is Exclusive.—The ancillary writ of attachment may be issued only on one or more of the grounds specified by this section. Whitaker v. Wade, 229 N. C. 327, 49 S. E. (2d) 627.

Grounds Must Appear by Affidavit.—The grounds upon which an ancillary writ of attachment is issued must be made to appear by affidavit. Whitaker v. Wade, 229 N. C. 327, 49 S. E. (2d) 627.

§ 1-440.4. Property subject to attachment.—All of a defendant's property within this state which is subject to levy under execution, or which in supplemental proceedings in aid of execution is subject to the satisfaction of a judgment for money, is subject to attachment under the conditions prescribed by this article. (1947, c. 693, s. 1.)

Cash Deposited as Security in Lieu of Bond.—The right of a nonresident defendant in the cash voluntarily deposited by him as security in lieu of bond for his appearance to answer a criminal charge preferred against him is liable to garnishment; and the purposes for which the cash was deposited having been accomplished by defendant's appearing, and later giving a new recognizance for his appearance, the entire amount of the deposit is subject to the lien of the attachment. White v. Ordille, 229 N. C. 490, 50 S. E. (2d) 499.

§ 1-440.5. By whom order issued; when and where; filing of bond and affidavit.—(a) An order of attachment may be issued by

(1) The clerk of the superior court in which the action has been, or is being, commenced, or by

(2) The resident judge, the judge regularly holding the superior courts of the district, or any judge holding a term of superior court in the county in which the action has been, or is being, commenced.

(b) An order of attachment issued by a judge may be issued as follows:

(1) The resident judge of the district, or the judge regularly holding the superior courts of the district, may issue the order in open court or in chambers, at term or in vacation, and within or without the district.

(2) Any other judge holding a term of superior court in the county may issue the order in open court.

(c) In those cases where the order of attachment is issued by the judge, such judge shall cause the bond required by § 1-440.10 and the affidavit required by § 1-440.11 to be filed promptly with the clerk of the superior court of the county in which the action is pending. (1947, c. 693, s. 1.)

§ 1-440.6. Time of issuance with reference to summons or service by publication.—(a) The order of attachment may be issued

(1) In those cases where a summons is issued, at the time the summons is issued or at any time thereafter, or

(2) In those cases where service is by publication, at the time the order of publication is made or at any time thereafter.

(b) No order of attachment may be issued in any action after judgment in the principal action is had in the superior court. (1947, c. 693, s. 1.)

§ 1-440.7. Time within which service of summons or service by publication must be had.—

(a) When an order of attachment is issued before the summons is served,

(1) If personal service within the state is to be had, such personal service must be had within thirty days after the issuance of the order of attachment;

(2) If such personal service within the state is not to be had,

a. Service of the summons outside the state, in the manner provided by § 1-104, must be had within thirty days after the issuance of the order of attachment, or

b. Service by publication must be commenced not later than the thirty-first day after the issuance of the order of attachment. If publication is commenced, such publication must be completed as provided by § 1-99, unless the defendant appears in the action or unless personal service is had on him within the state.

(b) Upon failure of compliance with the applicable provisions of subsection (a) of this section, either the clerk or the judge shall, upon the motion of the defendant or any other interested party, make an order dissolving the attachment, and the defendant shall have all the rights that would accrue to him under the provisions of § 1-440.45, the same as if the principal action had been prosecuted to judgment and the defendant had prevailed therein. (1947, c. 693, s. 1.)

Applied in Scott & Co. v. Jones, 230 N. C. 74, 52 S. E. (2d) 219.

§ 1-440.8. General provisions relative to bonds.—(a) Any bond given pursuant to the provisions of this article shall be executed by the party required to furnish the bond and by

(1) A surety company authorized to do business in this state, as provided by § 109-17, or by

(2) One or more individual sureties, as may be required by the court.

(b) Each individual surety shall execute an affidavit, to be attached to the bond, stating that he is a resident of the state and that he is worth the amount specified in the bond exclusive of property exempt from execution and over and above all his liabilities.

(c) Any bond given pursuant to any provisions of this article shall be subject to the approval of the court.

(d) It is not a defense in an action on any bond given pursuant to this article that

(1) The court had no jurisdiction to require or accept bond, or

(2) The order of attachment was improperly granted, or

(3) There was any other irregularity in the attachment proceeding. (1947, c. 693, s. 1.)

§ 1-440.9. Authority of court to fix procedural details.—The court of proper jurisdiction, before which any matter is pending under the provisions of this article, shall have authority to fix and determine all necessary procedural details in all instances in which the statute fails to make definite provision as to such procedure. (1947, c. 693, s. 1.)

Part 2. Procedure to Secure Attachment.

§ 1-440.10. Bond for attachment.—

(a) Before the court issues an order of attachment, the plaintiff must furnish a bond as follows:

(1) The amount of the bond shall be such as may be fixed by the court issuing the order of attachment and shall be such as may be deemed necessary by the court in order to afford reasonable protection to the defendant, but shall not be less than two hundred dollars ($200.00);

(2) The condition of the bond shall be that

a. If the order of attachment is dissolved, dismissed or set aside by the court, or

b. If the plaintiff fails to obtain judgment against the defendant, the plaintiff will pay all costs that may be awarded to the defendant and all damages that the defendant may sustain by reason of the attachment, the surety's liability, however, to be limited to the amount of the bond. (1947, c. 693, s. 1.)

§ 1-440.11. Affidavit for attachment; amendment.—

(a) To secure an order of attachment, the plaintiff, or his agent or attorney in his behalf, must state by affidavit

(1) In every case:

a. The plaintiff has commenced or is about to commence an action, the purpose of which, in whole or in part, or in the alternative, is to secure a judgment for money, and the amount thereof,

b. The nature of such action, and

c. The ground or grounds for attachment (one or more of those stated in § 1-440.3); and

(2) In those cases described below, the additional facts indicated:

a. If the action is based on breach of contract, that the plaintiff is entitled to recover the amount for which judgment is sought over and above all counterclaims known to him;

b. If it is alleged as a ground for attachment that the defendant has done, or is about to do, any act with intent to defraud his creditors, the facts and circumstances supporting such allegation.

(b) A verified complaint may be used as the affidavit required by this section.

(c) The court, in its discretion, at any time before judgment in the principal action, may allow any such affidavit to be amended even though the original affidavit is wholly insufficient.

(d) An amendment of an insufficient affidavit of attachment relates to the beginning of the attachment proceeding, and no rights based on such irregularity can be required by any third party by any subsequent attachment intervening between the original affidavit and the amendment. (1947, c. 693, s. 1.)

§ 1-440.12. Order of attachment; form and contents.—

(a) If the matters required by § 1-440.11 (a) are shown by affidavit to the satisfaction of the court and if the bond required by § 1-440.10 is furnished, the court shall issue an order of attachment which shall

(1) Show the venue, the court in which the action has been, or is being, commenced, and the title of the action;

(2) Run in the name of the state and be directed to the sheriff of a designated county;

(3) State that an affidavit for the attachment of the defendant's property has been filed with the court in the action, that the required attachment bond has been executed and delivered to the court and that it has been made to appear to the satisfaction of the court that the allegations of the plaintiff's affidavit for attachment are true;

(4) Direct the sheriff to attach and safely keep all of the property of the defendant within the sheriff's county which is subject to attachment, or so much thereof as is sufficient to satisfy the plaintiff's demand, together with costs and expenses;

(5) Direct that the order of attachment be returned to the clerk of the court in which the action is pending;

(6) Show the date of issuance; and

(7) Be signed by clerk or the judge issuing the order.

(b) The order of attachment shall not contain a return date, but shall be returned to the clerk as provided by § 1-440.16. (1947, c. 693, s. 1.)

§ 1-440.13. Additional orders of attachment at time of original order; alias and pluries orders.—

(a) At the time the original order of attachment is issued, or thereafter, one or more additional orders, as the request of the plaintiff, may be issued, and any such additional order may be directed to the sheriff of any county in which the defendant may have property.

(b) After the original order or orders have been returned, if no property or, in the opinion of the plaintiff, insufficient property has been attached thereunder, alias or pluries orders may be issued prior to judgment, at the request of the plaintiff, and such alias or pluries orders may be directed to the sheriff of any county in which the defendant may have property. (1947, c. 693, s. 1.)

§ 1-440.14. Notice of issuance of order of attachment when no personal service.—

(a) When the original order of attachment is issued in an action in which an order is thereafter issued for service by publication of a notice as provided by § 1-98, the order of publication shall direct that the published notice include notice of the issuance of the order of attachment.

(b) When the original order of attachment is is-

sued after the order of publication is made, a notice of the issuance of the order of attachment shall be published once a week for four successive weeks in some newspaper published in the county in which the action is pending, such publication to be commenced within thirty days after the issuance of the order of attachment. Such notice shall show

(1) The county and the court in which the action is pending,

(2) The names of the parties,

(3) The purpose of the action, and

(4) The fact that on a date specified an order was issued to attach the defendant's property.

(c) If no newspaper is published in the county in which the action is pending, the notice

(1) Shall be published once a week for four successive weeks in some newspaper published in the same judicial district, or

(2) Shall be posted at the courthouse door in the county for thirty days.

(d) When an order of attachment is issued in an action in which service on the defendant is to be, or has been, had in the manner provided by § 1-104 in lieu of personal service on the defendant,

(1) A notice of the issuance of the order of attachment shall also be served on the defendant in the same manner as is provided for service of notice by § 1-104, which notice shall show the same facts with reference to the attachment as are required by subsection (b) of this section, or

(2) A notice of the issuance of the order of attachment shall be published in the manner provided by subsections (b) or (c) of this section. (1947, c. 693, s. 1.)

Applied in Scott & Co. v. Jones, 230 N. C. 74, 52 S. E. (2d) 219.

Part 3. Execution of Order of Attachment; Garnishment.

§ 1-440.15. Method of execution.—

(a) The sheriff to whom the order of attachment is directed shall note thereon the date of its delivery to him and shall promptly execute it by levying on the defendant's property as follows:

(1) The levy on real property shall be made as provided by § 1-440.17;

(2) The levy on stock in a corporation shall be made as provided by § 1-440.19;

(3) The levy on goods stored in a warehouse shall be made as provided by § 1-440.20;

(4) The levy on tangible personal property in the possession of the defendant shall, except as provided in § 1-440.19, be made as provided by § 1-440.18;

(5) The levy on tangible personal property belonging to the defendant but not in his possession, or on any indebtedness to the defendant, or on any other intangible personal property belonging to the defendant, shall, except as provided by §§ 1-440.19 and 1-440.20, be made as provided by § 1-440.25 relating to garnishment.

(b) The sheriff is not required to levy upon personal property before levying upon real property.

(c) In order for the sheriff to make any levy, it is not necessary for him to deliver to the defendant or any other person any copy of the order of attachment or any other process except in the case of garnishment as provided by § 1-440.25. (1947, c. 693, s. 1.)

§ 1-440.16. Sheriff's return.—

(a) After the sheriff has executed an order of attachment, he shall promptly make a written return showing all property levied upon by him and the date of such levy. In such return, he shall describe the property levied upon in sufficient detail to identify the property clearly. The sheriff forthwith shall deliver the order of attachment, together with his return, to the court in which the action is pending.

(b) If garnishment process is issued, as provided by §§ 1-440.23 and 1-440.24, the sheriff shall include in his return a report of his proceedings with respect to such garnishment and shall return to the court the original process issued to the garnishee.

(c) If the sheriff makes no levy within ten days after the issuance of the order of attachment, he forthwith shall deliver to the court, in which the action is pending, the order, and any other process relating thereto, together with his return showing that no levy has been made and the reason therefor. (1947, c. 693, s. 1.)

§ 1-440.17. Levy on real property.—

(a) In order to make a levy on real property, the sheriff need not go upon the land or take control over it, but he

(1) Shall make an endorsement upon the order of attachment or shall attach thereto a statement showing that he thereby levies upon the defendant's interest in the real property described in such endorsement or statement, describing the real property in sufficient detail to identify it clearly, and

(2) Shall, as promptly as practicable, certify such levy, and the names of the parties to the action, to the clerk of the superior court of the county in which the land lies.

(b) Upon receipt of the sheriff's certificate, the clerk shall dock the levy, as provided by § 1-440.33. (1947, c. 693, s. 1.)

The sheriff may make a valid levy under a warrant of attachment on real property without going on the property. The levy is made effective by the endorsement thereof on the execution or warrant of attachment. The jurisdiction of the court dates from the levy, but the lien becomes effective when certified to the clerk and indexed. Voehringer v. Pollock, 224 N. C. 409, 30 S. E. (2d) 374.

§ 1-440.18. Levy on tangible personal property in defendant's possession.—The sheriff shall levy on tangible personal property in the possession of the defendant by seizing and taking into his possession so much thereof as will be sufficient to satisfy the plaintiff's demands. (1947, c. 693, s. 1.)

§ 1-440.19. Levy on stock in corporation.—

(a) The sheriff may levy, as on tangible property, on a share of stock in a corporation by seizing the certificate of stock

(1) When the certificate is in the possession of the defendant, and

(2) When, by the law of the state in which the corporation is incorporated, the property interest of the stockholder is embodied in the certificate of stock, as is provided by the Uniform Stock Transfer Act or similar legislation.

(b) The sheriff may levy on a share of stock in

a corporation by delivery of copies of the garnishment process to the proper officer or agent of such corporation, as set out in § 1-440.26,

(1) When, by the law of the state in which the corporation is incorporated, the property interest of the stockholder is not embodied in the certificate of stock, or

(2) When, by the law of the state in which the corporation is incorporated, the property interest of the stockholder is embodied in the certificate of the stock, as is provided by the Uniform Stock Transfer Act or similar legislation, and

a. Such certificate has been surrendered to the corporation which issued it, or

b. The transfer of such certificate by the holder thereof has been restrained or enjoined.

(c) A restraining order or injunction against the transfer of a certificate of stock, when proper in an attachment proceeding, may be granted by the clerk or judge pursuant to a motion in the cause to which the attachment is ancillary. (1947, c. 693, s. 1.)

§ 1-440.20. Levy on goods in warehouses.—(a) The sheriff may levy on goods delivered to a warehouseman for storage, by delivering copies of the garnishment process to the warehouseman, or to the proper officer or agent for the corporate warehouseman, as set out in § 1-440.26,

(1) If a negotiable warehouse receipt has not been issued with respect thereto, or

(2) If a negotiable warehouse receipt has been issued with respect thereto, and

a. Such receipt is seized, or

b. Such receipt is surrendered to the warehouseman who issued it, or

c. The transfer of such receipt by the holder thereof is restrained or enjoined.

(b) A restraining order or injunction against the transfer of a negotiable warehouse receipt, when proper in an attachment proceeding, may be granted by the clerk or judge pursuant to a motion in the cause to which the attachment is ancillary. (1947, c. 693, s. 1.)

§ 1-440.21. Nature of garnishment.—(a) Garnishment is not an independent action but is a proceeding ancillary to attachment and is the remedy for discovering and subjecting to attachment

(1) Tangible personal property belonging to the defendant but not in his possession, and

(2) Any indebtedness to the defendant and any other intangible personal property belonging to him.

(b) A garnishee is a person, firm, association, or corporation to which such a summons as specified by § 1-440.23 is issued. (1947, c. 693, s. 1.)

§ 1-440.22. Issuance of summons to garnishee.—(a) A summons to garnishee may be issued

(1) At the time of the issuance of the original order of attachment, by the court making such order, or

(2) At any time thereafter prior to judgment in the principal action, by the court in which the action is pending.

(b) At the request of the plaintiff, such summons to garnishee shall, at either such time, be issued to each person designated by the plaintiff as a garnishee. (1947, c. 693, s. 1.)

§ 1-440.23. Form of summons to garnishee.—The summons to garnishee shall be substantially in the following form:

State of North Carolina

In the Superior Court

..... County
....., Plaintiff,
vs.
....., Defendant,
and
....., Garnishee.

Summons to Garnishee

State of North Carolina

To ....., Garnishee:

You are hereby summoned, as a garnishee of the defendant, ..., and required, within twenty days after the service of this summons upon you, to file a verified answer in the Office of the Clerk of the Superior Court of the above named county, at ....., North Carolina, showing—

(1) Whether, at the time of the service of this summons upon you, or at any time since then until the date of your answer, you were indebted to the defendant or had any property of his in your possession and, if so, the amount and nature thereof; and

(2) Whether, according to your knowledge, information or belief, any other person is indebted to the defendant or has any property of the defendant in his possession and, if so, the name of each such person.

In case of your failure to file such answer a conditional judgment will be rendered against you for the full amount for which the plaintiff has prayed judgment against the defendant, together with such amount as will be sufficient to cover the plaintiff's costs.

This the ..... day of ....., 19...

.....
(Here designate Clerk Superior Court or Judge.)

(1947, c. 693, s. 1.)

§ 1-440.24. Form of notice of levy in garnishment proceeding.—The notice of levy to be served on the garnishee shall be substantially in the following form:

State of North Carolina

In the Superior Court

..... County
Plaintiff,
.....,
vs.
....., Defendant,
and
....., Garnishee.

Notice of Levy

To ....., Garnishee:

By virtue of the authority contained in an order of attachment issued by the Superior Court of ..... county and directed to me, I hereby levy upon any and all property that you have or hold in your possession for the account, use, or

benefit of the defendant, and upon all debts owed by you to the defendant.

You are notified that a lien is hereby created on all the tangible property of the defendant in your possession, and that if you surrender the possession of, or transfer to anyone, any property belonging to the defendant, or if you pay any debt you owe the defendant, unless the same is delivered or paid to me or to the court for such proper disposition as the court may determine, you will be subject to punishment as for contempt, and that judgment may be rendered against you for the value of such property not exceeding the full amount of plaintiff's claim and costs of the action.

This the ..... day of ....., 19...

.....

Sheriff of ..... County.

(1947, c. 693, s. 1.)

§ 1-440.25. Levy upon debt owed by, or property in possession of, the garnishee.—The levy in all cases of garnishment shall be made by delivering to the garnishee, or a process agent authorized by him or expressly or impliedly authorized by law, or some representative of a corporate garnishee designated by § 1-440.26, a copy of each of the following:

(1) The order of attachment,

(2) The summons to garnishee, and

(3) The notice of levy.

(1947, c. 693, s. 1.)

§ 1-440.26. To whom garnishment process may be delivered when garnishee is corporation.—

(a) When the garnishee is a domestic corporation, the copies of the process listed in § 1-440.25 may be delivered to the president or other head, secretary, cashier, treasurer, director, managing agent or local agent of the corporation.

(b) When the garnishee is a foreign corporation, the copies of the process listed in § 1-440.25 may be delivered only to the president, treasurer or secretary thereof personally and while such officer is within the state, except that

a. If the corporation has property within this state, or

b. If the cause of action arose in this state, or

c. If the plaintiff resides in this state,

the copies of the process may be delivered to any of the persons designated in subsection (a) of this section.

(c) A person receiving or collecting money within this state on behalf of a corporation is deemed to be a local agent of the corporation for the purpose of this section. (1947, c. 693, s. 1.)

§ 1-440.27. Failure of garnishee to appear.—

(a) When a garnishee, after being duly summoned, fails to file a verified answer as required, the clerk of the court shall enter a conditional judgment for the plaintiff against the garnishee for the full amount for which the plaintiff shall have prayed judgment against the defendant, together with such amount as in the opinion of the clerk will be sufficient to cover the plaintiff's costs.

(b) The clerk shall thereupon issue a notice to the garnishee requiring him to appear not later than ten days after the date of service of the notice, and show cause why the conditional judgment shall not be made final. If, after service of such notice, the garnishee fails to appear within the time named and file a verified answer to the summons to the garnishee, or if such notice cannot be served upon the garnishee because he cannot be found within the county where the original summons to such garnishee was served, then in either such event, the clerk shall make the conditional judgment final. (1947, c. 693, s. 1.)

§ 1-440.28. Admission by garnishee; set-off; lien.—

(a) When a garnishee admits in his answer that he is indebted to the defendant, or was indebted to the defendant at the time of service of garnishment process upon him or at some date subsequent thereto, the clerk of the court shall enter judgment against the garnishee for the smaller of the two following amounts:

(1) The amount which the garnishee admits that he owes the defendant or has owed the defendant at any time from the date of the service of the garnishment process to the date of answer by the garnishee, or

(2) The full amount for which the plaintiff has prayed judgment against the defendant, together with such amount as in the opinion of the clerk will be sufficient to cover the plaintiff's costs.

(b) When a garnishee admits in his answer that he has in his possession personal property belonging to the defendant, with respect to which the garnishee does not claim a lien or other interest, the clerk of the court shall enter judgment against the garnishee requiring him to deliver such property to the sheriff, and upon such delivery the garnishee shall be exonerated as to the property so delivered.

(c) When a garnishee admits in his answer that, at or subsequent to the date of the service of the garnishment process upon him, he had in his possession property belonging to the defendant, with respect to which the garnishee does not claim a lien or other interest, but that he does not have such property at the time of his answer, the clerk of the court shall at a hearing for that purpose determine, upon affidavits filed, the value of such property, unless the plaintiff, the defendant and the garnishee agree as to the value thereof, or unless, prior to the hearing, a jury trial thereon is demanded by one of the parties. The clerk shall give the parties such notice of the hearing as he may deem reasonable and by such means as he may deem best.

(d) When the value of the property has been determined as provided in subsection (c) of this section the court shall enter judgment against the garnishee for the smaller of the two following amounts:

(1) An amount equal to the value of the property in question, or

(2) The full amount for which the plaintiff has prayed judgment against the defendant, together with such amount as in the opinion of the clerk will be sufficient to cover the plaintiff's costs.

(e) When a garnishee alleges in his answer that the debt or the personal property due to be delivered by him to the defendant will become payable or deliverable at a future date, and the plaintiff, within twenty days thereafter, files a reply denying such allegation, the issue thereby raised shall be submitted to and determined by a jury.

If it is not denied that the debt owed or the personal property due to be delivered to the defendant will become payable or deliverable at a future date, or if it is so found upon the trial, judgment shall be given against the garnishee which shall require the garnishee at the due date of the indebtedness to pay the plaintiff such an amount as is specified in subsection (a) of this section, or at the deliverable date of the personal property to deliver such property to the sheriff in order that it may be sold to satisfy the plaintiff's claim.

(f) In answer to a summons to garnishee, a garnishee may assert any right of set-off which he may have with respect to the defendant in the principal action.

(g) With respect to any property of the defendant which the garnishee has in his possession, a garnishee, in answer to a summons to garnishee, may assert any lien or other valid claim amounting to an interest therein. No garnishee shall be compelled to surrender the possession of any property of the defendant upon which the garnishee establishes a lien or other valid claim amounting to an interest therein, which lien or interest attached or was acquired prior to service of the summons to garnishee, and such property only may be sold subject to the garnishee's lien or interest. (1947, c. 693, s. 1.)

§ 1-440.29. Denial of claim by garnishee; issues of fact.—

(a) In addition to any other instances when issues of fact arise in a garnishment proceeding, issues of fact arise

(1) When a garnishee files an answer such that the court cannot determine therefrom whether the garnishee intends to admit or deny that he is indebted to, or has in his possession any property of, the defendant, or

(2) When a garnishee files an answer denying that he is indebted to, or has in his possession any property of, the defendant, or was indebted to, or had in his possession any property of, the defendant at the time of the service of the summons upon him or at any time since then, and the plaintiff, within twenty days thereafter, files a reply alleging the contrary.

(b) When a jury finds that the garnishee owes the defendant a specific sum of money or has in his possession property of the defendant of a specific value, or owed the defendant a specific sum of money or had in his possession property of the defendant of a specific value at the time of the service of the summons upon him or at any time since then, the court shall enter judgment against the garnishee for the smaller of the two following amounts:

(1) The amount specified in the jury's verdict, or

(2) The full amount for which the plaintiff has prayed judgment against the defendant, together with such amount as in the opinion of the clerk will be sufficient to cover the plaintiff's costs. (1947, c. 693, s. 1.)

§ 1-440.30. Time of jury trial.—All issues arising under § 1-440.28 or § 1-440.29 shall, when a jury trial is demanded by any party, be submitted to and determined by a jury at the same time the principal action is tried, unless the judge, on motion of any party for good cause shown, orders an earlier trial or a separate trial. (1947, c. 693, s. 1.)

§ 1-440.31. Payment to defendant by garnishee.—Any garnishee who shall pay to the defendant any debt owed the defendant or deliver to the defendant any property belonging to the defendant, after being served with garnishment process, and while the garnishment proceeding is pending, shall not thereby relieve himself of liability to the plaintiff. (1947, c. 693, s. 1.)

§ 1-440.32. Execution against garnishee.—

(a) Pursuant to a judgment against a garnishee, execution may be issued against such garnishee prior to judgment against the defendant in the principal action. The court may issue such execution without notice or hearing. All property seized pursuant to such execution shall be held subject to the order of the court pending judgment in the principal action.

(b) The court, pending judgment in the principal action, may permit the property to remain in the garnishee's possession upon the garnishee's giving a bond in the same manner and on the same conditions as is provided by § 1-440.39 with respect to the discharge of an attachment by the defendant. (1947, c. 693, s. 1.)

Part 4. Relating to Attached Property.

§ 1-440.33. When lien of attachment begins; priority of liens.—

(a) Upon securing the issuance of an order of attachment, a plaintiff may cause notice of the issuance of the order to be filed with the clerk of the court of any county in which the plaintiff believes that the defendant has real property which is subject to levy pursuant to such order of attachment. Upon receipt of such notice the clerk shall promptly docket the same on the lis pendens docket.

(b) When the clerk receives from the sheriff a certificate of levy on real property as provided by § 1-440.17, the clerk shall promptly note the levy on his judgment docket and index the same. When the levy is thus docketed and indexed,

(1) The lien attaches and relates back to the time of the filing of the notice of lis pendens if the plaintiff has prior to the levy caused notice of the issuance of the order of attachment to be properly entered on the lis pendens docket of the county in which the land lies, as provided by subsections (a) of this section.

(2) The lien attaches only from the time of the docketing of the certificate of levy if no entry of the issuance of the order of attachment has been made prior to the levy on the lis pendens docket of the county in which the land lies.

(c) A levy on tangible personal property of the defendant in the hands of the garnishee, when made in the manner provided by § 1-440.25, creates a lien on the property thus levied on from the time of such levy.

(d) If more than one order of attachment is served with respect to property in possession of the defendant or is served upon a garnishee, the priority of the order of the liens is the same as the order in which the attachments were levied, subject to the provisions of subsection (b) of this sec-

tion, relating to the time when a lien of attachment begins with respect to real property.

(e) If two or more orders of attachment are served simultaneously, liens attach simultaneously, subject to the provisions of subsection (b) of this section, relating to the time when a lien of attachment begins with respect to real property.

(f) If the funds derived from the attachment of property on which liens become effective simultaneously are insufficient to pay the judgments in full of the simultaneously attaching creditors who have liens which began simultaneously, such funds are prorated among such creditors according to the amount of the indebtedness of the defendant to each of them, respectively, as established upon the trial.

(g) If more than one order of attachment is served on a garnishee, the court from which the first order of attachment was issued shall, upon motion of the garnishee or of any of the attaching creditors, make parties to the action all of the attaching creditors, who are not already parties thereto in order that any questions of priority among the attaching creditors may be determined in that action and in that court. (1947, c. 693, s. 1.)

§ 1-440.34. Effect of defendant's death after levy.—

(a) In case of the death of the defendant, after the issuance of an order of attachment and after a levy is made thereunder but before service of summons is had or before an appearance is entered in the principal action, the levy shall remain in force

(1) If the cause of action set forth by the plaintiff in the principal action is one which survives, and

(2) If service is completed on the personal representative of the defendant within three months from the date of his qualification.

(b) If a levy has been made upon real property and the defendant dies before such real property is sold pursuant to the attachment, the lien of the attachment shall continue but the judgment may be enforced only through the defendant's personal representative in the regular course of administration. (1947, c. 693, s. 1.)

§ 1-440.35. Sheriff's liability for care of attached property; expense of care.—The sheriff is liable for the care and custody of personal property levied upon pursuant to an order of attachment just as if he had seized it under execution. Upon demand of the sheriff, the plaintiff shall advance to the sheriff from time to time such amount as may be required to provide the necessary care and to maintain the custody of the attached property. The expense so incurred in caring for and maintaining custody of attached property shall be taxed as part of the costs of the action. (1947, c. 693, s. 1.)

Part 5. Miscellaneous Procedure Pending Final Judgment.

§ 1-440.36. Dissolution of the order of attachment.—

(a) At any time before judgment in the principal action, a defendant whose property has been attached may specially or generally appear and move, either before the clerk or the judge, to dissolve the order of attachment.

(b) When the defect alleged as grounds for the motion appears upon the face of the record, no issues of fact arise, and the motion is heard and determined upon the record.

(c) When the defect alleged does not appear upon the face of the record, the motion is heard and determined upon the affidavits filed by the plaintiff and the defendant, unless, prior to the actual commencement of the hearing, a jury trial is demanded in writing by the plaintiff or the defendant. Either the clerk or the judge hearing and determining the motion to dissolve the order of attachment shall find the facts upon which his ruling thereon is based. If a jury trial is demanded by either party, the issues involved shall be submitted and determined at the same time the principal action is tried, unless the judge, on motion of any party for good cause shown, orders an earlier trial or a separate trial. (1947, c. 693, s. 1.)

Remedy in This Section Is Not Exclusive.—When the defendant contests the grounds on which the writ issued, this section provides a ready means of attack upon the writ without awaiting the trial of the main issue. But this remedy is not exclusive. He may make the necessary allegations in his answer by way of defense and await the trial. Whitaker v. Wade, 229 N. C. 327, 49 S. E. (2d) 627. See § 1-440.41.

The jury having found that the attachment was wrongfully issued, it was proper for the court to dissolve the attachment and discharge the defendant's surety from liability. Whitaker v. Wade, 229 N. C. 327, 49 S. E. (2d) 627.

§ 1-440.37. Modification of the order of attachment.—At any time before judgment in the principal action, the defendant may apply to the clerk or the judge for an order modifying the order of attachment. Such motion shall be heard upon affidavits. If the order is modified, the court making the order of modification shall make such provisions with respect to bonds and other incidental matters as may be necessary to protect the rights of the parties. (1947, c. 693, s. 1.)

§ 1-440.38. Stay of order dissolving or modifying an order of attachment.—Whenever a plaintiff appeals from an order dissolving or modifying an order of attachment, such order shall be stayed and the attachment lien with respect to all property theretofore attached shall remain in effect until the appeal is finally disposed of. In order to protect the defendant in the event that an order dissolving or modifying an order of attachment is affirmed on appeal, the court from whose order the appeal is taken may, in its discretion, require the plaintiff to execute and deposit with the clerk an additional bond with sufficient surety and in an amount deemed adequate by the court to indemnify the defendant against all losses which he may suffer on account of the continuation of the lien of the attachment pending the determination of the appeal. (1947, c. 693, s. 1.)

§ 1-440.39. Discharge of attachment upon giving bond.—

(a) Any defendant whose property has been attached may move, either before the clerk or the judge, to discharge the attachment upon his giving bond for the property attached. If no prior general appearance has been made by such defendant, such motion shall constitute a general appearance.

(b) The court hearing such motion shall make an order discharging such attachment upon such defendant's filing a bond as follows:

(1) If it is made to appear to the satisfaction

of the court by affidavit that the property attached is of a greater value than the amount claimed by the plaintiff, the court shall require a bond in double the amount of the judgment prayed for by the plaintiff, and the condition of such bond shall be that if judgment is rendered against the defendant, the defendant will pay to the plaintiff the amount of the judgment and all costs that the defendant may be ordered to pay, the surety's liability, however, to be limited to the amount of the bond. (2) If it is made to appear to the satisfaction of the court by affidavit that the property attached is of less value than the amount claimed by the plaintiff, the court shall, upon affidavits filed, determine the value thereof and shall require a bond in double the amount of such value, and the condition of the bond shall be that if judgment is rendered against the defendant, the defendant will pay to the plaintiff an amount equal to the value of such property.

(c) If a bond is filed as provided in subsection (b) of this section, all property of such defendant then remaining in the possession of the sheriff pursuant to such attachment, including, but not by way of limitation, money collected and the proceeds of sales, shall be delivered to the defendant and shall thereafter be free from the attachment.

(d) The discharge of an attachment as provided by this section does not bar the defendant from exercising any right provided by §§ 1-440.36, 1-440.37 or 1-440.40. (1947, c. 693, s. 1.)

§ 1-440.40. Defendant's objection to bond or surety.—

(a) At any time before judgment in the principal action, on motion of the defendant, the clerk or judge may, if he deems it necessary in order to provide adequate protection, require an increase in the amount of the bond previously given by or required of the plaintiff.

(b) At any time before judgment in the principal action the defendant may except to any surety upon any bond given by the plaintiff pursuant to the provisions of this article, in which case the surety shall be required to justify, and the procedure with respect thereto shall be as is prescribed for the justification of bail in arrest and bail proceedings. (1947, c. 693, s. 1.)

§ 1-440.41. Defendant's remedies not exclusive. —The exercise by the defendant of any one or more rights provided by §§ 1-440.36 through 1-440.40 does not bar the defendant from exercising any other rights provided by those sections. (1947, c. 693, s. 1.)

Stated in Whitaker v. Wade, 229 N. C. 327, 49 S. E. (2d) 627.

§ 1-440.42. Plaintiff's objection to bond or surety; failure to comply with order to furnish increased or new bond.—

(a) At any time before judgment in the principal action, on motion of the plaintiff, the clerk or judge may, if he deems it necessary in order to provide adequate protection, require an increase in the amount of the bond previously given by or required of any defendant, garnishee or intervenor.

(b) At any time before judgment in the principal action the plaintiff may except to any surety upon any bond given by any defendant, garnishee or intervenor pursuant to the provisions of this article, in which case the surety shall be required to justify, and the procedure with respect thereto shall be as is prescribed for the justification of bail in arrest and bail proceedings.

(c) Upon failure of a defendant, garnishee or intervenor to comply with an order requiring an increase in the amount of a bond previously given, or upon failure to comply with an order requiring a new bond when the surety on the previous bond is unsatisfactory, the court may, in addition to any other action with respect thereto, issue an order or attachment directing the sheriff to seize and take into his possession property released upon the giving of the previous bond, if the person failing to comply with the order still has possession of the same. Such property when retaken into his possession by the sheriff shall be subject to all the provisions of this article relating to attached property. (1947, c. 693, s. 1.)

§ 1-440.43. Remedies of third person claiming attached property or interest therein.—Any person other than the defendant who claims property which has been attached, or any person who has acquired a lien upon or an interest in such property, whether such lien or interest is acquired prior to or subsequent to the attachment, may

(1) Apply to the court to have the attachment order dissolved or modified, or to have the bond increased, upon the same conditions and by the same methods as are available to the defendant, or

(2) Intervene and secure possession of the property in the same manner and under the same conditions as is provided for intervention in claim and delivery proceedings. (1947, c. 693, s. 1.)

§ 1-440.44. When attached property to be sold before judgment.—

(a) The sheriff shall apply to the clerk or to the judge for authority to sell property, or any share or interest therein, seized pursuant to an order of attachment,

(1) If the property is perishable, or

(2) If the property is not perishable, but

a. Will materially deteriorate in value pending litigation, or

b. Will likely cost more than one-fifth of its value to keep pending a final determination of the action, and

c. Is not discharged from the attachment lien in the manner provided by § 1-440.39 within ten days after the seizure thereof.

(b) If the court so orders, the property described in subsection (a) of this section shall thereupon be sold under the direction of the court unless the discharge of the same is secured by the defendant or other person interested therein, in the manner provided by § 1-440.39, prior to such sale. The proceeds of such sale shall be liable for any judgment obtained in the principal action and shall be retained by the sheriff to await such judgment. (1947, c. 693, s. 1.)

Part 6. Procedure after Judgment.

§ 1-440.45. When defendant prevails in principal action.—

(a) If the defendant prevails in the principal ac-

tion, or if the order of attachment is for any reason dissolved, dismissed or set aside, or if service is not had on the defendant as provided by § 1-440.7,

(1) The defendant shall be entitled to have delivered to him

a. All bonds taken for his benefit whether filed in the proceedings or taken by an officer, and

b. The proceeds of any sales and all money collected, and

c. All attached property remaining in the officer's hands, and

(2) Any garnishee shall be entitled to have vacated any judgment theretofore taken against him.

(b) Either the clerk or the judge shall have authority, upon motion of the defendant or any garnishee, to make any such order as may be necessary or proper to carry out the provisions of subsection (a) of this section.

(c) The defendant may recover in the original principal action on any bond taken for his benefit therein, or he may maintain an independent action thereon. (1947, c. 693, s. 1.)

Prior to 1947, there was no provision in this article for the assessment of damages in the original action against the plaintiff and his surety for the wrongful issuance of a warrant of attachment. The defendant was compelled to pursue his remedy by independent action after the groundlessness of the action or the ancillary writ was judicially determined. Whitaker v. Wade, 229 N. C. 327, 49 S. E. (2d) 627.

Claim on Bond May Not Be Heard at Original Hearing.—Subsection (c) of this section does not mean that defendant's claim against plaintiff's bond may be heard and damages assessed at the original hearing. It provides instead that such damages are to be assessed in the same action, at the election of the defendant, after judgment on the main issue. Defendant's cause of action on the bond is bottomed on the wrongful issuance of the writ. The groundlessness of the writ is an essential element of his right to damages and this cannot completely exist or appear until that fact is judicially determined either by judgment vacating the writ or judgment against the plaintiff in the main action. Then only does defendant's cause of action on the bond arise and become complete. His proper remedy is by motion in the cause after judgment. Whitaker v. Wade, 229 N. C. 327, 49 S. E. (2d) 627.

Remedy Is by Motion after Judgment or Subsequent Independent Action.—Where it is determined upon the trial of the main issue that plaintiff's averment upon which attachment was issued was false, defendant may have damages assessed for the wrongful attachment either upon motion in the cause after judgment or by subsequent independent action. Whitaker v. Wade, 229 N. C. 327, 49 S. E. (2d) 627.

§ 1-440.46. When plaintiff prevails in principal action.—

(a) If judgment is entered for the plaintiff in the principal action, the sheriff shall satisfy such judgment out of money collected by him or paid to him in the attachment proceeding or out of property attached by him as follows:

(1) After paying the costs of the action, he shall apply on the judgment as much of the balance of the money in his hands as may be necessary to satisfy the judgment.

(2) If the money so applied is not sufficient to pay the judgment in full, the sheriff shall, upon the issuance of an execution on the judgment, sell sufficient attached property, except debts and evidences of indebtedness to satisfy the judgment.

(3) While the judgment remains unsatisfied, and notwithstanding the pendency of the sale of any personal or real property as provided by paragraph (2) of this subsection, the sheriff shall collect and apply on the judgment any debts or evidences of indebtedness attached by him.

(4) If, after the expiration of six months from the docketing of the judgment, the judgment is not fully satisfied, the sheriff shall, when ordered by the clerk or judge, as provided in subsection (b) of this section, sell all debts and notes and other evidences of indebtedness remaining unpaid in his hands, and shall apply the net proceeds thereof, or as much thereof as may be necessary, to the satisfaction of the judgment. To forestall the running of the statute of limitations, earlier sale may be ordered in the discretion of the court.

(b) In order to secure the sale of the remaining debts and evidences of indebtedness as provided in subsection (a) (4) of this section, the plaintiff may move therefor, either before the clerk or the judge, and shall submit with his motion

(1) His affidavit setting forth fully the proceedings had by the sheriff since the service of the attachment, listing or describing the property attached, and showing the disposition thereof, and

(2) The affidavit of the sheriff that he has endeavored to collect the debts or evidences of indebtedness and that there remains uncollected some part thereof.

Upon the filing of such motion, the court to which the motion is made shall give the defendant or his attorney such notice of the hearing thereon as the court may deem reasonable, and by such means as the court may deem best. Upon the hearing, the court may order the sheriff to sell the debts and other evidences of indebtedness remaining in his hands, or may make such other order with respect thereto as the court may deem proper.

(c) In case of the sale of a share of stock of a corporation or of property in a warehouse for which a negotiable warehouse receipt has been issued, the sheriff shall execute and deliver to the purchaser a certificate of sale therefor, and the purchaser shall have all the rights with respect thereto which the defendant had.

(d) When the judgment and all costs of the proceedings have been paid, the sheriff, upon demand of the defendant, shall deliver to the defendant the residue of the attached property or the proceeds thereof. (1947, c. 693, s. 1.)

Part 7. Attachments in Justice of the Peace Courts.

§ 1-440.47. Powers of justice of the peace; procedure.—

(a) A justice of the peace has the same powers with respect to attachment proceedings in actions of which he has jurisdiction which a clerk or judge of the superior court had with respect to attachment proceedings in actions of which the superior court has jurisdiction.

(b) The procedure with respect to attachment in courts of justices of the peace shall conform as nearly as practicable to the procedure of the superior court, and the statutes relating to attachment in the superior court shall be in effect and shall govern the procedure in so far as it is practicable to apply them except as otherwise provided

in §§ 1-440.48 through 1-440.56 of this article. (1947, c. 693, s. 1.)

§ 1-440.48. Return of order of attachment in justice of the peace courts.—The order of attachment shall not contain a return date but shall be returned to the justice of the peace who issued it. Such return must meet the requirements with respect to the return of orders of attachment issued in the superior court, as provided by § 1-440.16. (1947, c. 693, s. 1.)

§ 1-440.49. To whom order issued by justice of the peace is directed.—An order of attachment issued by a justice of the peace may be directed to any constable or other lawful officer of a county, who shall have the same powers and duties with respect thereto which the sheriff has with respect to an order of attachment issued by the superior court. (1947, c. 693, s. 1.)

§ 1-440.50. Issuance of order by justice of the peace to another county.—When a justice of the peace issues an order of attachment to a county other than his own, such order may not be served in such county unless there is endorsed on or attached to the order the certificate of the clerk of the superior court of the justice's county certifying that the justice issuing the order is a justice of the peace and that the signature on the order is in the handwriting of the justice. It is the duty of the clerk of the superior court to issue such certificate upon application and the payment of the fee therefor. (1947, c. 693, s. 1.)

§ 1-440.51. Notice of attachment in justice of the peace courts when no personal service.—When an order of attachment is issued by a justice of the peace and there is no personal service of the summons on the defendant against whom the attachment is issued, notice of the attachment need not be published in a newspaper, but, between the issuance of the order and the trial of the principal action, notice of the attachment must be posted for thirty days at the county courthouse door. Such notice shall state:

(1) The county and the township and the name of the justice of the peace before whom the action is pending,
(2) The names of the parties,
(3) The purpose of the action, and
(4) The fact that on a date specified an order of attachment was issued against the defendant. (1947, c. 693, s. 1.)

§ 1-440.52. Allowance of time for attachment and garnishment procedure in justice of the peace courts.—In order that sufficient time may be allowed in any action before a justice of the peace for the parties to exercise such rights with respect to attachment and garnishment as are hereinbefore provided for, within the same periods of time as are allowed therefor in the superior court, the justice of the peace before whom the principal action has been, or is being, commenced has all such powers with respect to fixing the time for the defendant to appear and answer, granting continuances and fixing the time for the trial, as may be necessary or proper for that purpose, notwithstanding the provisions of §§ 7-136 and 7-149, Rule 15. (1947, c. 693, s. 1.)

§ 1-440.53. Certificates of stock and warehouse receipts; restraint of transfer not authorized in justice of the peace courts.—Nothing in this article is intended to authorize any justice of the peace to restrain or enjoin the transfer of a certificate of stock or a warehouse receipt. (1947, c. 693, s. 1.)

§ 1-440.54. Procedure in justice of the peace courts when land attached.—

(a) Upon securing the issuance of an order of attachment by a justice of the peace, a plaintiff may cause notice of the issuance of the order to be filed with the clerk of the court of any county in which the plaintiff believes that the defendant has real property which is subject to levy pursuant to such order of attachment. Upon receipt of such notice the clerk shall promptly docket the same on the lis pendens docket.

(b) A justice of the peace has no authority to issue an execution to sell real property attached in any action commenced in his court. Whenever in any such action real property has been attched, the justice of the peace, upon rendering judgment in the principal action, shall deliver to the clerk of the superior court of his county a copy of the judgment rendered by him together with the original order of attachment.

(c) If judgment was rendered against the defendant whose property was attached, the clerk shall docket the judgment and shall thereupon issue execution directing the sale of the real property attached as shown by the officer's return made pursuant to § 1-440.17, or so much thereof as may be necessary to satisfy the judgment. If judgment was not rendered against the defendant whose property was attached, the clerk shall make an entry on his judgment docket showing the discharge of the attachment.

(d) Notwithstanding the lack of authority of the justice of the peace to issue an execution to sell real property, the levy of the attachment issued by him on real property constitutes a lien on such property, but only under the conditions provided by § 1-440.33. (1947, c. 693, s. 1.)

§ 1-440.55. Trial of issue of fact in justice of the peace court.—When an issue of fact is raised pursuant to the provisions of § 1-440.28 or § 1-440.29, the justice of the peace may try such issue unless a jury trial is demanded. If a jury trial is demanded, proceedings with respect thereto shall be conducted as in other jury trials before a justice of the peace. (1947, c. 693, s. 1.)

§ 1-440.56. Jurisdiction with respect to recovery on bond in justice of the peace court.—Notwithstanding the provisions of § 1-440.45(c), the defendant may recover on the plaintiff's bond in the principal action in a court of the justice of the peace only when the amount of the bond does not exceed two hundred dollars ($200.00). (1947, c. 693, s. 1.)

Part 8. Attachment in Other Inferior Courts.

§ 1-440.57. Jurisdiction of inferior courts not affected.—Nothing in this article shall be construed to change in any manner the jurisdiction of any court inferior to the superior court with respect to attachment. (1947, c. 693, s. 1.)

§ 1-459. Levy on intangible property.

Cited in White v. Ordille, 229 N. C. 490, 50 S. E. (2d) 499.

§ 1-461. Proceedings against garnishee.

Cited in White v. Ordille, 229 N. C. 490, 50 S. E. (2d) 499.

Art. 37. Injunction.

§ 1-486. When solvent defendant restrained.

Continuing Trespass.—
When relief is sought against a continuing trespass, a restraining order may properly issue without allegation of insolvency; and this ancillary remedy may be available in an action where the title to land is at issue, but may not be used as an instrument to settle a dispute as to the possession, or to effect an ouster. Young v. Pittman, 224 N. C. 175, 176, 29 S. E. (2d) 551.

§ 1-487. Timber lands, trial of title to.

Applied in Chandler v. Cameron, 227 N. C. 233, 41 S. E. (2d) 753.

§ 1-488. When timber may be cut.

Essential Elements.—
In accord with original. See Chandler v. Cameron, 227 N. C. 233, 41 S. E. (2d) 753.

§ 1-493. What judges have jurisdiction.

Restraining Orders.—
Where a restraining order is made returnable before a judge assigned to the district at a place outside of the district and after the courts were over, but before the end of the term of the assignment, such judge has jurisdiction to hear the application and to grant injunction until the hearing. Reidsville v. Slade, 224 N. C. 48, 54, 29 S. E. (2d) 215.

Where an action to try title is pending, a judge of the superior court has judicial power to issue an order restraining a party from further action as proceeding to obtain possession against a tenant of the adverse party. Massengill v. Lee, 228 N. C. 35, 44 S. E. (2d) 356.

§ 1-498. Issued without notice; application to vacate.

Modification of Previously Granted Injunction.—
A Superior Court judge assigned to a district has, during the period of assignment, jurisdiction of all "in Chambers" matters arising in the district, including restraining orders and injunctions, and he may, in an adjoining district, vacate or modify a temporary injunction issued without notice. Reidsville v. Slade, 224 N. C. 48, 29 S. E. (2d) 215.

§ 1-499. When opposing affidavits admitted.

Stated in Reidsville v. Slade, 224 N. C. 48, 29 S. E. (2d) 215.

§ 1-500. Restraining orders and injunctions in effect pending appeal; indemnifying bond.

Cited in Reidsville v. Slade, 224 N. C. 48, 29 S. E. (2d) 215.

Art. 38. Receivers.

§ 1-502. In what cases appointed.

In General.—
This section is expressly made applicable to all receivers. Ledbetter v. Farmers Bank, etc., Co., 142 F. (2d) 147, 149.

Section Does Not Limit Power of Court to Appoint Receiver.—The power of the court to appoint a receiver in proper cases and upon a proper showing is not limited by this section or § 55-147. Sinclair v. Moore Central R. Co., 228 N. C. 389, 45 S. E. (2d) 555.

§ 1-503. Appointment refused on bond being given.

This section was enacted for the benefit and protection of a defendant against whom an application for a receiver is prosecuted. It authorizes the judge in his discretion, upon the filing of the undertaking therein stipulated, "to refuse the appointment of a receiver." Sinclair v. Moore Central R. Co., 228 N. C. 389, 45 S. E. (2d) 555.

Plaintiff Estopped by Acceptance of Bond by Court.—
Plaintiffs who are parties at the time the court accepts bond filed pursuant to this section, and denies application for appointment of a receiver, are thereby estopped from further prosecuting their application for a receiver, and the court is without authority to revoke such order at a subsequent term over objection of defendants. Sinclair v. Moore Central R. Co., 228 N. C. 389, 45 S. E. (2d) 555.

§ 1-504. Receiver's bond.

Effect of Failure to Require Bond.—
An order appointing a receiver is not void because of an inadequate bond. Ledbetter v. Farmers Bank, etc., Co., 142 F. (2d) 147, 150, citing Nesbitt & Bro. v. Turrentine, 83 N. C. 536.

The determination of the amount of the bond is within the discretion of the court. Ledbetter v. Farmers Bank, etc., Co., 142 F. (2d) 147, 150.

And Mortgagee Is Not Liable for Suggesting Inadequate Bond.—The fact that mortgagees suggested an inadequate amount in the bond of a receiver was held not to thereby render them legally liable to the mortgagor. Ledbetter v. Farmers Bank, etc., Co., 142 F. (2d) 147, 150.

§ 1-505. Sale of property in hands of receiver.—The resident judge or the judge assigned to hold any of the courts in any judicial district of North Carolina shall have power and authority to order a sale of any property, real or personal, in the hands of a receiver duly and regularly appointed by the superior court of North Carolina upon such terms as appear to be to the best interests of the creditors affected by said receivership. Except as provided in G. S. § 1-506 the procedure for such sales shall be as provided in article 29A of chapter 1 of the General Statutes. (1931, c. 123, s. 1; 1949, c. 719, s. 2.)

Editor's Note.—The 1949 amendment, effective Jan. 1, 1950, added the second sentence.

Art. 39. Deposit or Delivery of Money or Other Property.

§ 1-510. Defendant ordered to satisfy admitted sum.

Tender of Judgment under § 1-541. — Where defendant admits liability under its own construction of the contract for a part of the amount alleged by plaintiff to be due thereunder, plaintiff is entitled, under this section, to judgment for such amount without prejudice to the litigation of the balance claimed to be due him, which right may not be defeated by defendant's tender of judgment under § 1-541. McKay v. McNair Inv. Co., 228 N. C. 290, 45 S. E. (2d) 358.

Art. 41. Quo Warranto.

§ 1-521. Trials expedited.—All actions to try the title or right to any state, county or municipal office shall stand for trial at the next term of court after the summons and complaint have been served for thirty days, regardless of whether issues were joined more than ten days before the term; and it is the duty of the judge to expedite the trial of these actions and to give them precedence over all others, civil or criminal. It is unlawful to appropriate any public funds to the payment of counsel fees in any such action. (Rev., s. 833; Code, s. 616; 1901, c. 42; 1874-5, c. 173; 1947, c. 781; C. S. 876.)

Editor's Note.—The 1947 amendment rewrote this section.

Art. 43. Nuisance and Other Wrongs.

§ 1-539. Remedy for nuisance.

Obstruction of Fish in Their Passage Upstream.—The rule that a riparian owner is not entitled to maintain an action for the reason that he had sustained no peculiar injury through the obstruction of fish in their upstream passage to his fishery, has not been rendered obsolete by this section and the prescription of a right to sue in like cases. Hampton v. North Carolina Pulp Co., 49 F. Supp. 625, 631.

§ 1-539.1. Damages for unlawful cutting or removal of timber.—Any person not being the bona fide owner thereof or agent of the owner who shall knowingly and without the consent and permission of the bona fide owner enter upon the land of another and injure, cut or remove any valuable

wood, timber, shrub or tree therefrom, shall be liable to the owner of said land for double the value of such wood, timber, shrubs or trees so injured, cut or removed. (1945, c. 837.)

Art. 44. Compromise.

§ 1-541. Tender of judgment.

A defendant may not defeat the purpose of § 1-510 by undertaking to make a tender under this section. McKay v. McNair Inv. Co., 228 N. C. 290, 45 S. E. (2d) 358.

§ 1-543. Disclaimer of title in trespass; tender of judgment.—In actions of trespass upon real estate, the defendant in his answer may disclaim any title or claim to the lands against which the trespass is alleged, may allege that the trespass was by negligence or involuntary, and may make a tender or offer of sufficient amends for the trespass. In the event of such disclaimer, defense and offer by the defendant, the plaintiff is required to file a reply before trial, with respect to the defendant's allegation that the trespass was negligent or involuntary, and that a sufficient tender has been made.

If the plaintiff controverts such answer or a part thereof, and at the trial verdict is found for the defendant or the plaintiff is nonsuited, other than voluntarily, then in either such event he is barred from the said action.

All costs incurred after the defendant's disclaimer and tender shall be charged against the plaintiff in the event the jury finds for the defendant on the issues of disclaimer and tender, or in the event the plaintiff is nonsuited. (Rev., s. 863; Code, s. 577; Rev. Code, c. 31, s. 79; 1715, c. 2, s. 7; 1947, c. 781; C. S. 898.)

Editor's Note.—The 1947 amendment inserted the second sentence of the first paragraph, added the last paragraph and made other changes.

Art. 45. Arbitration and Award.

§ 1-544. Agreement for arbitration.

Common Law Method of Arbitration Adopted.—Where the method of arbitration adopted by the parties is in accordance with procedure at common law, and not with that prescribed in this article, plaintiff's motion to strike report of arbitrator must be considered in light of common law. Tarpley v. Arnold, 226 N. C. 679, 40 S. E. (2d) 33.

The common law governs a written agreement for arbitration which is not in accordance with the procedure prescribed by this article. Brown v. Moore, 229 N. C. 406, 50 S. E. (2d) 5.

Art. 46. Examination of Parties.

§ 1-568. Action for discovery abolished.

Editor's Note.—As to inspection of chattels, see 26 N. C. Law Rev. 398.

§ 1-569. Adverse party examined.

Time Provisions of Section Available.—After complaint is filed, and before answer is filed, the provisions of this and the following sections are available to defendant for adverse examination of plaintiffs to procure information to file answer. Fox v. Yarborough, 225 N. C. 606, 35 S. E. (2d) 885.

Premature Appeal.—

Upon verified application for examination of an adverse party, under this and the following section, the affidavit complying with the requirements of the statutes, an appeal from an order granting the application is premature and will be dismissed. Sudderth v. Simpson, 224 N. C. 181, 29 S. E. (2d) 550. See also, Fox v. Yarborough, 225 N. C. 606, 35 S. E. (2d) 885.

However, supreme court may in its discretion elect to consider the appeal on its merit. Fox v. Yarborough, 225 N. C. 606, 35 S. E. (2d) 885.

Cited in Gibbs v. Russ, 223 N. C. 349, 26 S. E. (2d) 909.

§ 1-570. Before trial in his own county.

Sufficiency of Petition for Examination.—

In accord with 2nd paragraph in original. See Sudderth v. Simpson, 224 N. C. 181, 182, 29 S. E. (2d) 550.

Cited in Gibbs v. Russ, 223 N. C. 349, 26 S. E. (2d) 909.

Art. 47. Motions and Orders.

§ 1-584. Petition to remove to federal court; order by the court.—When it shall appear to a court of this state that a petition for removal of any action or proceeding pending therein has been filed in a district court of the United States, the state court may then, upon its own motion or the motion of a party to the action or proceeding, order that no further proceedings be had in the state court unless and until the action or proceeding has been remanded to the state court by the United States court and a certified copy of the order of remand is filed with the clerk; but failure to enter such order shall not entitle the state court or any party to proceed; the appearance of a party for the purpose of making the above mentioned motion shall not affect or be deemed a waiver of the right to remove. (Ex. Sess. 1921, c. 92, s. 16; 1925, c. 282, s. 2; 1949, c. 808, s. 2; C. S. 913(b).)

Editor's Note.—The 1949 amendment rewrote this section. For a brief comment on this amendment, see 27 N. C. Law Rev. 477.

Art. 48. Notices.

§ 1-589. Service by telephone or registered mail on witnesses and jurors.—Sheriffs, constables and other officers charged with service of such process may serve subpoenas for witnesses and summonses for jurors by telephone or by registered mail, and such service shall be valid and binding on the person served. When such process is served by telephone the return of the officer serving it shall state it is served by telephone. When served by registered mail a copy shall be mailed and a written receipt requested of the addressee and such receipt shall be filed with the return and be a necessary part thereof. (1915, c. 48; 1925, c. 98; 1945, c. 635; C. S. 918.)

Editor's Note.—

The 1945 amendment substituted in the last sentence the words "requested of the addressee" for the word "demanded."

Art. 49. Time.

§ 1-593. How computed.

Actions on Judgments.—Where a judgment was rendered on October 20, 1873, and an action was brought on the judgment on October 20, 1883, it was held that the statute barring actions on judgments in ten years was not a defense. Cook v. Moore, 95 N. C. 1. Judgment in this case was inadvertently entered for the defendant; the mistake was corrected in Cook v. Moore, 100 N. C. 294, 6 S. E. 795, 6 Am. St. Rep. 587.

Art. 50. General Provisions as to Legal Advertising.

§ 1-596. Charges for legal advertising. — The publication of all advertising required by law to be made in newspapers in this state shall be paid for at not to exceed the local commercial rate of the newspapers selected. Any public or municipal officer or board created by or existing under the laws of this state that is now or may hereafter be authorized by law to enter into contracts for the publication of legal advertisements is hereby authorized to pay therefor prices not exceeding said rates.

No newspaper in this state shall accept or print any legal advertising until said newspaper shall have first filed with the clerk of the superior court of the county in which it is published a sworn statement of its current commercial rate for the several classes of advertising regularly carried by said publication, and any owner or manager of a newspaper violating the provisions of this section shall be guilty of a misdemeanor. (1919, c. 45, ss. 1, 2; 1945, c. 635; 1949, c. 205, s. 1½; C. S. 2586.)

Local Modification.—Nash: 1949, c. 205, s. 2.

Editor's Note.—The 1945 amendment substituted the first "or" in line six for "of" and rewrote the former last sentence of the first paragraph so as to make it subject to the former limitations prescribed by § 1-99 with respect to the cost of service by publication. The 1949 amendment struck out such last sentence.

§ 1-598. Sworn statement prima facie evidence of qualification; affidavit of publication.—Whenever any owner, partner, publisher, or other authorized officer or employee of any newspaper which has published a notice or any other paper, document or legal advertisement within the meaning of § 1-597 has made a written statement under oath taken before any notary public or other officer or person authorized by law to administer oaths, stating that the newspaper in which such notice, paper, document, or legal advertisement was published, was, at the time of such publication, a newspaper meeting all of the requirements and qualifications prescribed by § 1-597, such sworn written statement shall be received in all courts in this state as prima facie evidence that such newspaper was at the time stated therein a newspaper meeting the requirements and qualifications of § 1-597. When filed in the office of the clerk of the superior court of any county in which the publication of such notice, paper, document or legal advertisement was required or authorized, any such sworn statement shall be deemed to be a record of the court, and such record or a copy thereof duly certified by the clerk shall be prima facie evidence that the newspaper named was at the time stated therein a qualified newspaper within the meaning of § 1-597. Nothing in this section shall preclude proof that a newspaper was or is a qualified newspaper within the meaning of § 1-597 by any other competent evidence. Any such sworn written statement shall be prima facie evidence of the qualifications on any newspaper at the time of any publication of any notice, paper, document, or legal advertisement published in such newspaper at any time from and after the first day of May, 1940.

The owner, a partner, publisher or other authorized officer or employee of any newspaper in which such notice, paper, document or legal advertisement is published, when such newspaper is a qualified newspaper within the meaning of § 1-597, shall include in the affidavit of publication of such notice, paper, document or legal advertisement a statement that at the time of such publication such newspaper was a qualified newspaper within the meaning of § 1-597. (1939, c. 170, s. 1½; 1947, c. 213, ss. 1, 2.)

Editor's Note.—The 1947 amendment rewrote this section. A provision making a false statement a misdemeanor was eliminated from this section by the 1947 amendment. The effect of this deletion may well be to bring false swearing in the affidavit within the purview of the perjury statute, § 14-209, thus making it a felony. 25 N. C. Law Rev. 450.

Chapter 2. Clerk of Superior Court.

Sec.

Art. 4. Powers and Duties.

2-16.1. Validation of oaths administered by clerks.

Art. 6. Money in Hand; Investments.

2-52. Payment of insurance to persons under disability.

Art. 2. Assistant Clerks.

§ 2-10. Appointment; oath; powers and jurisdiction; responsibility of clerks.

Local Modification.—
Mecklenburg: 1943, c. 348.

Art. 4. Powers and Duties.

§ 2-16. Powers enumerated.

2. To administer any and all oaths and to take acknowledgment of the execution of all instruments or writings.

(1949, c. 57, s. 1.)

Cross References.—As to fixing compensation of commissioners for division of lands, see § 46-7.1.

As to clerk acting as temporary guardian of children of certain service men, see § 33-67.

Editor's Note.—The 1949 amendment made changes in subsection 2. As the rest of the section was not affected by the amendment it is not set out.

§ 2-16.1. Validation of oaths administered by clerks.—The act of any clerk of the superior court in administering any oath prior to the ratification of this section, when such was not necessary in the exercise of the powers and duties of his office, is hereby ratified and validated; provided, however, that nothing herein contained shall affect pending litigation. (1949, c. 57, s. 2.)

Editor's Note.—The act inserting this section was ratified Feb. 11, 1949, and became effective July 1, 1949.

§ 2-20. Disqualification unwaived; cause removed or judge acts.

Cited in In re Estate of Smith, 226 N. C. 169, 37 S. E. (2d) 127.

§ 2-22. Custody of records and property of office.

Two Distinct Remedies Provided.—Our statutes provide two separate and distinct remedies—one in behalf of the injured individual for a specific fund to which he is entitled or on account of a particular wrong committed against him by the clerk, as provided for in § 109-34, and one in behalf of the clerk against his predecessor in office to recover possession of records, books, papers, and money in the hands of the outgoing clerk by virtue or under color of his office, as provided for in this section. State v. Watson, 223 N. C. 437, 441, 27 S. E. (2d) 144; State v. Watson, 224 N. C. 502, 31 S. E. (2d) 465.

Where Clerk Sought to Be Removed Made Affirmative Allegations.—In an action by the clerk of the Superior Court against his predecessor in office, for possession of records, books and funds, under this section, where defendant denied the allegations of the complaint that plaintiff was duly appointed clerk to fill a vacancy caused by the removal of defendant and qualified as such, and also made further affirmative allegation to like effect, there was error in allowing a motion to strike such affirmative allegations. State v. Watson, 223 N. C. 437, 27 S. E. (2d) 144.

§ 2-24. Location of and attendance at office.

Provided, that the clerk's office in the respective counties may observe such office hours and holidays as authorized and prescribed by the board of

county commissioners for all county offices. (Rev., s. 909; Code, ss. 80, 114, 115; C. C. P., s. 141; 1871-2, c. 136; 1939, c. 82; 1941, c. 329; 1949, c. 122, s. 1; C. S. 945.)

Editor's Note.—The 1949 amendment rewrote the proviso appearing as the last sentence of the section. As the first two sentences were not changed they are not set out.

§ 2-25. Obtaining leave of absence from office.

Provided, it shall not be necessary when a clerk has an assistant clerk to secure an order permitting a leave of absence; and, provided further, it shall not be necessary when a clerk has a deputy clerk, but no assistant clerk, to secure an order permitting a leave of absence unless such absence extends more than forty-eight hours. (Rev., s. 910; 1903, c. 467; 1935, c. 348; 1949, c. 122, s. 2; C. S. 946.)

Editor's Note.—The 1949 amendment added the above provisos at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

§ 2-26. Fees of clerk of superior court.

Five per cent commission shall be allowed the clerk on all fines, penalties, amendments and taxes paid the clerk by virtue of his office; and three per cent on all sums of money not exceeding five hundred dollars placed in his hands by virtue of his office, except on judgments, decrees, executions, and deposits under article three of chapter forty-five; and upon the excess over five hundred dollars of such sums, one per cent.

(1945, c. 635.)

Local Modification.—Richmond: 1947, c. 235, s. 8; Wake: 1945, c. 733.

Editor's Note.—

The 1945 amendment substituted "forty-five" for "fifty-four" in line eight of the next to the last paragraph. As the rest of the section was not affected by the amendment it is not set out.

Cited in Watson v. Lee County, 224 N. C. 508, 31 S. E. (2d) 535.

§ 2-27. Local modifications as to clerk's fees.

Local Modification.—Richmond: 1947, c. 235, s. 11.

§ 2-28. Fees for probating and recording federal crop liens and chattel mortgages.

Provided that this section shall not apply to Beaufort, Brunswick, Cabarrus, Camden, Caswell, Currituck, Harnett, Haywood, Hertford, Macon, Moore, Nash, Person, Polk, Richmond, Stokes, Surry and Wilson counties. (1933, cc. 160, 176, 266, 281, 326, 393, 429, 479, 514; 1935, cc. 120, 260, 369; 1939, c. 211; 1945, cc. 78, 312, 880, 913; 1949, c. 368, s. 1.)

Local Modification.—Beaufort: 1949, c. 368, s. 2; Cabarrus: 1945, c. 880, s. 2; Johnston: 1945, c. 517.

Editor's Note.—

The first 1945 amendment inserted "Nash" in the list of counties in the proviso, the second inserted "Camden", the third inserted "Cabarrus," and the fourth inserted "Currituck," and the 1949 amendment inserted "Beaufort" in the list of counties. As the rest of the section was not changed it is not set out.

§ 2-29. Advance court costs.

Local Modification.—Catawba: 1949, c. 414.

§ 2-30. Advance costs on appeal from justice of the peace.

Cited in Watson v. Lee County, 224 N. C. 508, 31 S. E. (2d) 535.

§ 2-33. Fee for auditing annual accounts of receivers, executors, etc.

Nothing in this section shall be construed to allow commissions on allotment of dower, on distribution of the shares of heirs, on distribution of shares of distributees of personal property or on distribution of shares of legatees. (1935, c. 379, s. 5; 1945, c. 1036, s. 1.)

Local Modification.—Anson and Lee: 1945, c. 1036, s. 2½.

Editor's Note.—The 1945 amendment added the above sentence at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

§ 2-34. Fee for auditing final accounts of receivers, executors, etc.

Nothing in this section shall be construed to allow commissions on allotment of dower, on distribution of the shares of heirs, on distribution of shares of distributees of personal property or on distribution of shares of legatees. (1935, c. 379, s. 6; 1945, c. 1036, s. 2.)

Local Modification.—Anson and Lee: 1945, c. 1036, s. 2½; Durham: 1945, c. 115.

Editor's Note.—The 1945 amendment added the above sentence at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

§ 2-36. Certain counties not subject to sections 2-29 to 2-35.—Sections 2-29 to 2-35 shall not apply to the counties of: Chowan, Cleveland, Columbus, Iredell, Lincoln, Martin, Mecklenburg, Montgomery, Moore, New Hanover, Pitt, Richmond, Robeson, Rockingham, Union, Jackson, Swain, Buncombe, Rowan, Orange, Avery, Wayne, Nash, Wilson, Bladen, Cumberland, Ashe, Edgecombe, Tyrrell, Person, Duplin, Vance, Davie, Guilford, Onslow, Washington, Alleghany, Haywood, Davidson, Burke, Stokes, Franklin, Catawba, Lenoir, Jones, Pamlico, Caldwell, Caswell. Provided, that section 2-29 shall apply to Iredell county. (1935, c. 379, s. 8; 1935, c. 494; 1937, cc. 148, 149, 290; 1945, c. 296; 1947, c. 269; 1949, c. 386.)

Editor's Note.—

The 1945 amendment struck out "Cabarrus" from the list of counties appearing in this section, the 1947 amendment struck out "Surry" and the 1949 amendment struck out "Franklin."

§ 2-41. To endorse date of issuance on process.

Applied in State Board of Education v. Gallop, 227 N. C. 599, 44 S. E. (2d) 44.

§ 2-42. To keep books; enumeration.

Local Modification.—Forsyth: 1949, c. 963, s. 4.

Art. 5. Reports.

§ 2-44. List of justices of the peace to be sent to secretary of state.—The clerk of the superior court of each county shall, on or before February first of each year, send to the secretary of state a list of the qualified justices of the peace in his county as of January first of that year. The list shall include the following information with respect to each such justice of the peace:

1. The township for which he was elected or appointed.

2. The date of his election or appointment, and if appointed, by whom so appointed.

3. The term for which he was elected or appointed.

4. The date of his qualification. (Rev., s. 916; Code, s. 89; 1901, c. 37, s. 2; 1881, c. 326; 1945, c. 161; C. S. 954.)

Editor's Note.—The 1945 amendment rewrote this section.

Art. 6. Money in Hand; Investments.

§ 2-46. Public funds to be reported to county commissioners.

Local Modification.—Forsyth: 1945, c. 11; Halifax: 1949, c. 389; Hertford: 1945, c. 101; Lenoir: 1945, c. 201.

§ 2-47. Approval, registration, and publication of report.

Local Modification.—Forsyth: 1945, c. 11; Wilson: 1943, c. 555.

§ 2-50. Unclaimed fees of jurors and witnesses paid to school fund.

Local Modification.—Chatham: 1949, c. 906; Randolph: 1949, c. 519.

§ 2-52. Payment of insurance to persons under disability.—Where a minor, incompetent or insane person is named beneficiary in a policy or policies of insurance, and the insured dies prior to the majority of such minor, or prior to the restoration of competency or sanity of such incompetent or insane person, and the total proceeds of such policy or policies do not exceed five hundred dollars ($500.00), such proceeds may be paid to the public guardian or clerk of the superior court of the county where such beneficiary resides, to be administered by the public guardian or clerk for the benefit of such beneficiary, and the receipt of the public guardian or clerk shall be a full and complete discharge of the insurer issuing the policy or policies. Moneys so paid to the clerk or public guardian shall be held and disbursed in the manner and subject to the limitations provided by § 2-53. (1937, c. 201; 1945, c. 160, s. 1.)

Editor's Note.—This section applied only to minors prior to the 1945 amendment, which also added the second sentence and made other changes.

§ 2-53. Payment of money for indigent children and persons non compos mentis. — When any moneys in the amount of five hundred dollars or less are paid into court for any minor, indigent or needy child or children for whom there is no guardian, upon satisfactory proof of the necessities of such minor, child or children, the clerk may upon his own motion or order pay out of the same in such sum or sums at such time or times as in his judgment is for the best interest of said child or children, or to some discreet and solvent neighbor of said minor, to be used and faithfully applied for the sole benefit and maintenance of such minor indigent and needy child or children. The clerk shall take a receipt from the person to whom any such sum is paid and shall require such person to render an account of the expenditure of the sum or sums so paid, and shall record the receipt and the accounts, if any are rendered by order of the clerk, in a book entitled, Record of Amounts Paid for Indigent Children, and such receipt shall be a valid acquittance for the clerk. This section shall also apply to incompetent or insane persons, and it shall be the duty of any person or corporation having in its possession $500.00 or less for any minor child or indigent child, or incompetent or insane person to pay same in the office of the clerk of the superior court, and the clerk of the superior court is hereby authorized and empowered to disburse the sum thus paid into his office, upon his own motion or order, without the appointment of a guardian. (Rev., s. 924; 1899, c. 82; 1911, c. 29, s. 1; 1919, c. 91; Ex. Sess. 1924, c. 1, s. 1; 1927, c. 76; 1929, c. 15; 1933, c. 363; 1945, c. 160, s. 2; 1949, c. 188; C. S. 962.)

Editor's Note.—

The 1945 amendment substituted the words "there is no" in line four for the words "no one will become," and omitted the former third and fourth sentences relating to minor child as beneficiary of life insurance policy.

The 1949 amendment increased the maximum amount mentioned in this section from "$300.00" to "$500.00."

§ 2-54. Limitation on investment of funds in clerk's hands.

Cited in State v. Sawyer, 223 N. C. 102, 25 S. E. (2d) 443.

§ 2-55. Investments prescribed; use of funds in management of lands of infants, incompetents.

Local Modification.—Forsyth: 1945, c. 876, s. 4.

§ 2-56. Securing bank deposits.

Local Modification.—Forsyth: 1945, c. 876, s. 4.

Chapter 3. Commissioners of Affidavits and Deeds.

§ 3-1. Appointment by governor; term; oath.—The governor is authorized to appoint and commission one or more commissioners in any foreign country, state or republic, and in such of the states of the United States, or in the District of Columbia, or any of the territories, colonies or dependencies as he may deem expedient, who shall continue in office for two years from the date of their appointment, unless sooner removed by the governor. Before such commissioner proceeds to perform any duty by virtue of this chapter, he shall take and subscribe an oath before a justice of the peace or clerk of a court of record in the city or county in which he resides well and faithfully to execute and perform all the duties of such commissioner, according to the laws of North Carolina; which oath shall be filed in the office of the secretary of state. (Rev., ss. 926, 927; Code, ss. 632, 633; 1945, c. 635; C. S. 963.)

Editor's Note.—The 1945 amendment inserted after the word "peace" in line twelve the words "or clerk of a court of record."

Chapter 4. Common Law.

§ 4-1. Common law declared to be in force.

Extent of Common Law.—

So much of the common law as has not been abrogated or repealed by statute is in full force and effect in this state. Scholtens v. Scholtens, 230 N. C. 149, 52 S. E. (2d) 350; Hoke v. Atlantic Greyhound Corp., 226 N. C. 332, 38 S. E. (2d) 105.

The common law rights and disabilities of husband and wife are in force in this state except in so far as they have been abrogated or repealed by statute. Scholtens v. Scholtens, 230 N. C. 149, 52 S. E. (2d) 350.

The common law writ of error coram nobis to challenge the validity of petitioner's conviction for matters extraneous the record, is available under our procedure. In re Taylor, 230 N. C. 566, 53 S. E. (2d) 857.

Survival of Actions.—Since at common law, causes of action for wrongful injury, whether resulting in death or not, did not survive the injured party, the survival of such actions is solely by virtue of statute. Hoke v. Atlantic Greyhound Corp., 226 N. C. 332, 38 S. E. (2d) 105.

Punishment When No Penalty Expressly Provided.—The common-law rule obtains in this state that where a statute enacted in the public interest commands an act to be done or proscribes the commission of an act, and no penalty is expressly provided for its breach, its violation may be punished as for a misdemeanor. State v. Bishop, 228 N. C. 371, 45 S. E. (2d) 858.

Applied in State v. Sullivan, 229 N. C. 251, 49 S. E. (2d) 458.

Cited in State v. Emery, 224 N. C. 581, 31 S. E. (2d) 858.

Chapter 5. Contempt.

§ 5-1. Contempts enumerated; common law repealed.

I. GENERAL CONSIDERATION.

Nature of Offenses—Jury Trial.—Contempt proceedings may be resorted to in civil or criminal actions, and though contempt is criminal in its nature, respondents therein are not entitled to trial by jury. Safie Mfg. Co. v. Arnold, 228 N. C. 375, 45 S. E. (2d) 577.

IV. SUBDIVISION IV.

Failure to obey a court order cannot be punished for contempt unless the disobedience is willful, which imports knowledge and a stubborn purpose. Lamm v. Lamm, 229 N. C. 248, 49 S. E. (2d) 403.

Where defendant testifies that his failure after knowledge to obey a court order for the payment of alimony pendente lite was due to his lack of financial means, and no evidence is presented at the hearing tending to negative the truth of defendant's explanation or to establish as an affirmative fact that he possessed the means wherewith to comply with the order, the court's finding that defendant willfully disobeyed the order is not supported by the record, and judgment committing him to imprisonment for contempt must be set aside. Id.

An order of court not "lawfully issued" may not be the basis on which to found a proceeding for contempt. Patterson v. Patterson, 230 N. C. 481, 53 S. E. (2d) 658.

Upon application for custody of children after decree of divorce, the resident judge entered a temporary order awarding the custody to the father, and issued an order to defendant wife to appear outside the county and outside the district to show cause why the temporary order should not be made permanent. It was held that the judge was without jurisdiction to hear the matter outside the district, and an order issued upon the hearing of the order to show cause was void ab initio. Id.

Temporary Restraining Orders.—A court has inherent power, necessary to the maintenance of judicial authority, to punish as for contempt the willful violation of its orders, including temporary restraining orders. Safie Mfg. Co. v. Arnold, 228 N. C. 375, 45 S. E. (2d) 577.

Failure to Comply with Separation Agreement.—Husband could not be adjudged in contempt for failure to comply with separation agreement entered into prior to the institution of divorce action, judgment in which provided that it should not affect or invalidate the separation agreement. Brown v. Brown, 224 N. C. 556, 31 S. E. (2d) 529.

§ 5-6. Courts and officers empowered to punish.—Every justice of the peace, referee, commissioner, clerk of the superior court, inferior court, criminal court, or judge of the superior court, or justice of the supreme court, or board of commissioners of each county, or the utilities commission, or member of the industrial commission, has power to punish for contempt while sitting for the trial of causes or engaged in official duties. (Rev., s. 942; Code, ss. 651, 652; 1933, c. 134, s. 8; 1941, c. 97; 1945, c. 533; C. S. 983.)

Editor's Note.—The 1945 amendment inserted the words "or member of the industrial commission."

§ 5-9. Trial of proceedings in contempt.—Proceedings as for contempt shall be by an order directing the offender to appear within a reasonable time and show cause why he should not be attached for contempt. In all proceedings for contempt and in proceedings as for contempt, the judge or other judicial officer who issues the rule or notice to the respondent may make the same returnable before some other judge or judicial officer. When the personal conduct of the judge or other judicial officer or his fitness to hold his judicial position is involved, it is his duty to make the rule or notice returnable before some other judge or officer. Nothing herein contained shall apply to any act or conduct committed in the presence of the court and tending to hinder or delay the due administration of the law, nor to proceedings for the disobedience of a judicial order rendered in any pending action. (Rev., s. 945; Code, s. 655; 1915, c. 4; 1947, c. 781; C. S. 986.)

Editor's Note.—The 1947 amendment rewrote the first sentence.

Chapter 6. Costs.

Art. 1. Generally.

§ 6-1. Items allowed as costs.

This section does not include expenses for returning defendants to this state from points without the state. State v. Patterson, 224 N. C. 471, 473, 31 S. E. (2d) 380.

§ 6-5. Jurors' tax fees.—On every indictment or criminal proceeding, tried or otherwise disposed of in the superior or criminal courts, the party convicted, or adjudged to pay the costs, shall pay a tax of four dollars unless a different jury tax is prescribed elsewhere. In every civil action in any court of record for which different jury taxes are not prescribed by law the party adjudged to pay the costs shall pay a tax of five dollars; but this tax shall not be charged unless a jury shall be impaneled. Said tax fees shall be charged by the clerk in the bill of costs, and collected by the sheriff, and by him paid into the county treasury. And the fund thus raised in any county shall be set apart for the payment of the jurors attending

the courts thereof. (Rev., s. 1253; Code, s. 732; R. C., c. 28; 1830, c. 1; 1879, c. 325; 1881, c. 249; 1905, c. 348; 1909, c. 1; 1919, c. 319; 1945, c. 635; C. S. 1229.)

Editor's Note.—The 1945 amendment inserted the words "unless a different jury tax is prescribed elsewhere" at the end of the first sentence. It also inserted in the second sentence the words "for which different jury taxes are not prescribed by law."

§ 6-7. Clerk to state in detail in entry of judgment.

Costs Properly Adjudged after Decision of the Supreme Court.—After decision of the supreme court modifying and affirming a judgment of the superior court on appeal from the referee allowances constituting items of costs may be adjudged as provided by this section. Clark v. Cagle, 226 N. C. 230, 37 S. E. (2d) 672.

Art. 3. Civil Actions and Proceedings.

§ 6-20. Costs allowed or not, in discretion of court.

Where one of defendants in injunction suit seeks affirmative relief by way of specific performance, the taxing of costs is in the discretion of the trial court since the controversy is of an equitable nature. Consequently the order of the court apportioning the costs will not ordinarily be disturbed on appeal upon affirmance of the judgment. Chandler v. Cameron, 229 N. C. 62, 47 S. E. (2d) 528, 3 A. L. R. (2d) 571.

§ 6-21. Costs allowed either party or apportioned in discretion of court.

The expense of employing attorneys in the successful defense of a suit for damages for tort is not allowable as part of the costs or recoverable in the absence of an express agreement therefor. Queen City Coach Co. v. Lumberton Coach Co., 229 N. C. 534, 50 S. E. (2d) 288.

Allowance to Referee.—

Where, in a suit to obtain advice and instruction of the court for the proper distribution of the assets of the estate, the cause is referred to a referee, the taxing of the referee's fee is within the discretion of the court, and order of the court pro rating the referee's fee between the funds derived from sale of realty to make assets and the personal property of the estate will not be disturbed. Williams v. Johnson, 230 N. C. 338, 53 S. E. (2d) 277.

§ 6-22. Petitioner to pay costs in certain cases.—The petitioner shall pay the costs in the following proceedings:

1. In petitions for draining or damming lowlands where the petitioner alone is benefited.

(1945, c. 635.)

Editor's Note.—The 1945 amendment added at the end of subsection 1 the words "where the petitioner alone is benefited." As the other subsections were not affected by the amendment they are not set out.

Art. 5. Liability of Counties in Criminal Actions.

§ 6-36. County to pay costs in certain cases; if approved, audited and adjudged.—In a criminal action, if there is no prosecutor designated by the court as liable for the costs under the provisions of General Statutes § 6-49, and the defendant is acquitted or convicted and unable to pay the costs, or a nolle prosequi is entered, or judgment arrested, the county shall pay the clerks, sheriffs, constables, justices and witnesses one-half their lawful fees; except in capital cases and in prosecutions for forgery, perjury, or conspiracy, when they shall receive full fees. No county shall pay any such costs unless the same are approved, audited and adjudged against the county as provided in this chapter. (Rev., s. 1283; Code, ss. 733, 739; R. C., c. 28, s. 8; R. S., c. 28, s. 12; 1874-5, c. 247; 1947, c. 781; C. S. 1259.)

Editor's Note.—The 1947 amendment rewrote the first part of the first sentence.

§ 6-37. Local modification as to counties paying costs.

In New Hanover County, in a criminal action, if the defendant is convicted and serves out his sentence on the public roads of the county, the county shall pay one-half of the fees as provided in the first sentence of General Statutes § 6-36. (Rev., s. 1283; 1905, c. 511; 1947, c. 781; C. S. 1260.)

In Northampton and Sampson counties where in criminal proceedings before the recorder's court, the grand jury, or superior court the defendant is found not guilty or a true bill is not found by the grand jury, or the defendant is found guilty and is sentenced by the court to serve on the roads or a term in jail, then the said county shall pay full fees to the sheriff, officer, or constable who served any process in such proceeding. (1937, c. 43; 1947, c. 427.)

Editor's Note.—The 1947 amendments rewrote the next to last paragraph and made the last paragraph applicable to Sampson County. As the rest of the section was not affected by the amendments it is not set out.

§ 6-38. Liability of county when defendant acquitted in supreme court.

Provided, where the cause has been removed, said costs shall be paid by the county in which the offense was committed instead of the county from which the appeal is taken. (Rev., s. 1284; 1947, c. 781; C. S. 1261.)

Editor's Note.—The 1947 amendment added the above proviso at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

Art. 7. Liability of Prosecutor for Costs.

§ 6-49. Prosecutor liable for costs in certain cases; court determines prosecutor.—In all criminal actions in any court, if the defendant is acquitted, nolle prosequi entered, or judgment against him is arrested, or if the defendant is discharged from arrest for want of probable cause, the costs, including the fees of all witnesses whom the judge, court or justice of the peace before whom the trial took place shall certify to have been proper for the defense and prosecution, shall be paid by the prosecutor, whether marked on the bill or warrant or not, whenever the judge, court of justice is of the opinion that there was not reasonable ground for the prosecution, or that it was not required by the public interest. If a greater number of witnesses have been summoned than were, in the opinion of the court, necessary to support the charge, the court may, even though it is of the opinion that there was reasonable ground for the prosecution, order the prosecutor to pay the attendance fees of such witnesses, if it appear that they were summoned at the prosecutor's special request.

Every judge or justice is authorized to determine who the prosecutor is at any stage of a criminal proceeding, whether before or after the bill of indictment has been found, or the defendant acquitted: Provided, that no person shall be made a prosecutor after the finding of the bill, unless he shall have been notified to show cause why he should not be made the prosecutor of record. (Rev., s. 1295; Code, s. 737; 1889, c. 34; R. C., c. 35, s. 37; 1799, c. 4, s. 19; 1800, c. 558; 1868-9, c. 277; 1874-5, c. 151; 1879, c. 49; 1947, c. 781; C. S. 1271.)

Editor's Note.—The 1947 amendment rewrote this section.

Art. 8. Fees of Witnesses.

§ 6-52. Fees and mileage of witnesses.—The fees of witnesses, whether attending at a term of court or before the clerk, or a referee, or commissioner, or arbitrator, shall be such amount per day as the board of commissioners of the respective counties may fix, to be not less than one dollar per day and not more than three dollars per day, except in the counties of Union, Nash, Brunswick, Haywood, Polk, Swain, Alleghany, Anson, Graham, Ashe, Dare, Alexander, Cleveland, Clay, Transylvania, Harnett, Stanley, Mitchell, Burke, Franklin, Greene, Johnston, and Henderson, in which counties the fees shall be one dollar per day. They shall also receive mileage, to be fixed by the county commissioners of their respective counties, at a rate not to exceed five cents per mile for every mile necessarily traveled from their respective homes in going to and returning from the place of examination by the ordinary route, and ferriage and toll paid in going and returning. If attending out of their counties, they shall receive one dollar per day and five cents per mile going and returning by the ordinary route, and toll and ferriage expenses: Provided, that witnesses before courts of justices of the peace shall receive fifty cents per day in civil cases, and in criminal actions of which justices of the peace have final jurisdiction, witnesses attending the courts of the justices of the peace, under subpoena, shall receive fifty cents per day, and in hearings before coroners witnesses shall receive fifty cents per day and no mileage; but the party cast shall not pay for more than two witnesses subpoenaed to prove any one material fact, but no prosecutor or complainant shall pay any costs except as provided by General Statutes, §§ 6-49 and 6-50: Provided further, that experts, when compelled to attend and testify, shall be allowed such compensation and mileage as the court may in its discretion order. Witnesses attending before the utilities commission shall receive two dollars per day and five cents per mile traveled by the nearest practicable route: Provided further, that any sheriff, deputy sheriff, chief of police, police, patrolman, state highway patrolman, and/or any other law enforcement officer who receives a salary or compensation for his services from any source or sources other than the collection of fees, shall prove no attendance, and shall receive no fee as a witness for attending at any superior or inferior criminal court sitting within the territoria[1] boundaries in which such officer has authority to make an arrest: Provided, further, that in all criminal cases tried in the state where the crime charged is of the grade of a felony, all witnesses who have been held in jail incommunicado pending the trial of such case shall be paid witness fees for each such day which such witness is so held in jail, in addition to the witness fees provided by law in criminal actions. (Rev., s. 2803; Code, ss. 2860, 3756; 1891, c. 147; 1905, cc. 279, 522; P. L. 1911, c. 402; Ex. Sess. 1920, c. 61, ss. 2, 3; 1921, c. 62, s. 2; 1933, c. 40; 1941, c. 171; 1947, cc. 270, 781; 1949, c. 520; C. S. 3893.)

Editor's Note.—The first 1947 amendment struck out "Surry" from the list of counties in the first sentence, and the second 1947 amendment made changes in the first proviso.

The 1949 amendment struck out "Randolph" from the list of counties.

§ 6-57. Repealed by Session Laws 1947, c. 781.

§ 6-58. County to pay state's witnesses in certain cases.—Witnesses summoned or recognized on behalf of the state to attend on any criminal prosecution in the superior or criminal courts, except in actions or proceedings in which a justice of the peace has final jurisdiction, which are commenced or tried in a court of a justice of the peace, mayor, or in a county or recorder's court, where the defendant is insolvent, or by law is not bound to pay the same, and the court does not order them to be paid by the prosecutor, shall be paid by the county in which the prosecution was commenced. And in all cases wherein witnesses may be summoned or recognized to attend any such court to give evidence on behalf of the state, and the defendant is discharged, and in cases where the defendant breaks jail and is not afterwards retaken, the court shall order the witnesses to be paid. (Rev., s. 1289; Code, s. 740; R. C., c. 28, s. 9; 1804, c. 665; 1819, c. 1008; 1824, c. 1253; 1947, c. 781; C. S. 1281.)

Editor's Note.—The 1947 amendment inserted the exception clause beginning in line four.

Art. 9. Criminal Costs before Justices, Mayors, County or Recorders' Courts.

§ 6-64. Liability for criminal costs before justice, mayor, county or recorder's court.—In no action or proceeding in which a justice of the peace has final jurisdiction, commenced or tried in a court of a justice of the peace, mayor or in a county or recorder's court, shall the county be liable to pay any costs. Any defendant or prosecuting witness shall have the right of appeal to the superior court. (Rev., s. 1307; Code, s. 895; 1868-9, c. 178; 1879, c. 92, s. 3; 1881, c. 176; 1931, c. 252; 1947, c. 781; C. S. 1288.)

Editor's Note.—The 1947 amendment rewrote this section.

§ 6-65. Imprisonment of defendant for nonpayment of fine and costs.—If a justice of the peace, mayor or judge of a county or recorder's court sentences a party found by him to be guilty to pay a fine and costs in a criminal action or proceeding within the jurisdiction of a justice of the peace, and the same are not immediately paid, the justice of the peace, mayor or judge of a county or recorder's court shall commit the guilty person to the county jail until the same are paid, or he is otherwise discharged according to law. (Rev., s. 1308; Code, s. 904; 1868-9, c. 178, subchap. 4, s. 15; 1947, c. 781; C. S. 1289.)

Editor's Note.—The 1947 amendment rewrote this section.

Chapter 7. Courts.

SUBCHAPTER II. SUPERIOR COURTS.

Art. 7. Organization.

Art. 9. Judicial and Solicitorial Districts and Terms of Court.

SUBCHAPTER V. JUSTICES OF THE PEACE.

Art. 14A. Appointment by Judge and Abolition of Fee System.

SUBCHAPTER VI. RECORDERS' COURTS.

Art. 29A. Alternate Method of Establishing Municipal Recorders' Courts; Establishment without Election.

SUBCHAPTER VII. GENERAL COUNTY COURTS.

Art. 30. Establishment, Organization and Jurisdiction.

SUBCHAPTER XI. JUDICIAL COUNCIL.

Art. 38. Judicial Council.

SUBCHAPTER I. SUPREME COURT.

Art. 1. Organization and Terms.

§ 7-3. Salaries of supreme court justices.—Each justice of the supreme court shall be paid an annual salary of fourteen thousand four hundred ($14,400) dollars, payable in equal monthly installments. (Rev., s. 2764; Code, s. 3733; 1891, c. 193; 1903, c. 805; 1905, c. 208; 1907, cc. 841, 988; 1909, c. 486; 1911, c. 82; 1915, c. 44; 1919, c. 51; 1921, c. 25, s. 2; 1925, c. 214; 1927, c. 69, s. 1; 1939, c. 252; 1949, c. 158, s. 1; C. S. 3883.)

Editor's Note.—Prior to the 1949 amendment each justice received an annual salary of $7,500.00 and an additional amount in lieu of expenses. Section 2 of the amendatory act made the compensation provided in the above section effective as of Jan. 1, 1949.

Taxable Income.—Justice held not entitled to deduction of living expenses at Raleigh and traveling expenses between there and his home in computing his taxable income under the federal statute. Barnhill v. Commissioner of Internal Revenue, 148 F. (2d) 913.

Art. 2. Jurisdiction.

§ 7-16. Certificates to superior courts; execution for costs; penalty.

Cited in Cannon v. Cannon, 226 N. C. 634, 39 S. E. (2d) 821.

SUBCHAPTER II. SUPERIOR COURTS.

Art. 7. Organization.

§ 7-42. Salaries of superior court judges.—The salary of each of the judges of the superior court shall be ten thousand dollars ($10,000.00) per annum, and each judge shall be allowed the sum of two thousand five hundred dollars ($2,500.00) in lieu of necessary traveling expenses and subsistence expenses while attending court or transacting official business at a place other than in the county of his residence. (Rev., s. 2765; Code, ss. 918, 3734; 1891, c. 193; 1901, c. 167; 1905, c. 208; 1907, c. 988; 1909, c. 85; 1911, c. 82; 1919, c. 51; 1921, c. 25, s. 3; 1925, c. 227; 1927, c. 69, s. 2; 1949, c. 157, s. 1; C. S. 3884.)

Editor's Note.—The 1949 amendment rewrote this section. Section 2 of the 1949 amendatory act made the compensation provided in this section effective as of Jan. 1, 1949.

§ 7-44. Solicitors; general compensation.—The several solicitors of the solicitorial districts of the state of North Carolina shall each receive, as full compensation for services as solicitor, the sum of sixty-five hundred dollars ($6500.00) to be paid in equal monthly installments out of the state treasury upon warrants duly drawn thereon, which said salaries shall be in lieu of fees or other compensation, except the expenses allowed in § 7-45. (Rev., s. 2767; Code, s. 3736; 1879, c. 240, s. 12; 1923, c. 157, s. 1; 1933, c. 78, s. 1; 1935, c. 278; 1943, c. 134, s. 4; 1949, c. 189, s. 1; C. S. 3890.)

Editor's Note.—The 1949 amendment rewrote this section and increased the solicitor's salary from $4,500.00 to $6,500.00. Section 3 of the amendatory act made the compensation provided in this section effective as of Jan. 1, 1949.

§ 7-45. Appropriation for expenses of solicitor.—Each solicitor shall receive, in addition to the salary named in § 7-44, the sum of fifteen hundred dollars ($1500.00) per annum, which will cover all of his expenses while engaged in duties connected with his office. Said sum shall be paid in equal monthly installments out of the state treasury upon warrant duly drawn thereon. (1923, c. 157, s. 2; 1933, c. 78, s. 2; 1937, c. 348; 1949, c. 189, s. 2; C. S. 3890(a).)

Editor's Note.—The 1949 amendment rewrote this section and increased the amount allowed for expenses from $500.00 to $1,500.00. Section 3 of the amendatory act made the compensation provided in this section effective as of Jan. 1, 1949.

§ 7-50. Emergency judges; duties; compensation.

The recitation of an erroneous date in the concluding part of a commission to an emergency judge to hold a term of court will not invalidate the commission, when it is manifestly a clerical error without tendency to mislead when the commission is construed in its entirety in the light of the dates for the commencement of the terms of court. State v. Anderson, 228 N. C. 720, 47 S. E. (2d) 1.

§ 7-51. Salaries of resigned or retired justices of supreme court and judges of superior courts.— Every justice of the supreme court and regular or special judge of the superior court who has heretofore resigned or retired from office at the end of his term, or who shall hereafter resign or retire at expiration of his term, who has attained the age of sixty-five (65) years at the date of his resignation or retirement, and who has served for fifteen (15) years on the supreme court or on the superior court, or on the supreme and superior courts combined, or twelve consecutive years on the supreme court, or who, while serving on the supreme court, has attained the age of (80) years, or who, without regard to the age of such judge or justice having served one full term or six years on either the supreme or superior court, and while still in active service thereon, shall have become totally disabled through accident or disease to carry on the duties of said office; or who, without regard to the age of such judge or justice, by reason of such accident, without fault on his part, shall suffer such physical impairment as not to be able to efficiently perform the duties of his office and who retires at the end of his term, shall receive for life two-thirds (2/3) of the annual salary from time to time received by the justices of the supreme court or judges of superior court, respectively, payable monthly; in addition to the retirement pay provided in this section, each retired regular or special judge of the superior court shall be paid by the state fifty dollars ($50.00) for each week of any regular term of court held by such retired judge, together with his actual expenses; provided, that any such justice or judge, who has or shall have served as such for twenty-five years or longer (whether continuously or not), and whose sixty-fifth birthday shall occur within six months next succeeding his resignation or retirement, shall be entitled to all of the benefits of this section from and after the date of his resignation or retirement, and shall also be subject to the other provisions of this section.

The provisions herein as to the amount of lifetime pay shall relate back to and become effective as of the fourth day of March, one thousand nine hundred and twenty-one, and the state treasurer is authorized and directed to pay on the warrant of the state auditor the salary of any justice or judge as affected by such provisions, less any amount heretofore paid. (1921, c. 125, s. 1; Ex. Sess. 1921, c. 20, ss. 1, 2; 1927, cc. 133, 201; 1935, cc. 233, 400; 1937, c. 199; 1939, c. 258; 1943, c. 543; 1945, c. 790; 1949, c. 1092; C. S. 3884(a).)

Editor's Note.—

The 1945 amendment provided for retirement of supreme court justices upon attaining age of 80 years.

The 1949 amendment inserted the provision, beginning in line twenty-seven, relating to the compensation of retired judges for holding court.

§ 7-54. Governor to make appointment of four special judges.—The governor of North Carolina may appoint four persons who shall possess the requirements and qualifications of special judges as prescribed by article four, section eleven, of the constitution, and who shall take the same oath of office and otherwise be subject to the same requirements and disabilities as are or may be prescribed by law for judges of the superior court, save the requirements of residence in a particular district, to be special judges of the superior court of the state of North Carolina. Two of the said judges shall be appointed from the Western Judicial Division and two from the Eastern Judicial Division, as now established. The governor shall issue a commission to each of said judges so appointed whose term of office shall begin from his appointment and qualification and end June thirtieth, one thousand nine hundred and fifty-one, and the said commission shall constitute his authority to perform the duties of the office of a special judge of the superior court during the time named herein. (1927, c. 206, s. 1; 1929, c. 137, s. 1; 1931, c. 29, s. 1; 1933, c. 217, s. 1; 1935, c. 97, s. 1; 1937, c. 72, s. 1; 1939, c. 31, s. 1; 1941, c. 51, s. 1; 1943, c. 58, s. 1; 1945, c. 153, s. 1; 1947, c. 24, s. 1; 1949, c. 681, s. 1.)

Editor's Note.—

Present §§ 7-54 to 7-61 were codified from Session Laws 1949, c. 681, which was practically a re-enactment of the former sections without change except as to dates.

For comment on the 1943 amendment to this and the following seven sections, see 21 N. C. Law Rev. 342.

§ 7-55. Removal of special judges; filling vacancies.—Each special judge so appointed by the governor shall be subject to removal from office for the same causes and in the same manner as regular judges of the superior court; and vacancies occurring in the offices created by §§ 7-54 to 7-61 shall be filled by the governor in like manner for the unexpired term thereof. (1927, c. 206, s. 2; 1929, c. 137, s. 2; 1931, c. 29, s. 2; 1933, c. 217, s. 2; 1935, c. 97, s. 2; 1937, c. 72, s. 2; 1939, c. 31, s. 2; 1941, c. 51, s. 2; 1943, c. 58, s. 2; 1945, c. 153, s. 2; 1947, c. 24, s. 2; 1949, c. 681, s. 2.)

§ 7-56. Further appointments.—The governor is further authorized and empowered, if in his judgment the necessity exists therefor, to appoint at such time as he may determine, not exceeding four additional judges, two of whom shall be residents of the Western Judicial Division and two of whom shall be residents of the Eastern Judicial Division, whose terms of office shall begin from his or their appointment and qualification and end June thirtieth, one thousand nine hundred and fifty-one. All of the provisions of §§ 7-54 to 7-61 applicable to the four special judges shall be applicable to the four special judges authorized to be appointed under this section. (1927, c. 206, s. 3; 1929, c. 137, s. 3; 1931, c. 29, s. 3; 1933, c. 217, s. 3; 1935, c. 97, s. 3; 1937, c. 72, s. 3; 1939, c. 31, s. 3; 1941, c. 51, s. 3; 1943, c. 58, s. 3; 1945, c. 153, s. 3; 1947, c. 24, s. 3; 1949, c. 681, s. 3.)

§ 7-57. Extent of authority.—The authority herein conferred upon the governor, pursuant to article four, section eleven, of the constitution of North Carolina, to appoint such special judges shall extend to regular as well as special terms of the superior court, with either civil or criminal jurisdiction, or both, as may be designated by the statutes or by the governor pursuant to law.

(1927, c. 206, s. 4; 1929, c. 137, s. 4; 1931, c. 29, s. 4; 1933, c. 217, s. 4; 1935, c. 97, s. 4; 1937, c. 72, s. 4; 1939, c. 31, s. 4; 1941, c. 51, s. 4; 1943, c. 58, s. 4; 1945, c. 153, s. 4; 1947, c. 24, s. 4; 1949, c. 681, s. 4.)

§ 7-58. Same power and authority as regular judges.—To the end that such special judges shall have the fullest power and authority sanctioned by article four, section eleven, of the constitution of North Carolina, such judges are hereby vested, in the courts which they are duly appointed to hold, with the same power and authority in all matters whatsoever that regular judges holding the same courts would have. A special judge duly assigned to hold the court of a particular county shall have during said term of court, in open court and in chambers, the same power and authority of a regular judge in all matters whatsoever arising in that judicial district that could properly be heard or determined by a regular judge holding the same term of court. (1927, c. 206, s. 5; 1929, c. 137, s. 5; 1931, c. 29, s. 5; 1933, c. 217, s. 5; 1935, c. 97, s. 5; 1937, c. 72, s. 5; 1939, c. 31, s. 5; 1941, c. 51, s. 5; 1943, c. 58, s. 5; 1945, c. 153, s. 5; 1947, c. 24, s. 5; 1949, c. 681, s. 5.)

Motions in the Cause Made at Term in Civil Actions.—Civil actions pending on the civil issue docket of a county are always subject to motion in the cause. These motions may be made before the judge at term. In many instances they may be made out of term. When made at term the judge presiding, whether regular or special, has jurisdiction. To this extent this section has full constitutional sanction. Shepard v. Leonard, 223 N. C. 110, 113, 25 S. E. (2d) 445.

Special Judge May Hear Matter out of Term by Consent.—Once having acquired jurisdiction at term a special or emergency judge, by consent, may hear the matter out of term nunc pro tunc. Shepard v. Leonard, 223 N. C. 110, 25 S. E. (2d) 445.

§ 7-59. Salary and expenses; terms; practice of law.—The special judges so appointed shall receive the same salary and traveling expenses as now are, or may be, paid or allowed to judges of the superior court for holding their regularly assigned courts, and they shall hold all such regular and special terms of court as they may be directed and assigned by the governor to hold, without additional compensation: Provided, that no person appointed under §§ 7-54 to 7-61 shall engage in the practice of law. (1927, c. 206, s. 6; 1929, c. 137, s. 6; 1931, c. 29, s. 6; 1933, c. 217, s. 6; 1935, c. 97, s. 6; 1937, c. 72, s. 6; 1939, c. 31, s. 6; 1941, c. 51, s. 6; 1943, s. 58, s. 6; 1945, c. 153, s. 6; 1947, c. 24, s. 6; 1949, c. 681, s. 6.)

Editor's Note.—The 1947 act omitted the word "private" formerly appearing before the word "practice" in the last line.

§ 7-60. Powers after commission expires.—The special judges herein provided for are hereby fully authorized and empowered to settle cases on appeal and to make all proper orders in regard thereto after the time for which they were commissioned has expired. (1927, c. 206, s. 7; 1929, c. 137, s. 7; 1931, c. 29, s. 7; 1933, c. 217, s. 7; 1935, c. 97, s. 7; 1937, c. 72, s. 7; 1939, c. 31, s. 7; 1941, c. 51, s. 7, 1943, c. 58, s. 7; 1945, c. 153, s. 7; 1947, c. 24, s. 7; 1949, c. 681, s. 7.)

§ 7-61. Effect on sections 7-50 and 7-51.—Nothing in §§ 7-54 to 7-60 shall in any manner affect §§ 7-50 to 7-51. (1927, c. 206, s. 8; 1929, c. 137, s. 8; 1931, c. 29, s. 8; 1933, c. 217, s. 8; 1935, c. 97, s. 8; 1937, c. 72, s. 8; 1939, c. 31, s. 8; 1941, c. 51, s. 8; 1943, c. 58, s. 8; 1945, c. 153, s. 8; 1947, c. 24, s. 8; 1949, c. 681, s. 8.)

Art. 8. Jurisdiction.

§ 7-63. Original jurisdiction.

I. IN GENERAL.

Action in Summary Ejectment.—Superior courts and courts of justices of the peace have concurrent jurisdiction of actions in summary ejectment. Stonestreet v. Means, 228 N. C. 113, 44 S. E. (2d) 600.

Awarding Custody of Child.—After a decree for absolute divorce entered by the recorder's court of Nash county, the court entered an order awarding the custody of the child of the marriage under § 50-13, and defendant appealed to the superior court. It was held that if the recorder's court had jurisdiction to enter the order, the hearing in the superior court on appeal was de novo, while if the jurisdiction of the recorder's court did not include jurisdiction to award the custody of the child, the petition might be considered an application to the judge of the superior court, and the superior court had jurisdiction to enter a different order awarding the custody of the child, since in no event was its jurisdiction derivative. Brake v. Brake, 228 N. C. 609, 46 S. E. (2d) 643.

Cited in State v. Bentley, 223 N. C. 563, 27 S. E. (2d) 738 (con. op.); State v. Grimes, 226 N. C. 523, 39 S. E. (2d) 394.

§ 7-64. Concurrent jurisdiction.—

Provided, that this section shall not apply to the counties of Alleghany, Cabarrus, Caswell, Cherokee, Clay, Craven, Currituck, Dare, Davidson, Edgecombe, Gaston, Gates, Graham, Granville, Guilford, Harnett, Henderson, Hertford, Hyde, Iredell, Jones, Lenoir, New Hanover, Pamlico, Perquimans, Rockingham, Rutherford, Scotland, Surry, Union and Warren. (1919, c. 299; 1923, c. 98; 1941, c. 265; 1945, c. 164; c. 628, s. 1; C. S. 1437.)

Editor's Note.—

The 1945 amendments struck out "Cumberland" and "Halifax" from the list of counties exempted from the provisions of this section, thereby making it applicable to said counties. As only the proviso was affected by the amendments the rest of the section is not set out.

Court First Taking Cognizance Excludes Other Court.—Where a recorder's court and the superior court have concurrent jurisdiction, the court first taking cognizance of the offense has jurisdiction thereof to the exclusion of the other. State v. Reavis, 228 N. C. 18, 44 S. E. (2d) 354.

Where Record Failed to Show Conflict of Jurisdiction.—While an appeal from a judgment of recorder's court upon warrant charging unlawful possession of intoxicating liquor for the purpose of sale on a certain date was pending in Superior Court, that court did not have jurisdiction to try defendant on a bill of indictment, of later date than the warrant, charging the same offense, where the record contained nothing to show that the offenses were the same. Hence, the record failed to present conflict of jurisdiction between recorder's court under § 7-222, and Superior Court under this section. State v. Suddreth, 223 N. C. 610, 613, 27 S. E. (2d) 623.

Cited in State v. Bentley, 223 N. C. 563, 27 S. E. (2d) 738 (con. op.); State v. Grimes, 226 N. C. 523, 39 S. E. (2d) 394.

§ 7-65. Jurisdiction in vacation or at term.—In all cases where the superior court in vacation has jurisdiction, and all of the parties unite in the proceedings, they may apply for relief to the superior court in vacation, or in term time, at their election. The resident judge of the judicial district and the judge regularly presiding over the courts of the district, shall have concurrent jurisdiction in all matters and proceedings where the superior court has jurisdiction out of term: Provided, that in all matters and proceedings not requiring the intervention of a jury or in which trial by jury has been waived, the resident judge of the judicial district shall have concurrent jurisdiction

with the judge holding the courts of the district and the resident judge in the exercise of such concurrent jurisdiction may hear and pass upon such matters and proceedings in vacation, out of term or in term time: Provided, further, that all matters and proceedings heretofore passed upon by the resident judge of the judicial district according to and in conformity with the proviso first above set forth, prior to the date of the ratification of this Act, are hereby validated and declared to be in full force and effect, and all decisions, orders, decrees and judgments of whatsoever nature and kind heretofore entered and signed by the resident judge of the judicial district prior to the date of the ratification of this Act and according to and in conformity with the proviso first above set forth, are hereby validated and declared to be lawful, in full force and effect and binding upon the parties thereto, except that nothing herein contained shall be construed as applicable to or in any manner affecting pending litigation. (Rev., s. 1501; Code, c. 10, s. 230; 1871-2, c. 3; 1939, c. 69; 1945, c. 142; C. S. 1438.)

Editor's Note.—

The 1945 amendment added the provisos.

As to jurisdiction of resident judge, see 23 N. C. Law Rev. 329.

Jurisdiction to Order Payment of Expenses Out of the Recovery.—In an action by taxpayers against public officers under § 128-10, to recover public funds unlawfully expended, plaintiffs disclaimed in their complaint any right personally to participate in the recovery. After recovery, and the entry of a consent judgment dismissing appeals, and after payment of the judgment, the resident judge, on petition of one of the original taxpayer plaintiffs, is then without jurisdiction under this section to order payments, out of the recovery, of such petitioner's expenses and counsel fees. Hill v. Stanbury, 224 N. C. 356, 30 S. E. (2d) 150, commented on in 23 N. C. Law Rev. 40.

Resident judge issued order to defendant wife to appear outside county and outside district to show cause why temporary order awarding custody of children to husband should not be made permanent. It was held that the judge was without jurisdiction to hear the matter outside the district, and an order issued upon the hearing of the order to show cause was void ab initio. Patterson v. Patterson, 230 N. C. 481, 53 S. E. (2d) 658.

Stated in State Distributing Corp. v. Travelers Indemnity Co., 224 N. C. 370, 30 S. E. (2d) 377 (dis. op.).

Art. 9. Judicial and Solicitorial Districts and Terms of Court.

§ 7-70. Terms of court.

Eastern Division

First District

Currituck—First Monday in March; first Monday in September. (1913, c. 196; Ex. Sess. 1913, c. 51; Ex. Sess. 1920, c. 23, s. 2; 1939, c. 59; 1945, c. 179; C. S. 1443.)

Pasquotank—Eighth Monday before the first Monday in March for the trial of civil cases only; third Monday before the first Monday in March to continue for three weeks, the first week for the trial of civil cases only and the second and third weeks for the trial of criminal cases only; second Monday after the first Monday in March for the trial of civil cases only; ninth Monday after the first Monday in March to continue for two weeks for the trial of civil cases only; thirteenth Monday after the first Monday in March for the trial of criminal cases only; fourteenth Monday after the first Monday in March to continue for two weeks for the trial of civil cases only; second Monday after the first Monday in September for the trial of civil cases only; fifth Monday after the first Monday in September to continue for two weeks for the trial of civil cases only; ninth Monday after the first Monday in September to continue for two weeks, the first week for the trial of civil cases only and the second week for the trial of criminal cases only. (1913, c. 196; Ex. Sess., 1913, c. 51; 1921, c. 105; 1923, c. 232; Pub. Loc. 1925, c. 631; 1929, c. 167; 1933, cc. 3, 129; 1949, c. 878; C. S. 1443.)

Perquimans.—Sixth Monday after the first Monday in March; eighth Monday after the first Monday in September. (1913, c. 196; Ex. Sess., 1913, c. 51; 1931, c. 6; 1933, c. 286; 1949, c. 266; C. S. 1443.)

Second District

Wilson—Fourth Monday before the first Monday in March, to continue for two weeks, the first week for civil cases only, and the second week for criminal cases only; tenth Monday after the first Monday in March, to continue for two weeks, the first week for criminal cases only, and the second week for civil cases only; sixteenth Monday after the first Monday in March, for civil cases only; first Monday in September; fourth Monday after the first Monday in September, for civil cases only; seventh Monday after the first Monday in September for criminal cases only; eighth Monday after the first Monday in September, to continue for two weeks, for civil cases only thirteenth Monday after the first Monday in September and for this term of court a special or emergency judge shall be assigned by the governor to hold the same. (1913, c. 196; 1915, c. 45; 1917, c. 12; 1919, c. 133; 1921, c. 10; 1937, c. 104; 1947, c. 1057; C. S. 1443.)

Third District

Hertford—First Monday before the first Monday in March; sixth Monday after the first Monday in March, to continue for two weeks, for the trial of civil and criminal cases; fifth Monday before the first Monday in September; sixth Monday after the first Monday in September, to continue for two weeks. (1913, c. 196; 1915, c. 282; 1919, c. 142; 1923, c. 113; 1924, c. 9; 1927, c. 118; 1929, c. 217; 1931, cc. 140, 200; 1935, cc. 102, 276; 1939, c. 40; 1947, c. 282; C. S. 1943.)

Bertie—Third Monday before the first Monday in March, to continue for two weeks for the trial of both criminal and civil cases; ninth Monday after the first Monday in March, to continue for two weeks, for trial of both criminal and civil cases; first Monday before the first Monday in September, to continue for two weeks, for the trial of both criminal and civil cases; tenth Monday after the first Monday in September, to continue for two weeks, for the trial of both criminal and civil cases. (1913, c. 196; Ex. Sess. 1913, c. 16; 1915, c. 78; 1917, c. 226; Ex. Sess. 1921, c. 45; 1923, c. 185; 1931, cc. 192, 247; 1941; c. 367, s. 1; 1947, c. 61; C. S. 1443.)

Fourth District

Lee—Fifth Monday before the first Monday in March, to continue for two weeks, the first week for the trial of civil cases, the second week for the trial of criminal and civil cases, provided that, for this term, the governor shall assign a judge to hold the same from among the regular, special or emergency judges; third Monday after the first

Monday in March to continue for two weeks, the first week for the trial of criminal cases, and the second week for the trial of civil cases; fifteenth Monday after the first Monday in March, to continue for one week for the trial of civil cases, provided that for said term, the governor shall assign a judge to hold the same from among the regular, special or emergency judges; seventh Monday before the first Monday in September, to continue for two weeks, the first week for the trial of criminal cases and the second week for the trial of civil cases; first Monday after the first Monday in September, to continue for two weeks for the trial of civil cases, provided that for the second week of said term, the governor shall assign a judge to hold the same from among the regular, special or emergency judges; eighth Monday after the first Monday in September for one week for the trial of criminal cases; fourteenth Monday after the first Monday in September for one week for the trial of civil cases, provided that for said term, the governor shall assign a judge to hold the same from among the regular, special or emergency judges. (1913, c. 196; Ex. Sess. 1913, c. 24; 1917, c. 228; 1929, c. 162; 1931, c. 86; 1939, c. 194; 1947, c. 385; C. S. 1443.)

Fifth District

Pitt—Seventh Monday before the first Monday in March for civil cases only; sixth Monday before the first Monday in March; second Monday before the first Monday in March for civil cases only; second Monday after the first Monday in March for civil and criminal cases; third Monday after the first Monday in March for the trial of both civil and criminal cases; sixth Monday after the first Monday in March and seventh Monday after the first Monday in March to constitute one term for the trial of criminal and civil cases; ninth Monday after the first Monday in March to continue for one week for the trial of civil cases; eleventh Monday after the first Monday in March, for civil cases only; twelfth Monday after the first Monday in March, for civil cases and criminal cases where defendants are confined in jail; second Monday before the first Monday in September, for civil cases only; first Monday before the first Monday in September; first Monday after the first Monday in September, for civil cases only; third Monday after the first Monday in September, for civil cases only; seventh Monday after the first Monday in September, for civil cases only; eighth Monday after the first Monday in September; eleventh Monday after the first Monday in September, to continue for one week for trial of civil cases. For the terms beginning the ninth Monday after the first Monday in March, and the eleventh Monday after the first Monday in September, the governor may appoint a judge to hold the same from among the regular or emergency judges. (1913, c. 196; Ex. Sess. 1913, c. 25; 1915, cc. 111, 139; 1917, c. 217; 1919, c. 56; Ex. Sess. 1920, c. 29; 1921, c. 159; 1929, c. 153; 1931, c. 94; 1935, c. 73; 1939, c. 43; 1947, c. 686; 1949, cc. 867, 1246; C. S. 1443.)

Craven—Eighth Monday before the first Monday in March; thirteenth Monday after the first Monday in March, and the first Monday in September, for the trial of civil cases and criminal cases; fifth Monday after the first Monday in March for the trial of civil cases and criminal cases; fifth Monday before the first Monday in March to continue for one week for the trial of civil cases only; fourth Monday before the first Monday in March for the trial of civil cases only; third Monday before the first Monday in March for the trial of civil cases and criminal cases; fourth Monday after the first Monday in September and eleventh Monday after the first Monday in September, each to continue for two weeks for the trial of civil cases only; tenth Monday after the first Monday in March for the trial of civil cases only. (1913, c. 196; 1915, c. 111; 1917, c. 217; 1929, c. 166; 1945, c. 42; 1947, c. 1034; 1949, c. 1187; C. S. 1443.)

Greene—First Monday before the first Monday in March, to continue for two weeks; sixteenth Monday after the first Monday in March; fourteenth Monday after the first Monday in September, to continue for two weeks; thirteenth Monday after the first Monday in September to continue for one week for the trial of both criminal and civil cases. And for this last mentioned term of court the governor shall assign a judge from among the regular, special or emergency judges. Provided, that in all instances where there are consecutive weeks of superior court calendared for Greene county, each such week shall constitute a separate term of such court for all purposes whatsoever. (1913, cc. 63, 171, 196; Ex. Sess. 1913, cc. 19, 47; 1915, c. 139; 1935, c. 109; 1947, c. 775; C. S. 1443.)

Sixth District

Lenior—Sixth Monday before the first Monday in March, to continue for one week, for the trial of criminal cases; second Monday before the first Monday in March, to continue for one week, for the trial of civil cases only; first Monday before the first Monday in March for the trial of civil cases only; second Monday after the first Monday in March, to continue for one week for the trial of criminal or civil cases or both; the governor is hereby directed to appoint and assign a judge to hold the said term from among the regular or special superior court judges of North Carolina; seventh Monday after the first Monday in March, to continue for one week for the trial of criminal cases or civil cases, or both; tenth Monday after the first Monday in March, to continue for one week for the trial of civil cases only; eleventh Monday after the first Monday in March to continue for one week, for the trial of civil cases only; fourteenth Monday after the first Monday in March, to continue for one week for the trial of civil cases only; fifteenth Monday after the first Monday in March, to continue for one week, for the trial of civil cases only; sixteenth Monday after the first Monday in March, to continue for one week, for the trial of criminal cases only; second Monday before the first Monday in September, to continue for one week, for the trial of criminal cases only; first Monday after the first Monday in September, to continue for one week for the trial of criminal cases or civil cases, or both; the governor is hereby directed to appoint and assign a judge to hold the said term from among the regular or special judges of the state of North Carolina; third Monday after the first Monday in September, to continue for one week for the trial of civil cases only; eighth Monday after the first Monday in September, to continue for one week for the trial of criminal

cases or civil cases or both; the governor is hereby directed to appoint and assign a judge to hold the said term from among the regular or special superior court judges of North Carolina; ninth Monday after the first Monday in September, to continue for one week, for the trial of civil cases only; tenth Monday after the first Monday in September, to continue for one week, for the trial of civil cases only; twelfth Monday after the first Monday in September, to continue for one week for the trial of criminal cases or civil cases or both; the governor is hereby directed to appoint and assign a judge to hold the said term from among the regular or special judges of the state of North Carolina.

At all criminal terms of the superior court in the county of Lenoir, uncontested divorce cases may be tried and the court may hear and determine all motions in civil matters not requiring a jury, and make any order, judgment or decree respecting the confirmation of judicial sales. (1913, c. 196; Ex. Sess. 1913, c. 61; 1915, c. 240; 1917, c. 13; Pub. Loc. 1925, c. 5; 1931, c. 271; 1933, c. 234, s. 1; 1947, c. 909; 1949, c. 1099; C. S. 1443.)

Duplin—Eighth Monday before the first Monday in March, to continue for two weeks for the trial of civil cases only; fifth Monday before the first Monday in March, to continue for one week for the trial of criminal cases; first Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only; fifth Monday after the first Monday in March, to continue for two weeks, the first week of which shall be for the trial of criminal cases, or civil cases, or both, and the second week for the trial of civil cases exclusively; sixth Monday before first Monday in September to continue for one week, for the trial of criminal cases only; first Monday before the first Monday in September, to continue for two weeks, for the trial of civil cases only; fourth Monday after the first Monday in September, to continue for one week for the trial of criminal cases; thirteenth Monday after the first Monday in September, to continue for two weeks for the trial of civil cases only.

At all criminal terms of the superior court in the county of Duplin, uncontested divorce cases may be tried and the court may hear and determine all motions in civil matters, not requiring a jury trial and make any order, judgment or decree respecting the confirmation of judicial sales. (1913, c. 196; Ex. Sess. 1913, c. 53; 1915, c. 240; Ex. Sess. 1920, c. 81; Ex. Sess. 1921, cc. 78, 79; 1931, c. 271; 1933, c. 234, s. 1; 1935, cc. 157, 289; 1941, c. 321; 1947, c. 909; C. S. 1443.)

Seventh District

Franklin—The sixth Monday before the first Monday in March for two weeks for the trial of civil cases only; the third Monday before the first Monday in March one week for the trial of criminal cases; sixth Monday after the first Monday in March one week for the trial of criminal cases; eighth Monday after the first Monday in March two weeks for the trial of civil cases only; second Monday after the first Monday in September two weeks for the trial of civil cases only; fifth Monday after the first Monday in September one week for the trial of criminal cases; twelfth Monday after the first Monday in September two weeks for the trial of civil cases only.

The courts provided in the above paragraph shall be held by the judge regularly riding the seventh judicial district.

At all criminal terms provided for in the second preceding paragraph, all motions and divorce cases may be heard, and, by consent, jury trials in all civil cases may be heard at said criminal terms. (1913, c. 196; 1917, c. 116; 1937, c. 387, ss. 1, 3; 1939, c. 184; 1941, c. 189; 1943, c. 699; 1945, c. 630; C. S. 1443.)

Eighth District

Brunswick—Sixth Monday before the first Monday in March, a term of one week for the trial of civil and criminal cases; fourth Monday after the first Monday in March, a term of one week for the trial of civil cases only; eleventh Monday after the first Monday in March, a term of one week for the trial of civil cases and criminal cases; first Monday in September, a term of one week for the trial of civil and criminal cases; second Monday after the first Monday in September, a term of one week for the trial of civil cases only. (1913, c. 196; Ex. Sess. 1913, c. 56; 1917, c. 18; 1921, c. 14; 1941, c. 367, s. 1; 1945, c. 740; 1947, c. 910, s. 1; C. S. 1443.)

Columbus—Eighth Monday before the first Monday in March, a term of two weeks for the trial of civil cases only; fifth Monday before the first Monday in March, a term of two weeks for the trial of criminal cases only; second Monday before the first Monday in March, a term of two weeks for the trial of civil cases only; ninth Monday after the first Monday in March, a term of one week for the trial of criminal cases only; fifteenth Monday after the first Monday in March, a term of one week for the trial of civil and criminal cases; first Monday before the first Monday in September, a term of one week for the trial of criminal cases only; first Monday in September, a term of one week for the trial of criminal cases only; third Monday after the first Monday in September, a term of two weeks for the trial of civil cases only; seventh Monday after the first Monday in September, a term of two weeks for the trial of criminal cases only; tenth Monday after the first Monday in September, a term of one week for the trial of criminal cases only; eleventh Monday after the first Monday in September, a term of two weeks for the trial of civil cases only. (1913, c. 196; Ex. Sess. 1913, c. 61; 1917, c. 124; 1921, cc. 14, 149; Ex. Sess. 1921, c. 40; 1931, c. 246; 1937, c. 52; 1941, c. 367, s. 1; 1943, c. 541; 1945, c. 740; 1949, c. 474; C. S. 1443.)

New Hanover—Seventh Monday before the first Monday in March, tenth Monday after the first Monday in March, fourteenth Monday after the first Monday in March, sixth Monday before the first Monday in September, second Monday before the first Monday in September, for one week each for the trial of criminal cases only; first Monday before the first Monday in March for two weeks, for the trial of criminal cases only; eighth Monday after the first Monday in September, for one week, for the trial of criminal cases only; first Monday in September, the fifth Monday after the first Monday in September, the thirteenth Monday after the first Monday in September, the fourth Monday before the first Mon-

day in March, the first Monday after the first Monday in March, the fifth Monday after the first Monday in March, the twelfth Monday after the first Monday in March, each for two weeks for the trial of civil cases only; ninth Monday after the first Monday in September for the trial of civil and criminal cases, for one week. (1913, c. 196; 1915, c. 60; 1919, c. 167; 1921, c. 14; 1941, c. 367, s. 1; 1945, c. 740; 1949, c. 692; C. S. 1443.)

Pender—Eighth Monday before the first Monday in March, a term of one week for the trial of civil and criminal cases; third Monday after the first Monday in March, a term of one week for the trial of civil cases only; eighth Monday after the first Monday in March, a term of one week for the trial of civil and criminal cases; seventh Monday before the first Monday in September, a term of one week for the trial of civil cases only; first Monday after the first Monday in September, a term of one week for the trial of criminal cases only; seventh Monday after the first Monday in September, a term of one week for the trial of civil cases only. (1913, c. 196; 1921, c. 14; 1933, c. 153; 1941, c. 367, s. 1; 1945, c. 740; 1947, c. 910, s. 2; C. S. 1443.)

Western Division

Eleventh District

Alleghany—Fifth Monday before the first Monday in March; eighth Monday after the first Monday in March; third Monday before the first Monday in September; fourth Monday after the first Monday in September. All terms to be held by the regular judge, and to be for the trial of civil and criminal cases. (1913, c. 196; 1935, c. 246; 1937, c. 413, s. 4; 1941, c. 367, s. 1; 1949, c. 456; C. S. 1443.)

Forsyth—Eighth Monday before the first Monday in March, to continue for two weeks, for the trial of criminal cases only, to be presided over by a regular judge to be assigned; seventh Monday before the first Monday in March, to continue for three weeks, for the trial of civil cases only, the first week of said term to be presided over by a special judge to be assigned and the second two weeks to be presided over by a regular judge to be assigned; fourth Monday before the first Monday in March, to continue for two weeks, for the trial of criminal cases only, to be presided over by a regular judge to be assigned; third Monday before the first Monday in March for three weeks, for the trial of civil cases only, the first week of said term to be presided over by a special judge to be assigned and the second two weeks to be presided over by a regular judge to be assigned; first Monday in March, to continue for two weeks, for trial of criminal cases only, to be presided over by a regular judge to be assigned; first Monday after the first Monday in March for three weeks, for the trial of civil cases only, the first week of said term to be presided over by a special judge to be assigned, and the last two weeks to be presided over by a regular judge to be assigned; fourth Monday after the first Monday in March, to continue for two weeks, for the trial of criminal cases only, to be presided over by a regular judge to be assigned; sixth Monday after the first Monday in March, to continue for three weeks, the first week of said term to be presided over by a special judge to be assigned, the second week to be presided over by a regular judge to be assigned and the third week to be presided over by a special judge to be assigned; tenth Monday after the first Monday in March, to continue for two weeks, for the trial of criminal cases only, to be presided over by a regular judge to be assigned; twelfth Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only, to be presided over by a special judge to be assigned; fourteenth Monday after the first Monday in March, to continue for two weeks, for the trial of criminal cases only, to be presided over by a regular judge to be assigned; fifteenth Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only, to be presided over by a special judge to be assigned; ninth Monday before the first Monday in September, to continue for two weeks, for the trial of criminal cases only, to be presided over by a regular judge to be assigned; first Monday in September, to continue for two weeks, for the trial of criminal cases only, to be presided over by a regular judge to be assigned; second Monday after the first Monday in September, to continue for three weeks, for the trial of civil cases only, the first two weeks of said term to be presided over by a regular judge to be assigned and the last week to be presided over by a special judge to be assigned; fifth Monday after the first Monday in September, to continue for two weeks, for the trial of criminal cases only, to be presided over by a regular judge to be assigned; seventh Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases only, the first week of said term to be presided over by a special judge to be assigned and the second week to be presided over by a regular judge to be assigned; tenth Monday after the first Monday in September, to continue for one week, for the trial of criminal cases only, to be presided over by a regular judge to be assigned; eleventh Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases only, to be presided over by a regular judge to be assigned; thirteenth Monday after the first Monday in September, to continue for two weeks, for the trial of criminal cases only, to be presided over by a regular judge to be assigned.

The governor shall assign a special, emergency or any regular judge to hold the courts hereinbefore provided for when the regular judge assigned to the district is unable to hold same for any cause set out in article IV, section eleven of the constitution.

In the terms of court herein designated as criminal terms, motions in civil actions may be heard upon due notice; trials in civil actions may be heard by consent of the parties, and uncontested divorce actions may be tried. At such criminal terms motions for confirmation or rejection of referee's reports may be heard upon ten days notice and judgment entered on said reports. (1913, c. 196; 1917, c. 169; Pub. Loc. 1917, c. 375; 1919, c. 87; 1923, c. 151; Pub. Loc. 1925, c. 19; 1927, c. 197; 1929, c. 131; 1933, cc. 231, 306; 1935, c. 246; 1937, c. 158; 1937, c. 413, ss. 4, 5; 1941, c. 367, s. 1; 1945, c. 466; C. S. 1443.)

Twelfth District

The twelfth district is composed of Guilford county and Davidson county. The superior court

of Guilford county is composed of two divisions, the Greensboro division and the High Point division; and the superior court thereof shall be opened and held at the following times and places, to-wit:

In the Greensboro division at the county courthouse in Greensboro, for the trial of criminal cases only:

Eighth Monday before the first Monday in March, one week; fourth Monday before the first Monday in March, two weeks; first Monday in March, one week; third Monday after the first Monday in March, one week; seventh Monday after the first Monday in March, one week; eleventh Monday after the first Monday in March, one week; fifteenth Monday after the first Monday in March, one week; eighth Monday before the first Monday in September, one week; fifth Monday before the first Monday in September, one week; first Monday before the first Monday in September, one week; first Monday after the first Monday in September, one week; third Monday after the first Monday in September, one week; sixth Monday after the first Monday in September, one week; eighth Monday after the first Monday in September, three weeks; thirteenth Monday after the first Monday in September, one week; and fifteenth Monday after the first Monday in September, one week.

In the High Point division at the county building in High Point for the trial of criminal cases only:

Seventh Monday before the first Monday in March, one week; first Monday after the first Monday in March, one week; eighth Monday after the first Monday in March, one week; twelfth Monday after the first Monday in March, one week; seventh Monday before the first Monday in September, one week; second Monday after the first Monday in September, one week; seventh Monday after the first Monday in September, one week; and fourteenth Monday after the first Monday in September, one week.

In the Greensboro division at the county courthouse in Greensboro for the trial of civil cases only:

Seventh Monday before the first Monday in March, two weeks; second Monday before the first Monday in March, two weeks; fourth Monday after the first Monday in March, two weeks; sixth Monday after the first Monday in March, two weeks; thirteenth Monday after the first Monday in March, two weeks; first Monday before the first Monday in September, two weeks; third Monday after the first Monday. in September, three weeks; eleventh Monday after the first Monday in September, two weeks; and thirteenth Monday after the first Monday in September, two weeks.

In the High Point division at the county building in High Point, for the trial of civil cases only:

Third Monday before the first Monday in March, one week; second Monday after the first Monday in March, two weeks; tenth Monday after the first Monday in March, two weeks; fourth Monday before the first Monday in September, one week; and eighth Monday after the first Monday in September, two weeks.

The regular judge holding the courts of the twelfth judicial district shall hold the following courts of the Greensboro division:

Eighth Monday before the first Monday in March, one week criminal; seventh Monday before the first Monday in March, two weeks civil; fourth Monday before the first Monday in March, two weeks criminal; first Monday in March, one week criminal; fourth Monday after the first Monday in March, two weeks civil; sixth Monday after the first Monday in March, two weeks civil; eleventh Monday after the first Monday in March, one week criminal; thirteenth Monday after the first Monday in March, two weeks civil; fifteenth Monday after the first Monday in March, one week criminal; eighth Monday before the first Monday in September, one week criminal; fifth Monday before the first Monday in September, one week criminal; first Monday before the first Monday in September, two weeks civil; third Monday after the first Monday in September, three weeks civil; sixth Monday after the first Monday in September, one week criminal; eighth Monday after the first Monday in September, three weeks criminal; eleventh Monday after the first Monday in September, two weeks civil; thirteenth Monday after the first Monday in September, one week criminal; and fifteenth Monday after the first Monday in September, one week criminal.

The regular judge holding the courts of the twelfth judicial district shall hold the following courts of the High Point division:

First Monday after the first Monday in March, one week criminal; second Monday after the first Monday in March, two weeks civil; eighth Monday after the first Monday in March, one week criminal; twelfth Monday after the first Monday in March, one week criminal; seventh Monday before the first Monday in September, one week criminal; fourth Monday before the first Monday in September, one week civil; seventh Monday after the first Monday in September, one week criminal; and fourteenth Monday after the first Monday in September, one week criminal.

The governor shall assign a special, emergency or any regular judge to hold all other terms of both the Greensboro division and High Point division. And if for any reason the judge holding the courts of the twelfth judicial district is unable to hold any of said terms, the governor shall assign an emergency or any other judge to hold said terms.

Any of the terms of court assigned or provided as above set out to be held in either the Greensboro division or the High Point division of the superior court of Guilford county may be transferred to, and held in, the other division of the said superior court of Guilford by order of the governor: Provided, however, that the president of the Greensboro Bar Association and the president of High Point Bar Association recommend and agree in writing thereto.

Davidson County

In Davidson county at the courthouse in Lexington for the trial of civil and criminal cases:

Fifth Monday before the first Monday in March, one week; ninth Monday after the first Monday in March, one week; sixteenth Monday after the first Monday in March, one week; second Monday before the first Monday in September, one week; eleventh Monday after the first Monday in September, two weeks.

In Davidson county at the courthouse in Lexington for the trial of civil cases only:

Second Monday before the first Monday in March, two weeks; fifth Monday after the first Monday in March, two weeks; twelfth Monday after the first Monday in March, two weeks; first Monday after the first Monday in September, two weeks; fourth Monday after the first Monday in September, two weeks.

The regular judge holding the courts of the twelfth judicial district shall hold the following courts in Davidson county at the courthouse in Lexington:

Fifth Monday before the first Monday in March, one week mixed; second Monday before the first Monday in March, two weeks civil; ninth Monday after the first Monday in March, one week mixed; sixteenth Monday after the first Monday in March, one week mixed; second Monday before the first Monday in September, one week mixed; first Monday after the first Monday in September, two weeks civil.

The governor shall assign a special, emergency or any regular judge to hold all other terms in Davidson county. If for any reason the judge holding the courts of the twelfth judicial district is unable to hold any of said terms, the governor shall assign an emergency or any other judge to hold said terms. (1913, c. 196; Ex. Sess. 1913, c. 14; 1921, cc. 22, 42; 1923, c. 169; 1927, c. 211; 1931, c. 114; 1933, cc. 14, 404; 1935, c. 184; 1939, c. 42; 1941, c. 367, s. 1; 1943, c. 682; 1945, c. 654; 1947, c. 1050; C. S. 1443.)

Thirteenth District

Moore—Sixth Monday before the first Monday in March, for the trial of criminal cases only, to continue for one week; third Monday before the first Monday in March, for the trial of civil cases only, to continue for one week; third Monday after the first Monday in March, for the trial of civil cases only, to continue for one week; eleventh Monday after the first Monday in March, to continue for two weeks, the first week for the trial of criminal cases only and the second week for the trial of civil cases only; third Monday before the first Monday in September, to continue for one week, for the trial of criminal cases only; second Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases only; second Monday after the first Monday in November, for the trial of civil cases only, to continue for one week.

(1949, c. 454.)

Fifteenth District

Alexander—Sixth Monday before the first Monday in March, to continue for two weeks, for the trial of civil and criminal cases; first Monday before the first Monday in September, to continue for two weeks, for the trial of criminal and civil cases. For these terms of court the governor may assign a judge to hold the same from among the regular, special or emergency judges. (1913, c. 196; 1921, c. 166; 1933, c. 250, s. 4; 1935, cc. 101, 252, s. 2; 1937, c. 214; 1949, c. 458; C. S. 1443.)

Sixteenth District

Burke—Second Monday before the first Monday in March, to continue for one week, for the trial of civil and criminal cases; first Monday after the first Monday in March, to continue for two weeks, for the trial of civil and criminal cases; thirteenth Monday after the first Monday in March, to continue for three weeks, for the trial of civil and criminal cases; fourth Monday before the first Monday in September, to continue for two weeks, for the trial of civil and criminal cases; third Monday after the first Monday in September, to continue for three weeks, for the trial of civil and criminal cases; fourteenth Monday after the first Monday in September, to continue for two weeks, for the trial of civil and criminal cases: Provided, however, that the board of commissioners of Burke county, in any year, upon written petition of a majority of the practicing attorneys resident in said county, may, by resolution duly adopted, dispense with and abrogate the holding of that term of said court which by the provisions of this section commences on the thirteenth Monday after the first Monday in March. (1913, c. 196; 1915, c. 67; Ex. Sess. 1920, c. 5; Ex. Sess. 1921, c. 90, s. 3; Pub. Loc. 1925, c. 306; 1931, c. 343; 1947, c. 26; C. S. 1443.)

Caldwell—First Monday before the first Monday in March; second Monday before the first Monday in September, each to continue two weeks; eleventh Monday after the first Monday in March, to continue two weeks, for civil cases only; twelfth Monday after the first Monday in September, to continue two weeks, for the trial of civil and criminal cases; the eighth Monday before the first Monday in March, to continue two weeks, for the trial of civil cases only; ninth Monday after the first Monday in March, to continue one week, for the trial of civil and criminal cases; fourth Monday after the first Monday in September, to continue two weeks, for the trial of civil cases only; thirteenth Monday after the first Monday in March, to continue two weeks, for the trial of civil cases only; first Monday in September, to continue two weeks, for the trial of civil cases only. For the last five terms provided for above, the governor may assign a regular, special, or emergency judge when the judge regularly assigned to the district is unable to hold said terms for any cause set out in article IV, section 11, of the constitution. If the regular judge holding the courts in the sixteenth district is not available for any cause set out in article IV, section 11, of the constitution, to hold any of the terms of court provided for in this paragraph, the governor shall assign a judge to hold such term or terms from among the regular, special or emergency judges. (1913, c. 196; 1915, c. 35; Ex. Sess. 1921, c. 90, s. 2; 1941, c. 367, s. 1; 1949, c. 453; C. S. 1443.)

Catawba—Seventh Monday before the first Monday in March, to continue for two weeks and for the trial of civil cases only, fourth Monday before the first Monday in March, to continue for two weeks; ninth Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only; ninth Monday before the first Monday in September, to continue for two weeks; first Monday in September, to continue for two weeks, and for the trial of civil cases only; tenth Monday after the first Monday in September, to continue for two weeks, for the trial of both criminal and civil cases; thirteenth Monday after the first Monday in September, to continue for one week and for the trial of civil cases only.

Fifth Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only: Provided, that the board of county commissioners may by resolution, adopted not less than thirty days prior to the convening of either of the last two courts, determine that the holding of such court is not necessary and cancel the same, in which case notice of such action shall immediately be given to the governor to the end that the judge assigned to said court may be relieved from such assignment. (1913, c. 196; Ex. Sess. 1913, c. 7; Ex. Sess. 1921, c. 47; c. 90, s. 1; 1923, c. 18; 1925, c. 13, ss. 1, 2; 1933, c. 311; 1949, c. 1126; C. S. 1443.)

Watauga—Seventh Monday after the first Monday in March; second Monday after the first Monday in September (both by regular judge), for the trial of criminal cases only; fourteenth Monday after the first Monday in March to continue for a term of two weeks, trial of civil cases only; the tenth Monday after the first Monday in September to continue for a term of two weeks, for the trial of civil cases only; provided, that motions and uncontested civil cases may be heard at either of the terms designated for the trial of criminal cases only. (1913, c. 196; 1921, c. 166; 1931, c. 424; 1933, c. 250, s. 2; 1935, c. 274; 1945, c. 696; 1949, c. 689; C. S. 1443.)

Seventeenth District

Davie—Third Monday after the first Monday in March for the trial of both criminal and civil cases; twelfth Monday after the first Monday in March, for the trial of civil cases only; first Monday before the first Monday in September, for the trial of both criminal and civil cases; thirteenth Monday after the first Monday in September, for the trial of civil cases only. (1913, c. 196; 1921, cc. 31, 121, 166; 1935, c. 105, s. 2; 1947, c. 587; C. S. 1443.)

Wilkes—Seventh Monday before the first Monday in March for three weeks for the trial of civil cases only; first Monday in March for three weeks for the trial of both civil and criminal cases; eighth Monday after the first Monday in March for two weeks for the trial of civil cases only; thirteenth Monday after the first Monday in March for two weeks for the trial of both civil and criminal cases; fifteenth Monday after the first Monday in March for two weeks for the trial of civil cases only, without the intervention of a grand jury; seventh Monday before the first Monday in September for one week for the trial of civil cases only; fourth Monday before the first Monday in September for three weeks for the trial of both civil and criminal cases; first Monday after the first Monday in September for one week for the trial of civil cases only; fourth Monday after the first Monday in September for two weeks for the trial of civil cases only; eighth Monday after the first Monday in September for two weeks for the trial of civil cases only; fourteenth Monday after the first Monday in September for two weeks for the trial of civil and criminal cases. (1913, c. 196; 1919, c. 165; 1921, c. 166; 1935, c. 105, s. 1; c. 192; 1937, c. 48; 1941, c. 367, s. 1; 1947, c. 587; 1949, c. 994; C. S. 1443.)

Yadkin—Fourth Monday before the first Monday in March for three weeks for the trial of both criminal and civil cases; first Monday in September for one week for the trial of both criminal and civil cases; eleventh Monday after the first Monday in September for two weeks for the trial of civil cases. (1913, c. 196; Ex. Sess. 1920, c. 42; 1921, c. 166; 1925, c. 65; 1941, c. 367, s. 1; 1947, c. 587; C. S. 1443.)

Avery—Sixth Monday after the first Monday in March, for two weeks, for the trial of both criminal and civil cases; ninth Monday before the first Monday in September, for two weeks, for the trial of both criminal and civil cases; sixth Monday after the first Monday in September, for two weeks, for the trial of both criminal and civil cases. (1913, c. 196; 1915, c. 169; 1921, c. 166; Ex. Sess. 1921, c. 33; 1923, c. 90; 1931, c. 84; 1933, cc. 152, 250, s. 1; 1941, c. 212, s. 1, c. 367, s. 1; 1943, c. 162; 1945, c. 66; C. S. 1443.)

Nineteenth District

Madison—First Monday before the first Monday in March, to continue for one week; fourth Monday after the first Monday in March, for two weeks, for the trial of both criminal and civil cases; twelfth Monday after the first Monday in March, to continue for one week; sixteenth Monday after the first Monday in March, to continue for one week; first Monday before the first Monday in September, to continue for one week; fourth Monday after the first Monday in September, for two weeks, for the trial of both criminal and civil cases; twelfth Monday after the first Monday in September, to continue for one week.

The board of county commissioners shall, at the time of drawing the jurors for the terms of court provided in the preceding paragraph, designate whether the terms shall be for the trial of civil or criminal cases, and draw the jurors accordingly.

In addition to the terms provided for above, there shall be held in Madison county a term of the superior court to which a judge shall be assigned beginning on the fifth Monday before the first Monday in March to continue for one week, for the trial of civil cases. (1913, c. 196; 1915, c. 117; 1917, c. 79; 1929, c. 205; 1931, c. 25; 1941, c. 367, s. 1; 1947, c. 549, ss. 1, 2; 1949, c. 1101; C. S. 1443.)

Twentieth District

Jackson—Second Monday before the first Monday in March; eleventh Monday after the first Monday in March, each term to continue for two weeks and both to be for the trial of criminal and civil cases; fourteenth Monday after the first Monday in March, for the trial of civil cases only, and for this term of court the governor shall assign a judge to hold same from among the regular, special or emergency judges; fifth Monday after the first Monday in September to continue for two weeks.

The county commissioners, may, in their judgment abrogate the term herein provided to be held on the fourteenth Monday after the first Monday in March, the jurors for this term to be drawn at the same time as those for the May term, service to be withheld pending the decision of the county commissioners. (1913, c. 196; 1933, c. 107; 1939, c. 212; 1947, c. 556; C. S. 1443.)

Twenty-First District

Caswell—Second Monday after the first Monday in March to continue for two weeks for the trial of criminal and civil cases; ninth Monday before

the first Monday in September to continue for one week for the trial of both criminal and civil cases; tenth Monday after the first Monday in September to continue for two weeks for the trial of both criminal and civil cases. (1913, c. 196; 1919, c. 289; 1927, c. 202; 1933, c. 45, s. 1; 1935, c. 246; 1937, cc. 107, 413, s. 5; 1941, c. 367, s. 1; 1945, c. 143; C. S. 1443.)

Surry—Eighth Monday before the first Monday in March to continue for one week; third Monday before the first Monday in March to continue for one week; seventh Monday after the first Monday in March to continue for one week; second Monday after the first Monday in September to continue for one week; fifteenth Monday after the first Monday in September to continue for one week; all the above terms to be for the trial of criminal and civil cases.

Seventh Monday before the first Monday in March to continue for one week; second Monday before the first Monday in March to continue for two weeks; eighth Monday after the first Monday in March to continue for one week; thirteenth Monday after the first Monday in March to continue for one week; eighth Monday before the first Monday in September to continue for two weeks; third Monday after the first Monday in September to continue for two weeks; all the above terms to be for the trial of criminal and civil cases. (1913, c. 196; Ex. Sess. 1913, c. 34; Ex. Sess. 1921, c. 9; Pub. Loc. 1925, c. 417; 1931, c. 251; 1933, cc. 180, 413; 1935, c. 246; 1937, cc. 210, 413, s. 5; 1945, c. 174; C. S. 1443.)

Editor's Note.—

The 1945, 1947 and 1949 amendatory acts have been cited at the ends of the paragraphs affected thereby. Only the parts of the section affected by such acts have been set out.

For comment on the 1943 amendment, see 21 N. C. Law Rev. 344.

Judicial Notice of Dates of Terms.—The courts will take judicial notice of the dates of the terms of the superior courts. State v. Anderson, 228 N. C. 720, 47 S. E. (2d) 1.

§ 7-71.1. Governor authorized to cancel terms of court; judges available for assignment elsewhere.

For comment on this and the following section, see 21 N. C. Law Rev. 336.

§ 7-72. Civil cases at criminal terms.—At criminal terms of court, motions in civil actions may be heard upon due notice, and trials in civil actions may be heard by consent of parties. Also motions for confirmation or rejection of referees' reports may be heard upon ten days' notice and judgment entered on said reports. At criminal terms of court, the court is also authorized and empowered to enter consent orders and consent judgments and to try uncontested civil actions and uncontested divorce cases. (Rev., s. 1507; 1901, c. 28; 1913, c. 196, s. 2; Ex. Sess. 1913, c. 23; 1915, cc. 68, 240; 1917, c. 13; 1931, c. 394; 1947, c. 25; C. S. 1444.)

Editor's Note.—The 1947 amendment added the last sentence, which represents a further step towards flexibility in the handling of judicial business. 25 N. C. Law Rev. 389.

§ 7-73.1. Calendar for all terms for trial of criminal cases.—1. Filing with Clerk; Fixing Day for Trial of Each Case.—At least one week before the beginning of any term of the superior court for the trial of criminal cases, the solicitor shall file with the clerk of the superior court a calendar of the cases he intends to call for trial at that term. The calendar shall fix a day for the trial of each case included thereon.

2. Grand Jury Cases.—The solicitor may place on the calendar for the first day of the term all cases which will require consideration by the grand jury without obligation to call such cases for trial on that day.

3. Trial of Case before Day Fixed.—No case on the calendar may be called for trial before the day fixed by the calendar except by consent or by order of the court.

4. Cases Docketed after Calendar Completed.—All cases docketed after the calendar has been made and filed with the clerk of superior court may be placed on the calendar at the discretion of the solicitor.

5. Subpoenaing of Witnesses.—All witnesses shall be subpoenaed to appear on the date listed for the trial of the case in which they are witnesses.

6. Proof of Attendance of Witnesses.—Witnesses shall not be entitled to prove their attendance for any days prior to the day on which the case in which they are witnesses is set for trial unless otherwise ordered by the presiding judge.

7. Authority of Court Unaffected.—Nothing in this section shall be construed to affect the authority of the court in the call of cases for trial. (1949, c. 169.)

Editor's Note.—For brief comment on section, see 27 N. C. Law Rev. 451.

§ 7-74. Rotation of judges.

Jurisdiction of "in Chambers" Matters.—Within the period of assignment the judge so assigned to a district has jurisdiction of all "in Chambers" matters arising in the district. Moreover, "the judge assigned to the district" is specifically designated by § 1-493 as one of the judges to whom all restraining orders and injunctions shall be made returnable. Reidsville v. Slade, 224 N. C. 48, 54, 29 S. E. (2d) 215. See also, Ridenhour v. Ridenhour, 225 N. C. 508, 35 S. E. (2d) 617.

§ 7-76. Court adjourned by sheriff when judge not present.

Editor's Note.—For comment on this section, see 21 N. C. Law Rev. 338.

Art. 11. Special Regulations.

§ 7-89. Court reporters.

Local Modification.—Cleveland County: 1945, c. 505.

§ 7-90. Official court reporter for second judicial district.

The resident judge shall likewise fix the compensation to be received by such reporter and such reporter pro tem: Provided, however, such compensation shall not exceed thirteen dollars per day and actual expenses upon a weekly basis.

(1947, c. 794.)

Editor's Note.—The 1947 amendment substituted "thirteen" for "ten" in line four of the fifth paragraph. As the rest of the section was not affected by the amendment it is not set out.

§ 7-91. Official court reporter for fifth judicial district.

Local Modification.—Pitt: 1947, c. 759; 1949, c. 1185.

SUBCHAPTER IV. DOMESTIC RELATIONS COURTS.

Art. 13. In Counties with a City of at Least Twenty-Five Thousand Inhabitants.

§ 7-101. Established by county or city or both.

—The Board of County Commissioners in the various counties having a county population of eighty-five thousand or more or having a county seat with twenty-five thousand or more inhabitants of the state, or the governing authorities in cities of twenty-five thousand or more inhabitants shall have authority to establish a "Domestic Relations Court", which court may be a joint county and city court, as provided in section 7-102 or a court for the county or city as may be determined by the governing authorities. Provided, that in counties with two or more cities having twenty-five thousand or more inhabitants each, any such city may join any other city or cities of at least twenty-five thousand inhabitants each in establishing a domestic relations court; or any number of or all of such cities may join the county in which they are situate in establishing a domestic relations court. (1929, c. 343, s. 1; 1949, cc. 420, 957.)

Editor's Note.—The first 1949 amendment inserted after the word "county" in line two the words "population of eighty-five thousand or more or having a county", and the second 1949 amendment added the proviso.

By virtue of Session Laws 1947, c. 142, and Session Laws 1949, cc. 78, 334 and 707, the counties of New Hanover, Gaston, Durham and Guilford, respectively, should be stricken from the list of counties appearing under Local Modification set out under this section in the original volume. The acts referred to above made the counties mentioned subject to the provisions of this article, which was also made applicable to the city of High Point by Session Laws 1947, c. 962.

§ 7-103. Jurisdiction.

Editor's Note.—

For comment on the 1943 amendment, see 21 N. C. Law Rev. 343.

An exclusive remedy to compel a father to provide for the support of his illegitimate child is provided by this section and chapter 49 of General Statutes, and the statutes do not authorize the child to maintain a civil action to compel its father to provide for its support. Allen v. Hunnicutt, 230 N. C. 49, 52 S. E. (2d) 18.

Cited in In re Morris, 224 N. C. 487, 491, 31 S. E. (2d) 539.

§ 7-104. Election of judge and term of office; vacancy appointments; judge to select clerk; juvenile court officers may be declared officers of new court.

Local Modification.—Buncombe: 1947, c. 989; Mecklenburg (and city of Charlotte): 1949, c. 949.

Editor's Note.—

For comment on the 1943 amendment, see 21 N. C. Law Rev. 343.

§ 7-106. Procedure, practice and punishment.

Editor's Note.—

For comment on the 1943 amendment to this and the following section, see 21 N. C. Law Rev. 343.

§ 7-110. Cases transferred from superior court.—Upon the establishment of a domestic relations court as authorized in this article, the clerk of the superior court and the clerk of any inferior criminal court of the county shall immediately transfer from the superior court and from any inferior criminal courts of the county to such domestic relations court all actions pending in the superior court of which the domestic relations court has jurisdiction as in this article conferred, whether such actions are untried or tried and retained for judgment, sentence or further orders, and the domestic relations court shall immediately have jurisdiction of such actions and shall thereafter try, enter further orders or dispose of such actions in the same manner and to the same extent as if said actions had been initiated in said domestic relations court. (1941, c. 208, s. 1; 1949, c. 600.)

Editor's Note.—The 1949 amendment inserted the provisions for transfer of cases from inferior criminal courts to domestic relations courts. For brief comment on amendment, see 27 N. C. Law Rev. 441.

SUBCHAPTER V. JUSTICES OF THE PEACE.

Art. 14. Election and Qualification.

§ 7-113. Election and number of justices.

Cross Reference.—For repeal of this section as to counties coming within the provisions of article 14A of this chapter, see § 7-120.11.

§ 7-114. Oath of office; vacancies filled.

Cross Reference.—As to repeal of the last two sentences of this section as to counties coming within the provisions of article 14A of this chapter, see § 7-120.11.

Appointed by Clerk.—

In accord with original. See Etheridge v. Leary, 227 N. C. 636, 637, 43 S. E. (2d) 847.

§ 7-115. Governor may appoint justices.

Cross Reference.—For repeal of this section as to counties coming within the provisions of article 14A of this chapter, see § 7-120.11.

Art. 14A. Appointment by Judge and Abolition of Fee System.

§ 7-120.1. Determination by county commissioners of number of justices to be appointed.—The board of commissioners of any county in the state, upon the adoption of a resolution on the first Monday in March, 1950, or any even numbered year thereafter, shall, for the term beginning the first Monday in December thereafter, fix the number of justices of the peace to be appointed in such county, taking into consideration the population, the business then being transacted by justices of the peace in such county and the future business as may be reasonably anticipated, and having due regard for all other factors to the end that a sufficient number of justices of the peace are appointed to serve adequately the needs of the county and the various localities therein. (1949, c. 1091, s. 1.)

For brief discussion of article, see 27 N. C. Law Rev. 442.

§ 7-120.2. Appointment and removal by the resident judge.—The justices of the peace for each county adopting this article shall be appointed by the resident judge of the superior court of the district in which the county is situated. Any justice of the peace may, after due notice and hearing, be removed from office by such resident judge for misfeasance, malfeasance, nonfeasance or other good cause. (1949, c. 1091, s. 2.)

§ 7-120.3. Term of office.—The term of office of every justice of the peace appointed pursuant to this article shall be two years. The term shall commence on the first Monday in December, 1950, and biennially thereafter. (1949, c. 1091, s. 3.)

§ 7-120.4. Salaries and fees.—Each justice of the peace shall be paid an annual salary, to be fixed by the board of county commissioners, in its discretion, to be paid out of the general fund of the county. Such salary shall be in lieu of all fees as compensation for a justice of the peace in connection with any criminal or civil case, but he shall continue to collect such fees as are provided by law with respect to criminal or civil cases and pay them into the general fund of the county. Each such justice of the peace shall be permitted to collect and retain for his own use,

in addition to the salary fixed by the county board of commissioners, all fees provided by law with respect to any matter other than a criminal or a civil case. (1949, c. 1091, s. 4.)

§ 7-120.5. Deposits and reports.—Every justice of the peace appointed pursuant to this article shall be subject to the provisions of G. S. § 153-135, known as the "Daily Deposit Law", and shall also make monthly reports to the board of county commissioners, showing in full detail all fees, fines and forfeitures collected by him, in such form and manner as the board may require. (1949, c. 1091, s. 5.)

§ 7-120.6. Jurisdiction and places for holding court.—Every justice of the peace shall have county-wide jurisdiction, but the board of commissioners shall designate the place or places where each justice of the peace shall sit regularly for the transaction of business, which place shall be so designated as to serve reasonably the convenience of the citizens of the county. The board of county commissioners shall provide adequate space or quarters, either in county buildings, or through renting appropriate space, or otherwise, in which each justice of the peace may hold court and perform the other duties of his office. (1949, c. 1091, s. 6.)

§ 7-120.7. Vacancies.—Any vacancy other than a vacancy arising by expiration of a term shall be filled by appointment by the clerk of the superior court of the county in which such vacancy occurs. (1949, c. 1091, s. 7.)

§ 7-120.8. Expiration of terms of present justices; transfer of pending cases.—In those counties accepting the provisions of this article, the terms of all persons holding the office of justice of the peace, other than those appointed pursuant to this article, shall expire on the first Monday after the adoption of the provisions of this article, and any case or proceeding pending on such date before any justice of the peace shall be transferred to a justice of the peace appointed pursuant to this article, in such manner as may be directed by the board of county commissioners. (1949, c. 1091, s. 8.)

§ 7-120.9. Bond.—Every justice of the peace appointed pursuant to this article, prior to assuming the duties of his office, shall furnish a bond payable to the county in and for which he is appointed, in such amount as the board of commissioners may determine, conditioned upon the faithful performance of his duties and upon a correct and proper accounting for all funds paid into his hands by virtue of or under color of his office. The premium on such bond shall be paid by the board of county commissioners out of the general fund of the county. (1949, c. 1091, s. 9.)

§ 7-120.10. Counties exempt from article.—This article shall not apply to the counties of Alamance, Alexander, Alleghany, Ashe, Avery, Beaufort, Bertie, Brunswick, Cabarrus, Carteret, Caswell, Chatham, Cherokee, Clay, Cleveland, Cumberland, Davie, Davidson, Duplin, Durham, Forsyth, Franklin, Gates, Granville, Greene, Guilford, Halifax, Harnett, Haywood, Henderson, Hoke, Hyde, Jackson, Johnston, Lee, Lincoln, Macon, Madison, Martin, McDowell, Mitchell, Moore, Nash, Northampton, Pamlico, Pitt, Polk, Randolph, Richmond, Robeson, Rutherford, Sampson, Surry, Swain, Transylvania, Tyrrell, Union, Wake, Washington, Watauga, Wayne, Wilkes, Wilson, Yadkin, Yancey, Rockingham, Catawba, Caldwell, New Hanover, Scotland, Warren, Person, Jones, and Sampson. (1949, c. 1091, s. 10.)

§ 7-120.11. Conflicting laws repealed.—Section 7-113, the last two sentences of § 7-114, and § 7-115, and all other laws and clauses of laws in conflict with this article are hereby repealed. (1949, c. 1091, s. 11.)

Art. 15. Jurisdiction.

§ 7-121. Jurisdiction in actions on contract.

I. ACTIONS EX CONTRACTU.

The jurisdiction of a justice of the peace is limited and special—not general—and he can only exercise the power conferred upon him by the constitution, Art. IV, sec. 27, and statutes. He has no equitable powers. Hopkins v. Barnhardt, 223 N. C. 617, 27 S. E. (2d) 644.

And Justice Has No Jurisdiction in Action for Penalty Plus Attorney's Fees.—Neither the constitution nor any statutes enacted pursuant thereto, give jurisdiction to justices of the peace in an action for a penalty plus reasonable attorney's fees to be fixed and awarded by the court. Hopkins v. Barnhardt, 223 N. C. 617, 27 S. E. (2d) 644.

§ 7-129. Jurisdiction in criminal actions.

Cited in State v. Gregory, 223 N. C. 415, 27 S. E. (2d) 140; State v. Bentley, 223 N. C. 563, 27 S. E. (2d) 738 (con. op.); State v. Grimes, 226 N. C. 523, 39 S. E. (2d) 394.

Art. 17. Fees.

§ 7-134. Fees of justices of the peace.

Justices of the peace in the counties of Montgomery, Onslow, Macon, Swain, Greene, Hyde, Cherokee, Rowan, Anson, Bertie, Nash, Chowan, Alamance, Wake, Transylvania, Watauga, Pender, Lee, Lenoir, Perquimans, Rockingham, Stokes, Johnston, Halifax, Duplin, Chatham, Forsyth, Wilkes, Gates, Tyrrell, Brunswick, Stanley, Columbus, Edgecombe, Franklin, Vance, Mitchell, Orange, Buncombe, Jackson, Alexander, McDowell, Clay, Hertford, Davidson, Northampton, Wayne, Jones, Cabarrus, Robeson, Richmond, Polk, Henderson, Harnett, Bladen, Burke, Granville, Person, Haywood, Caldwell, Cumberland, Yadkin, and Madison shall receive the following fees, and none other: For attachment with one defendant, thirty-five cents, and if more than one defendant, fifteen cents for each additional defendant; transcript of judgment, fifteen cents; summons, thirty cents; if more than one defendant in the same case, for each additional defendant, fifteen cents; subpoena for each witness, fifteen cents; trial when issues are joined, one dollar; and if no issues are joined, then a fee of fifty cents for trial and judgment; taking an affidavit, bond, or undertaking, or for an order of publication, or in order to seize property, thirty-five cents; for jury trial and entering verdict, one dollar; execution, thirty-five cents; renewal of execution, fifteen cents; return to an appeal, forty cents; order of arrest in civil actions, thirty cents; warrant of arrest in criminal and bastardy cases, including affidavit or complaint, seventy-five cents; warrant of commitment, fifty cents; taking depositions on order of commission, per one hundred words, fifteen cents; garnishment for taxes and making necessary return and certificate of same, thirty-five cents. (Rev., s. 2788; Code, ss. 2135, 3748; 1870-1, c. 130, s. 9; 1883, c.

368; 1885, c. 86; 1903, c. 225; 1907, c. 967; 1917, c. 260; 1921, c. 113; Ex. Sess. 1921, cc. 38, 64, 67; 1923, cc. 28, 114, 238; 1929, cc. 13, 59; 1931, cc. 51, 303; 1945, c. 150; 1947, c. 337; C. S. 3923.)

Local Modification. — Catawba: 1949, c. 348; Davidson: 1949, c. 643; Franklin: 1945, c. 167; 1949, c. 258; Granville: 1945, c. 1066; Haywood: 1947, c. 687; Jackson: 1949, c. 252; Lincoln: 1947, c. 138; Polk: 1949, c. 729; Randolph: 1947, c. 337; Robeson: 1949, c. 619; Transylvania: 1947, c. 1003; Watauga: 1947, c. 983.

Editor's Note.—

The 1945 amendment inserted "Yadkin" in line fourteen of the second paragraph. The 1947 amendment struck out "Randolph" from the list of counties in the second paragraph. As the first paragraph was not affected by the amendments it is not set out.

Art. 19. Pleading and Practice.

§ 7-149. Rules of practice.

Rule 17, Attachment proceedings. Attachment proceedings before justices of the peace are governed by the provisions of §§ 1-440.47 through 1-440.56. (Rev., s. 1474; Code, s. 853; 1947, c. 693, s. 2; C. S. 1500.)

Editor's Note.—The 1947 amendment rewrote Rule 17. As the rest of the section was not affected by the amendment it is not set out.

Amendment of Warrants.—The superior court, under Rule 12 of this section, may allow, within the discretion of the court, an amendment to a warrant both as to form and substance before or after verdict, provided the amended warrant does not change the nature of the offense intended to be charged in the original warrant. State v. Brown, 225 N. C. 22, 24, 33 S. E. (2d) 121.

A warrant may be defective in form and substance and yet contain sufficient information to inform defendant of the accusation made against him. Such a warrant may be amended. Id.

Art. 22. Appeal.

§ 7-179. Manner of taking appeal.

Time.—

In accordance with practice and procedure in courts of justices of peace, an appeal to the superior court means to the next term of the court to which an appeal in orderly and regular course would go. Starr Elec. Co. v. Lipe Motor Lines, 229 N. C. 86, 47 S. E. (2d) 848.

§ 7-180. No written notice of appeal in open court.

If notice of appeal be given in open court, the adverse party being present in person or by attorney at the time appeal is prayed, no written notice is required. Starr Elec. Co. v. Lipe Motor Lines, 229 N. C. 86, 47 S. E. (2d) 848.

§ 7-181. Justice's return on appeal.

Remedy Where Justice Fails in His Duty.—Upon failure of a justice of the peace to make a return to notice of appeal, appellant, if in no default, should move at the next ensuing term of the superior court for a writ of recordari to compel the justice of the peace to make the return and to file the papers, etc., as required by this section. Starr Elec. Co. v. Lipe Motor Lines, 229 N. C. 86, 47 S. E. (2d) 848.

Art. 23. Forms.

§ 7-184. Forms to be used in justice's court.—

[No. 3]-[No. 16], [No. 47] Repealed by Session Laws 1947, c. 693, s. 3.

SUBCHAPTER VI. RECORDERS' COURTS.

Art. 24. Municipal Recorders' Courts.

§ 7-185. In what cities and towns established; court of record.

As to validation of resolutions and ordinances establishing a municipal recorder's court of the city of Burlington, see Session Laws 1947, c. 950, s. 5.

§ 7-186. Recorder's election and qualification; term of office and salary.

Local Modification.—City of Belmont: 1949, c. 871, s. 1; city of Burlington: 1945, c. 618, s. 1; 1947, c. 950, s. 1; city of New Bern: 1949, c. 649; city of Randleman: 1947, c. 930, s. 1; town of Asheboro: 1947, c. 930, s. 1.

§ 7-190. Criminal jurisdiction.

Local Modification.—City of Belmont: 1949, c. 871, s. 2; city of Burlington: 1945, c. 618, s. 2; 1947, c. 950, s. 2; town of Mocksville: 1947, c. 1053.

§ 7-191. Jurisdiction to recover penalties.

Local Modification.—City of Belmont: 1949, c. 871, s. 3; city of Burlington: 1947, c. 950, s. 3.

§ 7-192. Disposition of cases when jurisdiction not final.

Local Modification.—City of Burlington: 1947, c. 950, s. 4.

§ 7-194. Sentences to be imposed.—When any person is convicted, or pleads guilty, of any offense of which the court has final jurisdiction, the recorder may sentence him to the common jail of the county in which the court is held, to be assigned to work under the state highway and public works commission; or when such person is a woman or an infant of immature years, the recorder may sentence him or her to the city or county workhouse or state reformatory, or other penal institution provided by law for such purposes. (1919, c. 277, s. 8; 1945, c. 635; C. S. 1545.)

Editor's Note.—The 1945 amendment struck out the words "and assign him to work on the public roads of the county as provided by law" in the fifth, sixth and seventh lines, and inserted in lieu thereof the words "to be assigned to work under the state highway and public works commission." It also struck out the former provision relating to sentence to work upon the roads of another county.

§ 7-195. Appeal to superior court.

Local Modification.—City of Belmont: 1949, c. 871, s. 4; city of Burlington: 1945, c. 618, s. 4.

§ 7-197. Seal of court.

Local Modification.—City of Belmont: 1949, c. 871, s. 5.

§ 7-198. Issuance and service of process.

Local Modification.—City of Belmont: 1949, c. 871, s. 6.

§ 7-199. Vice recorder; election and duties.

Local Modification.—City of Belmont: 1949, c. 871, s. 7; city of Burlington: 1945, c. 618, s. 5.

§ 7-200. Clerk of court; election and duties; removal; fees.

Local Modification.—City of Belmont: 1949, c. 871, s. 8.

§ 7-201. Clerk to keep records.

Local Modification.—City of Belmont: 1949, c. 871, s. 9.

§ 7-202. Clerk to issue process.

Local Modification.—City of Belmont: 1949, c. 871, s. 10.

§ 7-203. Prosecuting attorney; duties and salary.

Local Modification.—Lenoir: 1949, c. 1237; city of Belmont: 1949, c. 871, s. 11; city of Burlington: 1945, c. 618, s. 6.

§ 7-204. Jury trial, as in justice's court.

Local Modification.—Halifax: 1945, c. 628, s. 2; town of Asheboro: 1947, c. 930, s. 2; city of Belmont: 1949, c. 871, s. 12; city of Randleman: 1947, c. 930, s. 2.

§ 7-206. Officers' fees; fines and penalties paid.

Local Modification.—City of Belmont: 1949, c. 871, s. 13.

§ 7-207. County to pay for offenders' work on roads.—Whenever, under any judgment of the court, any defendant is sentenced to work upon the public works of the county, or to pay a fine and the costs of the prosecution, or costs only, and the defendant shall in fact work out the sentence or fine and costs, or either, upon such public works, then the county shall be liable for and shall

pay to the treasurer of the municipality one-half the amount of the costs taxed in the cause: Provided, the sentence imposed shall be of sufficient length to reimburse the county for one-half of such costs. (1919, c. 277, s. 19; 1945, c. 635; C. S. 1558.)

Local Modification.—City of Belmont: 1949, c. 871, s. 14; city of Burlington: 1945, c. 618, s. 7.

Editor's Note.—The 1945 amendment substituted in line three the words "works of" for the words "roads or other public work in" and made other alterations in phraseology in conformity to such change.

§ 7-211. Jurisdiction of justice of the peace after three months delay.

Local Modification.—City of Belmont: 1949, c. 871, s. 15.

Art. 25. County Recorders' Courts.

§ 7-218. Established by county commissioners.

Local Modification.—Halifax: 1945, c. 627; Orange: 1947, c. 214, s. 1.

§ 7-219. Recorder's election, qualification, and term of office.

Local Modification.—Orange: 1947, c. 214, s. 2; Washington: 1949, c. 1102.

§ 7-222. Criminal jurisdiction.

Cross Reference.—
See annotations under § 7-64.

Local Modification.—Orange: 1947, c. 214, s. 4.

§ 7-228. Jury trial as in municipal court.

Local Modification.—Halifax: 1945, c. 628, s. 2; Martin: 1945, c. 113; Orange: 1947, c. 214, s. 3; Pender: 1945, c. 60.

§ 7-229. Sentence imposed; fines and costs paid.—Whenever any person is convicted or pleads guilty of any offense of which the court has final jurisdiction, the recorder may sentence him to the common jail of the county in which court is held, and he may assign him to work under the state highway and public works commission. Provided, that in case the person so convicted or pleading guilty shall be a woman or an infant of immature years, then the recorder may assign him or her to the county workhouse, reformatory, or other penal institution located in the county; or if there be none, any similar institution that may be located outside of the county to which judges of the superior court are authorized to sentence such person under the general laws of the state. All fines imposed by the court shall be collected by the clerk of such court or the deputy clerk thereof in the same manner as the clerk of the superior court collects fines imposed by the superior court; and, where a defendant is convicted and fails to pay the costs of such conviction, the county shall pay such costs as is allowed by law in similar cases before the superior court. (1919, c. 277, s. 32; 1925, c. 308; 1945, c. 635; C. S. 1573.)

Editor's Note.—The 1945 amendment rewrote the first sentence.

§ 7-231. Clerk of superior court ex officio clerk of county recorder's court.

The preceding sentence shall not apply to recorder's courts in Bladen, Brunswick, Camden, Gates, Halifax, Martin, Moore, Perquimans, Forsyth and Vance counties. (1919, c. 277, s. 36; 1935, c. 346; 1947, c. 214, s. 5; C. S. 1576.)

Local Modification.—Mecklenburg: 1949, c. 955.

Editor's Note.—The 1947 amendment struck out "Orange" from the list of counties in the last sentence. As the rest of the section was not affected by the amendment it is not set out.

§ 7-232. Deputy clerk may be appointed.

This section shall not apply to Bladen, Brunswick, Camden, Gates, Guilford, Halifax, Lee, Martin, Moore, Perquimans, Forsyth and Vance counties. (1919, c. 277, s. 36; 1935, c. 346; 1947, c. 214, s. 5; C. S. 1576.)

Local Modification.—Mecklenburg: 1949, c. 955.

Editor's Note.—The 1947 amendment struck out "Orange" from the list of counties in the last sentence. As the rest of the section was not affected by the amendment it is not set out.

Art. 28. Civil Jurisdiction of Recorders' Courts.

§ 7-249. Trial by jury in civil actions.

Local Modification.—Halifax: 1945, c. 628, s. 2.

§ 7-250. Jurors drawn and summoned.

Local Modification.—Halifax: 1945, c. 628, s. 2.

§ 7-251. Talesmen and challenges.

Local Modification.—Halifax: 1945, c. 628, s. 2.

§ 7-252. Jury as in superior court.

Local Modification.—Halifax: 1945, c. 628, s. 2.

Art. 29. Elections to Establish Recorders' Courts.

§ 7-256. Election required.—The courts provided for in this subchapter shall be established upon elections held as set forth in this article, except municipal recorders' courts which are established without a popular vote pursuant to the provisions of article 29A of this chapter, and except the governing body of any municipality having an estimated population of more than twenty thousand (20,000) on the first day of January, 1945, may establish municipal recorders' courts and/or the board of county commissioners of any county may establish county recorders' courts without a vote of the people. (1919, c. 277, s. 58; 1921, c. 110, s. 14; 1947, c. 840, s. 1; c. 1021, s. 1; C. S. 1599.)

Editor's Note.—
The 1947 amendments rewrote this section. For brief comment on amendments, see 25 N. C. Law Rev. 400.

§ 7-264. Certain districts and counties not included.—This subchapter shall not apply to the following judicial districts; the tenth, except as to Granville, Orange and Alamance counties; the eleventh; the seventeenth; the eighteenth, except as to Rutherford and Transylvania counties; the nineteenth; and the twentieth, except as to Cherokee, Jackson, Haywood and Swain counties; nor shall it apply to the counties of Chatham, Columbus, Johnston, New Hanover, and Robeson. (1919, c. 277, s. 64; 1921, c. 110, s. 16; Ex. Sess. 1921, cc. 59, 80; 1923, cc. 19, 40; 1925, c. 162; Pub. Loc. 1927, cc. 214, 545; 1929, cc. 17, 111, 114, 130, 340; 1931, cc. 3, 19; 1933, c. 142; 1935, c. 396; 1939, c. 204; 1941, c. 338; 1947, c. 1021, s. 2; C. S. 1608.)

Editor's Note.—The 1947 amendment inserted the reference to Alamance county.

Art. 29A. Alternate Method of Establishing Municipal Recorders' Courts; Establishment without Election.

§ 7-264.1. Establishment of municipal recorders' courts without election.—(a) Notwithstanding the provisions of article 29 of this chapter, the governing body of any municipality authorized by this subchapter to establish a court may, by adoption of an appropriate resolution, create a municipal recorder's court after giving due notice and holding a public hearing with respect thereto.

(b) Such public notice shall set forth that the governing body is considering the creation of a municipal recorder's court without holding an election thereon and shall name a time and place for a public hearing thereon, at which time all interested persons may appear and be heard.

(c) Such notice shall be published at least once a week for four successive weeks in some newspaper published within the corporate limits of the municipality and shall be posted on the official bulletin board in the city hall of such municipality during the period of publication.

(d) After a public hearing is held pursuant to the provisions of this section, the governing body of the municipality is authorized, in its discretion, to establish a municipal recorder's court without holding an election thereon. (1947, c. 840, s. 2.)

SUBCHAPTER VII. GENERAL COUNTY COURTS.

Art. 30. Establishment, Organization and Jurisdiction.

§ 7-270. Costs.

Local Modification.—Surry: 1949, c. 896, s. 2.

§ 7-271. Judge; election, term of office, vacancy in office, qualification, salary, office.

Local Modification.—Surry: 1949, c. 896, s. 2.

§ 7-272. Terms of court.

Local Modification.—Duplin: 1947, c. 899.

§ 7-274. Superior court clerk as clerk ex officio; salary, bond, etc.

Local Modification.—Surry: 1949, c. 896, s. 2.

§ 7-285: Repealed by Session Laws 1949, c. 896, s. 1.

SUBCHAPTER VIII. CIVIL COUNTY COURTS.

Art. 33. With Jurisdiction Not to Exceed $3000.

§ 7-314. How actions commenced.—All actions shall be commenced in said court by summons running in the name of the state and issued by the clerk of said county court and shall be returnable as is provided by law for summons in the superior court. The plaintiff shall file complaint on or before the return day of such summons; the defendant shall file a written answer or demurrer and shall make his motions in writing during the term to which the summons is returnable and the case shall stand for trial at the next succeeding term. (1925, c. 135, s. 7; 1947, c. 781.)

Editor's Note.—The 1947 amendment struck out the words "and retain" formerly appearing after the word "file" in line six.

SUBCHAPTER IX. COUNTY CRIMINAL COURTS.

Art. 36. County Criminal Courts.

§ 7-394. Jury trials.

Local Modification.—Anson: 1949, c. 773.

§ 7-395. Process.—The clerks of the superior court as ex officio clerks and/or the clerks of county criminal courts or any of their deputies, upon application and the making of proper affidavit, as provided by law, shall have power and authority to issue any criminal warrant or warrants, peace warrants, subpoenas, and/or other processes of law in said court and make the same returnable before the judge thereof, at any time or times designated for the trial of criminal cases, and shall be directed to the sheriff or other lawful officer of the county, and the service thereof shall be lawfully made when made by the sheriff or deputy sheriff of the county, or any constable of said county, or by any rural policeman or municipal officer, and all warrants and subpoenas and other processes issued by the clerk of the superior court as ex officio clerk or the clerk of such court, when attested by the seal of said court, shall run anywhere in the state of North Carolina, and shall be executed by all officers in the same manner and way as processes now issued by the superior court. (1931, c. 89, s. 12; 1947, c. 130.)

Editor's Note.—The 1947 amendment rewrote this section.

SUBCHAPTER XI. JUDICIAL COUNCIL.

Art. 38. Judicial Council.

§ 7-448. Establishment and membership.—A judicial council is hereby created which shall consist of the chief justice of the supreme court or some other member of that court designated by him, two judges of the superior court designated by the chief justice, the attorney general, and eight additional members, two of whom shall be appointed by the governor, one by the president of the senate, one by the speaker of the house of representatives, and four by the council of the North Carolina state bar. All appointive members of the judicial council shall be selected on the basis of their interest in and competency for the study of law reform. The four members to be appointed by the council of the North Carolina state bar shall be active practitioners in the trial and appellate courts. (1949, c. 1052, s. 1.)

For a summary of article, see 27 N. C. Law Rev. 405.

§ 7-449. Terms of office.—Members of the council shall hold office for the following terms:

1. If he designates no other member of the supreme court, the chief justice during his term of office.

2. The attorney general during his term of office.

3. All other members for a term of two years. (1949, c. 1052, s. 2.)

§ 7-450. Vacancy appointments.—Vacancies shall be filled for the remainder of any term in the same manner as the original appointment. (1949, c. 1052, s. 3.)

§ 7-451. Chairman of council.—The member from the supreme court shall serve as chairman of the council. (1949, c. 1052, s. 4.)

§ 7-452. Meetings.—The council shall meet at least once each quarter of the calendar year, or more often at the call of the chairman. (1949, c. 1052, s. 5.)

§ 7-453. Duties of council.—It is the duty of the judicial council:

1. To make a continuing study of the administration of justice in this state, and the methods of administration of each and all of the courts of the state, whether of record or not of record.

2. To receive reports of criticisms and suggestions pertaining to the administration of justice in the state.

3. To recommend to the legislature, or the courts, such changes in the law or in the organi-

zation, operation or methods of conducting the business of the courts, or with respect to any other matter pertaining to the administration of justice, as it may deem desirable. (1949, c. 1052, s. 6.)

§ 7-454. Annual report; submission of recommendations.—The council shall annually file a report with the governor. The council shall submit any recommendations it may have for the improvement of the administration of justice to the governor, who shall transmit the same to the General Assembly. (1949, c. 1052, s. 7.)

§ 7-455. Compensation of members.—The members of the council shall be paid the sum of seven dollars ($7.00) per day and such necessary travel expenses and subsistence as may be incurred. (1949, c. 1052, s. 8.)

§ 7-456. Executive secretary; stenographer or clerical assistant.—The council, by and with the advice, consent and approval of the governor and council of state, may employ an executive secretary who shall be a licensed attorney either full-time or part-time and fix his salary in an amount not to exceed three thousand dollars ($3,000.00) per annum and also a stenographer or clerical assistant and fix her or his salary, said salaries to be paid out of the contingency and emergency fund. The executive secretary shall perform such duties as the council may assign to him. (1949, c. 1052, s. 9.)

Chapter 8. Evidence.

Art. 1. Statutes.

§ 8-3. Laws of other states or foreign countries.

Laws of Tennessee.—This section requires our courts to take judicial notice of the laws of Tennessee. Charnock v. Taylor, 223 N. C. 360, 26 S. E. (2d) 911, 148 A. L. R. 1126.

§ 8-4. Judicial notice of laws of United States, other states and foreign countries.

Applied in Lewis v. Furr, 228 N. C. 89, 44 S. E. (2d) 604.

§ 8-5. Town ordinances certified.

No Evidence of Certification or Publication.—The refusal to permit police officer to testify on cross-examination as to existence and contents of a paper-writing which purported to be an ordinance of the city, was not error where there was no evidence that purported ordinance had been certified, as required by this section, or that it had been printed and published by the city as provided in § 160-272. Toler v. Savage, 226 N. C. 208, 37 S. E. (2d) 485, 486.

Art. 2. Grants, Deeds and Wills.

§ 8-20. Certified copies registered in another county and used in evidence.

Cited in Universal Finance Co. v. Clary, 227 N. C. 247, 41 S. E. (2d) 760.

Art. 3A. Findings, Records and Reports of Federal Officers and Employees.

§ 8-37.1. Finding of presumed death.—A written finding of presumed death, made by the secretary of war, the secretary of the navy, or other officer or employee of the United States authorized to make such finding, pursuant to the Federal Missing Persons Act (56 Stat. 143, 1092, and P. L. 408, Ch. 371, 2d Sess. 78th Cong.; 50 U. S. C. App. Supp. 1001-17), as now or hereafter amended, or a duly certified copy of such finding, shall be received in any court, office or other place in this state as prima facie evidence of the death of the person therein found to be dead, and the date, circumstances and place of his disappearance. (1945, c. 731, s. 1.)

§ 8-37.2. Report or record that person missing, interned, captured, etc.—An official written report or record, or duly certified copy thereof, that a person is missing, missing in action, interned in a neutral country, or beleaguered, besieged or captured by an enemy, or is dead, or is alive, made by any officer or employee of the United States authorized by the act referred to in § 8-37.1, or by any other law of the United States to make same, shall be received in any court, office or other place in this state as prima facie evidence that such person is missing, missing in action, interned in a neutral country, or beleaguered, besieged or captured by an enemy, or is dead, or is alive, as the case may be. (1945, c. 731, s. 2.)

§ 8-37.3. Deemed signed and issued pursuant to law; evidence of authority to certify.—For the purposes of §§ 8-37.1 and 8-37.2 any finding, report or record, or duly certified copy thereof, purporting to have been signed by such an officer or employee of the United States as is described in said sections, shall prima facie be deemed to have been signed and issued by such an officer or employee pursuant to law, and the person signing same shall prima facie be deemed to have acted within the scope of his authority. If a copy purports to have been certified by a person authorized by law to certify the same, such certified copy shall be prima facie evidence of his authority so to certify. (1945, c. 731, s. 3.)

Art. 4. Other Writings in Evidence.

§ 8-39. Parol evidence to identify land described.

Stated in Peel v. Calais, 224 N. C. 421, 31 S. E. (2d) 440.

§ 8-41. Bills of lading in evidence.—In all actions by or against common carriers or in the trial of any criminal action in which it shall be thought necessary to introduce in evidence any bills of lading issued by said common carrier or by a connecting carrier, it shall be competent to introduce in evidence any paper-writing purporting to be the original bill of lading, or a duplicate thereof, upon proof that such paper purporting to be such bill of lading or duplicate was received in due course of mail from consignor or agent of said carrier or connecting carrier, or delivered by said common carrier to the consignee or other person entitled to the possession of the property for which said pa-

per purports to be the bill of lading: Provided, that such purported bill of lading shall not be declared to be the bill of lading unless the said purported bill of lading is first exhibited by the plaintiff or his agent or attorney to the defendant or its attorney, or its agent upon whom process may be served, ten days before the trial where the point of shipment is in the state, and twenty days when the point of shipment is without the state. Upon such proof and introduction of the bill of lading, the due execution thereof shall be prima facie established. (1915, c. 287; 1945, c. 97; C. S. 1785.)

Editor's Note.—The 1945 amendment inserted the words "or in the trial of any criminal action" in lines two and three.

§ 8-42. Book accounts under sixty dollars.

Cited in Perry v. First-Citizens Bank, etc., Co., 223 N. C. 642, 27 S. E. (2d) 636.

§ 8-43. Book accounts proved by personal representative.

Cited in Perry v. First-Citizens Bank, etc., Co., 223 N. C. 642, 27 S. E. (2d) 636.

Art. 5. Life Tables.

§ 8-46. Mortuary tables as evidence.

Formal Proof Unnecessary.—The mortuary table in this section is one of the prevailing mortality tables put into statutory form so as to permit its use without formal proof. Rea v. Simowitz, 225 N. C. 575, 35 S. E. (2d) 871, 162 A. L. R. 999.

Tables Not Conclusive.—

The mortuary table is merely evidence of life expectancy to be considered with other evidence as to the health, constitution and habits of the deceased, and an instruction making the expectancy set out in this section definitive and conclusive not only violates the evidence rule, but also § 1-180 prohibiting the expression of an opinion "whether a fact is fully or sufficiently proven." Starnes v. Tyson, 226 N. C. 395, 38 S. E. (2d) 211.

Life Expectancy of Child under Ten.—Although the tables set out in this section do not afford evidence of the life expectancy of a child under ten years of age, this does not leave the plaintiff destitute of proof, and the jury may consider evidence as to the constitution, health, vigor, habits and the like of the deceased as a basis for determining probable expectancy of life. Rea v. Simowitz, 226 N. C. 379, 38 S. E. (2d) 194, 196.

This statutory mortality table is not founded on any statistical information based on experience concerning children under ten years of age and does not give or purport to give the probable expectancy of life of such infants. Hence as to them it is irrelevant. Rea v. Simowitz, 225 N. C. 575, 35 S. E. (2d) 871, 162 A. L. R. 999.

Before a jury may consider the mortuary table there must be precedent proof of age, bringing the deceased clearly within the class of selected lives tabulated in the table, and in the absence of such proof it is error to direct the jury to consider it. Id.

However, a jury may consider evidence as to the constitution, health, vigor, habits and the like of an infant as a basis for determining his probable expectancy of life and other available mortality tables which list ages below ten years may be used in evidence upon proper identification and authentication. Id.

§ 8-47. Present worth of annuities.

Interest Rate.—Annuities, under this section, must be computed at four and one-half per cent and not at six per cent. Smith v. Smith, 223 N. C. 433, 27 S. E. (2d) 137.

Art. 7. Competency of Witnesses.

§ 8-49. Witness not excluded by interest or crime.

Editor's Note.—The trend of the development of the rules of evidence has been to remove personal disqualification to testify. State v. Davis, 229 N. C. 386, 50 S. E. (2d) 37.

§ 8-50.1. Competency of evidence of blood tests.

—In the trial of any criminal action or proceedings in any court in which the question of paternity arises, 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 the blood grouping test to pay the cost thereof. The results of such blood grouping tests shall be admitted in evidence when offered by a duly licensed practicing physician or other qualified person.

In the trial of any civil action, the court before whom the matter may be brought, upon motion of either party, shall direct and order that the defendant, the plaintiff, the mother and the child shall submit to a blood grouping test; provided, that the court, in its discretion, may require the person requesting the blood grouping test to pay the cost thereof. The results of such blood grouping tests shall be admitted in evidence when offered by a duly licensed practicing physician or other duly qualified person. (1949, c. 51.)

Editor's Note.—For a brief discussion of this section, see 27 N. C. Law Rev. 456.

§ 8-51. A party to a transaction excluded, when the other party is dead.

I. GENERAL CONSIDERATION.

The door is opened, under this section, by the representative of deceased taking the stand, only in respect to the transaction or set of facts about which such representative testifies. If one party opens the door as to one transaction, the other party cannot swing it wide in order to admit another independent transaction. Batten v. Aycock, 224 N. C. 225, 29 S. E. (2d) 739.

Personal letters written by decedent to his granddaughter, one of the propounders of his will, were held admissible over the objection that they constituted personal transactions with the deceased which are prohibited by the "dead man's statute." In re Will of McDowell, 230 N. C. 259, 52 S. E. (2d) 807.

Stated in State v. Davis, 229 N. C. 386, 50 S. E. (2d) 37.

Cited in Hinson v. Morgan, 225 N. C. 740, 36 S. E. (2d) 266; Bell v. Chadwick, 226 N. C. 598, 39 S. E. (2d) 743.

II. THE SECTION DISQUALIFIES WHOM.

A. Parties to the Action.

Testimony of Representative of Deceased.—When defendant, representative of deceased, is examined in behalf of himself and his co-representative concerning a personal transaction between plaintiff and deceased, under this section, he thus opens the door and makes competent the testimony of his adversary concerning the same transaction. Batten v. Aycock, 224 N. C. 225, 29 S. E. (2d) 739.

Testimony as to Handwriting of Deceased.—The plaintiff on his examination-in-chief, in an action against an executor or administrator, is competent to testify to the handwriting of deceased from his general knowledge, but not to testify that he saw deceased actually sign the particular instrument. Batten v. Aycock, 224 N. C. 225, 29 S. E. (2d) 739.

B. Persons Interested in the Event of the Action.

2. Applications.

A. Partner.—

Where one partner is (a) a party to the action, (b) is interested in the event of the action, and (c) the other partner is dead, because his lips are sealed in death the living partner is incompetent to testify in his own behalf to any transaction or communication between himself and the intestate concerning his relationship to the co-partnership and to relate certain conversations he had with deceased about the assets of the partnership. Wingler v. Miller, 223 N. C. 15, 20, 25 S. E. (2d) 160.

In a suit by distributees to recover from administrators and surviving partner money found on the person of decedent and claimed by his partner, testimony of the partner, concerning his relations to the partnership and the relation of certain conversations he had with deceased about the assets of the partnership, is clearly inadmissible under this section. Wingler v. Miller, 223 N. C. 15, 25 S. E. (2d) 160.

III. WHEN THE DISQUALIFICATION EXISTS.

Receipt of Money from Person Now Deceased.—Where, in an action to establish a claim against an estate, plaintiff introduces evidence that prior to his death decedent had received the funds in dispute, testimony by her that she had never received any part of the funds is tantamount to testifying that decedent had not paid her any part thereof, and is incompetent under this section. Wilson v. Ervin, 227 N. C. 396, 397, 42 S. E. (2d) 468.

Testimony by the maker of notes as to transactions with deceased payee tending to establish non-liability was properly excluded as coming within prohibition of this section. Perry v. First Citizens Nat. Bank, etc., Co., 226 N. C. 667, 40 S. E. (2d) 116.

IV. SUBJECT MATTER OF THE TRANSACTION.

This section applies to caveat proceedings notwithstanding that they are in rem, with the exception that beneficiaries under the will are competent to testify as to transactions with deceased testator solely upon the issue of testamentary capacity. In re Lomax's Will, 226 N. C. 498, 39 S. E. (2d) 388.

Illustrative Case.—In a civil action by plaintiffs against defendant for rents allegedly received by defendant's intestate from plaintiffs' property, evidence of plaintiffs, that deceased went into possession of the premises, shortly after default in payments to a mortgagee, for the purpose of collecting the rents and applying same to plaintiffs' mortgage indebtedness, that afterwards defendant's intestate purchased the property and plaintiffs executed notes to defendant's intestate and saw a deed for the premises in the possession of deceased, is excluded by this section as personal transactions and communications with defendant's intestate. McMichael v. Pegram, 225 N. C. 400, 35 S. E. (2d) 174.

V. EXCEPTIONS.

Illustrations.—
The prohibition against a beneficiary testifying as to transactions with deceased testator on the question of undue influence relates solely to transactions with the deceased, and a beneficiary is competent to testify as to circumstances tending to show undue influence on the part of the propounder unrelated to any transaction which the witness had with testator. In re Lomax's Will, 226 N. C. 498, 39 S. E. (2d) 388.

§ 8-53. Communications between physician and patient.

Relationship of Physician and Patient Must Exist.—
The relationship of patient and physician within the purview of this section, does not exist between a defendant and an alienist examining him in regard to his sanity. State v. Litteral, 227 N. C. 527, 528, 43 S. E. (2d) 84.

§ 8-54. Defendant in criminal action competent but not compellable to testify.

Editor's Note.—For note concerning confessions, see 23 N. C. Law Rev. 364.

As to compelling accused to speak so that witness may identify his voice, see note in 27 N. C. Law Rev. 262.

Treated as Other Witnesses.—
In accord with 1st paragraph in original. See State v. Auston, 223 N. C. 203, 25 S. E. (2d) 613.

Same—Where Introduced by Defendant.—
In accord with 2nd paragraph in original. See State v. McKinnon, 223 N. C. 160, 25 S. E. (2d) 606.

Admission before Magistrate.—
There is a distinction to be observed between the statement made by a prisoner on his preliminary examination before a magistrate under § 15-89, and his testimony given under this section as a witness on the trial of the cause. On the former, he is to be advised of his rights, and such examination is not to be on oath. On the latter, accused, at his own request, but not otherwise, is competent but not compellable to testify, and, of course, his testimony thus given is received under the sanction of an oath. State v. Farrell, 223 N. C. 804, 806, 28 S. E. (2d) 560.

Where the examining magistrate takes the preliminary statement of a prisoner under the compulsion of an oath, contrary to the provisions of § 15-89, and without the advice of counsel, such statement may not be used against him on the trial, because, being thus induced, it is deemed to be involuntary. But this has no application to the testimony of a defendant given voluntarily as a witness in his own behalf under this section. State v. Farrell, 223 N. C. 804, 807, 28 S. E. (2d) 560.

Erroneous Instructions. —
A charge to the jury to "very carefully and very cautiously scrutinize" defendant's testimony is not to be commended. State v. Auston, 223 N. C. 203, 25 S. E. (2d) 613.

Failure to Testify—How Far Subject to Comment.—The failure of defendant to testify in his own behalf should not be made the subject of comment by the court except to inform the jury that a defendant may or may not testify in his own behalf as he may see fit, and that his failure to testify does not create any presumption against him. State v. McNeill, 229 N. C. 377, 49 S. E. (2d) 733.

§ 8-55. Testimony enforced in certain criminal investigations; immunity.

Cited in State v. Foster, 228 N. C. 72, 44 S. E. (2d) 447.

§ 8-56. Husband and wife as witnesses in civil action.—In any trial or inquiry in any suit, action or proceeding in any court, or before any person having, by law or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action or proceeding is brought, prosecuted, opposed or defended, shall, except as herein stated, be competent and compellable to give evidence, as any other witness on behalf of any party to such suit, action or proceeding. Nothing herein shall render any husband or wife competent or compellable 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; or in any action or proceeding for or on account of criminal conversation, except that in actions of criminal conversation brought by the husband in which the character of the wife is assailed she shall be a competent witness to testify in refutation of such charges: Provided, however, that in all such actions and proceedings, the husband or wife shall be competent to prove, and may be required to prove, the fact of marriage. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage. (Rev., s. 1636; Code, s. 588; C. C. P., s. 341; 1866, c. 43, ss. 3, 4; 1919, c. 18; 1945, c. 635; C. S. 1801.)

Editor's Note.—
The 1945 amendment struck out the words "except to prove the fact of marriage" formerly appearing after the word "adultery" in line fifteen, and added the proviso at the end of the second sentence.

As to competency of husband and wife to testify in action for criminal conversation, see 26 N. C. Law Rev. 206.

Same—Protected.—
In the wife's action for criminal conversation with her husband and the alienation of his affections, testimony by the wife relative to statements made to her by her husband tending to show his illicit relationship with defendant are incompetent. Knighten v. McClain, 227 N. C. 682, 683, 44 S. E. (2d) 79.

§ 8-57. Husband and wife as witnesses in criminal actions.

Testimony Is Limited to Proof of Marriage.—Conceding that in a prosecution for bigamous cohabitation, as in a prosecution for bigamy, the wife is competent to testify against the husband to prove the fact of marriage, her testimony is limited to proof of the fact of marriage and any testimony by her as to other incriminating facts, such as testimony tending to show that they had not been divorced, is incompetent. State v. Setzer, 226 N. C. 216, 37 S. E. (2d) 513.

Art. 9. Attendance of Witnesses from without State.

§ 8-65. Definitions.

Cited in Hare v. Hare, 228 N. C. 740, 46 S. E. (2d) 840; White v. Ordille, 229 N. C. 490, 50 S. E. (2d) 499.

§ 8-68. Exemption from arrest and service of process.

A nonresident defendant while in the state in compliance

with conditions of a bail bond is not exempt from the service of process. Hare v. Hare, 228 N. C. 740, 46 S. E. (2d) 840.

Art. 10. Depositions.

§ 8-71. Manner of taking depositions in civil actions.—Any party in a civil action or special proceeding, upon giving notice to the adverse party or his attorney as provided by law, may take the depositions of persons whose evidence he may desire to use, without any special order therefor, unless the witness shall be beyond the limits of the United States.

Depositions shall be taken on commission, issuing from the court and under the seal thereof, by one or more commissioners, who shall be of kin to neither party, and shall be appointed by the clerk; or depositions may be taken by a notary public of this state or of any other state or foreign country, or any commissioner of oaths or commissioner of deeds of any foreign country, or by any officer of the army of the United States or marine corps having the rank of captain or higher, by any officer of the United States navy or United States coast guard having the rank of lieutenant, senior grade, or higher, or by any officer of the United States merchant marine having the rank of lieutenant, senior grade, or higher, without a commission issuing from the court. No official seal shall be required of said military or naval officials, but they shall sign their name, designate rank, name of ship or military division, and date, without a commission issuing from the court.

Depositions shall be subscribed and sealed up by the commissioners or notary public, and returned to the court, the clerk whereof or the judge holding the court, if the clerk is a party to the action, shall open and pass upon the same, after having first given the parties or their attorneys not less than one day's notice; and all such depositions, when passed upon and allowed by the clerk, without appeal, or by the judge upon appeal from the clerk's order, or by the judge holding the court, when the clerk is a party to the action, shall be deemed legal evidence, if the witness be competent, subject, however, to such objections as subsequently might be made according to law.

Any party in a civil action or special proceeding pending in the courts of this state, may take the depositions of any person in the armed forces of the United States or any person in the service of the United States government in a civilian capacity while serving outside of continental United States, by filing in the office of the clerk of the court where such action or proceeding is pending, a statement showing the name and post office or fleet post office address of such person, together with the written interrogatories which are desired to be propounded to such person, and serve a copy thereof on the adverse party or parties to such action, or their attorneys, whereupon, within ten days after the service of said copy, said adverse party or parties may file in said clerk's office such written cross-interrogatories as said adverse party or parties may desire to propound to such person, and after the expiration of said ten days, and as promptly as may be, the clerk of said court shall issue a commission to any commissioned officer of any of the armed forces of the United States, without otherwise naming him, with which the person to be so examined is connected, and mail the same, together with said interrogatories and cross-interrogatories, if any, to the person so to be examined, at the address stated, authorizing any such officer upon presentation of such papers to him to propound the interrogatories and cross-interrogatories to said person, under oath, and record his answers thereto, and the deposition so taken shall be signed by such person and sworn to before, and subscribed by, his said officer, and returned to the said clerk in a sealed envelope.

Any deposition taken in the manner herein provided and transmitted to the clerk of the court where such action or special proceeding is pending, shall be deemed legal evidence, if the witness be competent, subject to opening such deposition and passing upon the same as provided by this section. (Rev., s. 1652; Code, s. 1357; 1911, c. 158; R. C., c. 31, s. 63; 1881, c. 279; 1893, c. 360; 1943, c. 160, s. 1; 1945, c. 22; 1947, c. 781; 1949, c. 864; C. S. 1809.)

Editor's Note.—

The 1945 amendment added the last two paragraphs and the 1947 amendment added the reference to objections at the end of the third paragraph.

The 1949 amendment inserted, beginning in line four of the fourth paragraph the words "or any person in the service of the United States government in a civilian capacity while serving outside of continental United States."

For comment on the 1943 amendment, see 21 N. C. Law Rev. 346.

For comment on the 1945 amendment, see 23 N. C. Law Rev. 339.

The competency, in proper cases, of written depositions for the production of proof in civil actions is unquestioned. In such cases, it sufficiently complies with the constitutional mandate if the testimony was taken under oath in the manner prescribed by law, with opportunity to cross-examine. Chesson v. Kieckhefer Container Co., 223 N. C. 378, 380, 26 S. E. (2d) 904.

Attorney Mailing Deposition to Clerk.—Where the notary public taking a deposition in another state seals the same in an envelope addressed to the clerk of the superior court, the fact that the attorney of the party offering the deposition in evidence brings the sealed envelope back with him to this state and drops it in the mail, as requested by the notary, does not render the deposition incompetent. Randle v. Grady, 228 N. C. 159, 45 S. E. (2d) 35.

§ 8-75. Depositions in justices' courts.—Any party in civil action before a justice of the peace may take the depositions of all persons whose evidence he may desire to use in the action, and in order to do so may apply to the clerk of the superior court for a commission to take the same; or such deposition may be taken by a notary public of this or any other state, or of a foreign country, without a commission issuing from the court.

The proceedings in depositions in a civil action before a justice of the peace shall be in all respects as if such action were in the superior court.

When any such depositions are returned to the clerk, they shall be opened and passed upon by the clerk, and delivered to the justice of the peace before whom the trial is to be had; and the reading and using of said depositions shall conform to the rules of the superior court. (Rev., s. 1646; Code, s. 1359; 1872-3, c. 33; 1947, c. 781; C. S. 1813.)

Editor's Note.—The 1947 amendment rewrote the former first sentence of this section to appear as the first two paragraphs above.

§ 8-76. Depositions before municipal authorities.

Editor's Note.—
In the 15th line of this section in the original the word "county" should be "country."

Art. 12. Inspection and Production of Writings.

§ 8-89. Inspection of writings.

Acquiring Information Necessary to Filing of Complaint.—In an action against a clinic and doctors for alleged tortious defamation and disclosures of confidential information acquired professionally, plaintiff was held entitled to an order requiring defendants to produce specified papers and documents to afford information necessary to the filing of the complaint. Nance v. Gilmore Clinic, 230 N. C. 534, 53 S. E. (2d) 531, distinguishing Flanner v. Saint Joseph Home, 227 N. C. 342, 42 S. E. (2d) 225, in that the matter sought to be discovered in that case was not necessary as a basis for filing the complaint but related to a matter which it would have been improper to allege or which was not necessary to the statement of the cause of action. The case distinguished does not hold that the statute is not available in seeking information to enable plaintiff to draft his complaint. Only in respect to the discovery of evidence does the opinion hold that pleadings must first be filed and an issue raised to which the evidence sought must be pertinent.

Where Information to Be Used in Action against Third Party.—Though the point was not in issue, the court in Flanner v. Saint Joseph Home, 227 N. C. 342, 345, 42 S. E. (2d) 225, stated that plaintiff may not proceed under this section to examine the defendant's records and documents for the purpose of obtaining information to form the basis of an action against a third party.

The Affidavit Supporting an Order for Inspection, etc.—In accord with 1st paragraph in original. See Flanner v. Saint Joseph Home, 227 N. C. 342, 42 S. E. (2d) 225.

Cited in Shepard v. Leonard, 223 N. C. 110, 25 S. E. (2d) 445.

Chapter 9. Jurors.

Art. 2. Petit Jurors; Attendance, Regulation and Privileges.

Art. 1. Jury List and Drawing of Original Panel.

§ 9-1. Jury list from taxpayers of good character.—The board of county commissioners for the several counties, at their regular meetings on the first Monday in June in the year 1947, or the jury commissions or such other legally constituted body as may in the respective counties be charged by law with the duty of drawing names of persons for jury service, at the times of their regular meetings, and every two years thereafter, shall cause their clerks to lay before them the tax returns for the preceding year for their county, and a list of names of persons who do not appear upon the tax lists, who are residents of the county and over twenty-one years of age, from which lists the board of county commissioners or such jury commissions shall select the names of such persons who reside in the county who are of good moral character and have sufficient intelligence to serve as members of grand and petit juries. A list of the names thus selected by the board of county commissioners or such jury commissions shall be made out by the clerk of the board of county commissioners or such jury commissions and shall constitute the jury list of the county and shall be preserved as such.

The clerk of the board of county commissioners or such jury commissions, in making out the list of names to be laid before the board of county commissioners or such jury commissions, may secure said lists from such sources of information as deemed reliable which will provide the names of persons of the county above twenty-one years of age residing within the county qualified for jury duty. There shall be excluded from said lists all those persons who have been convicted of any crime involving moral turpitude or who have been adjudged to be non compos mentis. (Rev., s. 1957; Code, ss. 1722, 1723; 1806, c. 694; 1889, c. 559; 1899, c. 729; 1897, cc. 117, 539; 1899, c. 729; 1937, cc. 19, 200; 1941, c. 92; 1947, c. 1007, s. 1; C. S. 2312.)

Editor's Note.—
The 1947 amendment added the second paragraph and made other changes. For discussion of amendment, see 25 N. C. Law Rev. 334, 445.

Session Laws 1947, c. 217, provides that this chapter as amended shall govern the making up of the jury lists and the drawing of jurors in Columbus county.

As to discrimination against negroes in selection of jury, see 26 N. C. Law Rev. 185.

Rejection of prospective jurors for want of good moral character and sufficient intelligence is available to the county commissioners as a general objection only when the jury list is being prepared, and not after the names are in the box. State v. Speller, 229 N. C. 67, 47 S. E. (2d) 537.

As to right of women to serve on juries, see note in 25 N. C. Law Rev. 152, discussing case of State v. Emery, 224 N. C. 581, 31 S. E. (2d) 858, denying such right.

§ 9-2. Names on list put in box.

Cross Reference.—See note to § 9-1.

§ 9-3. Manner of drawing panel for term from box.

Local Modification.—Guilford: 1949, c. 568.
Cross Reference.—See note to § 9-1.

§ 9-4. Local modifications as to drawing panel.

Local Modification.—Rowan: 1945, c. 907.
Editor's Note.—
Session Laws 1947, c. 272 repealed the sixth paragraph of this section which read as follows: "In Hertford county fifteen extra jurors shall be drawn and summoned for the second week."

§ 9-5. Fees of jurors.—All jurors in the superior court shall receive such amount per day as the board of commissioners of their respective counties shall fix, not less than ($3.00) three dollars per day and not more than ($6.00) six dollars per day; provided, that the said commissioners of the respective counties may establish different rates of compensation for different classes of said superior court jurors within the limitations set out above.

In addition to the compensation above provided for, all jurors shall receive a travel allowance of five (5) cents per mile while coming to the countyseat and returning home, the distance to be computed by the usual route of public travel; provided, that this allowance shall be paid on the basis of one round trip per calendar week for each calendar week in which attendance is required. (Rev., s. 2798; 1919, c. 85, ss. 1, 2; Ex. Sess. 1920, c. 61, ss. 1, 3; 1921, c. 62, s. 1; 1947, c. 1015; 1949, c. 915; C. S. 3892.)

Local Modification.—Anson: 1947, c. 750; Bertie: 1949,

c. 802; c. 914, s. 2; Chatham: 1947, c. 47; Columbus: 1947, c. 124; Cumberland: 1945, c. 316; Currituck: 1945, c. 269; 1947, c. 228; Davidson: 1949, c. 521; Duplin: 1949, c. 680; Gaston: 1947, c. 206; Hertford: 1947, c. 59; Johnston: 1945, c. 993; Jones: 1949, c. 1002; New Hanover: 1947, c. 619; Onslow: 1947, c. 205; Randolph: 1949, c. 854; Richmond: 1947, c. 235, s. 1; Rowan: 1945, c. 233; Swain: 1949, c. 234; Washington: 1945, c. 103.

Editor's Note.—The 1947 amendment rewrote this section, and the 1949 amendment rewrote the first paragraph.

Session Laws 1945, c. 228, regulating the fees of jurors in Granville county was repealed by Session Laws 1949, c. 662, which provided that such fees shall be as provided in this section.

§ 9-7. Disqualified persons drawn.

Cited in State v. Speller, 229 N. C. 67, 47 S. E. (2d) 537.

Art. 2. Petit Jurors; Attendance, Regulation and Privileges.

§ 9-11. Summons to talesmen; their disqualifications.

Local Modification.—Halifax: 1949, c. 635.

"Freeholders."—

An order for a special venire properly specifies that the veniremen are to be freeholders. State v. Anderson, 228 N. C. 720, 47 S. E. (2d) 1.

§ 9-14. Jury sworn; judge decides competency.

Review.—The rulings of the judge on questions as to the competency of jurors are not subject to review on appeal unless accompanied by some imputed error of law. State v. DeGraffenreid, 224 N. C. 517, 31 S. E. (2d) 523; State v. Davenport, 227 N. C. 475, 492, 42 S. E. (2d) 686; State v. Suddreth, 230 N. C. 239, 52 S. E. (2d) 924.

A juror during homicide trial had sister of deceased as one of his passengers in a four mile automobile trip. Defendant moved to set aside the verdict. The juror stated upon oath that he did not know his passenger was the sister of the deceased, and the court found upon investigation that the case was not discussed during the ride. It was held that exception to refusal of motion was not reviewable. State v. Suddreth, 230 N. C. 239, 52 S. E. (2d) 924.

The trial court's findings, upon supporting evidence, that persons of defendant's race were not excluded from the petit jury on account of race or color, are conclusive on appeal, and defendant's exception to the overruling of his challenge to the array on that ground presents no reviewable question of law. State v. Reid, 230 N. C. 561, 53 S. E. (2d) 849.

§ 9-16. Causes of challenge to juror drawn from box.

Cited in State v. Lord, 225 N. C. 354, 34 S. E. (2d) 205; State v. Anderson, 228 N. C. 720, 47 S. E. (2d) 1.

§ 9-17. Jurors impaneled to try case furnished with accommodations; separation of jurors.—When a jury, impaneled to try any cause, is put in charge of an officer of the court, the said officer shall furnish said jury with such accommodation as the court may order, and the same shall be paid for by the party cast or by the county, under the order and in the discretion of the judge of the court.

It shall be within the discretion of the presiding judge of the superior court, in the trial of any capital felony or other criminal case, to permit the jurors to be separated while the jury has under consideration such case. In the event the jury is composed of men and women, the court may, in its discretion, appoint more than one officer to have charge of the jury and one of such officers may be a man and the other officer a woman; and the court may, in its discretion, permit the members of the jury of opposite sexes to be provided separate rooming accommodations when not actually engaged in deliberations as jurors and pending the bringing in of a verdict in such cases. (Rev., s. 1978; Code, s. 1736; 1876-7, c. 173; 1889, c. 44; 1947, c. 1007, s. 2; C. S. 2327.)

Editor's Note.—The 1947 amendment added the second paragraph. For discussion of amendment, see 25 N. C. Law Rev. 334, 445.

§ 9-19. Exemptions from jury duty.—All practicing physicians, licensed druggists, telegraph operators who are in the regular employ of any telegraph company or railroad company, train dispatchers who have the actual handling of either freight or passenger trains, regularly licensed pilots, regular ministers of the gospel, officers or employees of a state hospital for the insane, active members of a fire company, funeral directors and embalmers, printers and linotype operators, all millers of grist mills, all United States railway postal clerks and rural free delivery mail carriers, locomotive engineers, brakemen and railroad conductors in active service, radio broadcast technicians, announcers, and optometrists, registered or practical nurses in active practice and practicing attorneys at law, and all members of the national guard, North Carolina state guard and members of the civil air patrol, naval militia, officers reserve corps, enlisted reserve corps, and the naval reserves, who comply with and perform all duties required of them as members of the national guard, naval militia, officers reserve corps, enlisted reserve corps, and the naval reserves, shall be exempt from service as jurors. On the first day of January and July of each year, the commanding officer of each company, troop, battery, detachment, or division of the national guard, naval militia, officers reserve corps, enlisted reserve corps, and the naval reserves, of North Carolina, shall file with the clerk of the superior court of the county in which such company, troop, battery, detachment, or division is located a statement giving the name and rank of each member of his organization who has performed all military duties during the preceding six months; and any member of such military organization whose name does not appear upon such statement shall not receive the benefit of the exemption provided for herein during the six months immediately following the filing of the statement.

The board of county commissioners of any county in North Carolina may, in their discretion, exempt any ex-confederate soldier in their county from jury duty who shall apply to them for exemption.

The clerk of the superior court of each county is hereby empowered to excuse from jury duty any person or persons exempt under the first sentence of this section prior to the convening of the term of court for which such person or persons are required to serve as jurors.

When any woman is summoned to serve on any regular or tales jury, she or her husband may appear before the clerk of the superior court and certify that she desires to be excused from jury service for one of the following causes: (1) that she is ill and unable to serve; (2) that she is required to care for her children who may be under twelve years of age; (3) that some member of her family is ill which requires her presence and attention; whereupon the clerk in his discretion may excuse her from jury service and so notify the judge of the superior court upon con-

vening the court. (Rev., s. 1980; Code, ss. 1723, 2269; 1885, c. 289; 1889, c. 255; 1897, c. 32; 1901, c. 118; 1909, cc. 333, 868; 1913, c. 38, s. 1; 1913, c. 103; 1915, cc. 217, 228, 260; 1917, c. 200, s. 89; 1931, c. 410; 1937, c. 151; 1937, c. 224, s. 2; 1943, c. 343; 1945, c. 290, s. 2; 1947, c. 1007, s. 3; C. S. 2329, 6870.)

Local Modification.—Onslow: 1949, c. 696.

Editor's Note.—

The 1945 amendment inserted in the first paragraph the words "North Carolina state guard and members of the civil air patrol."

The 1947 amendment added the fourth paragraph and inserted in the first paragraph the words "registered or practical nurses in active practice and practicing attorneys at law." For discussion of amendment, see 25 N. C. Law Rev. 334, 445.

§ 9-21. Extra or alternate juror; challenges; compensation and duties.

Applied in State v. Stanley, 227 N. C. 650, 44 S. E. (2d) 196.

Art. 4. Grand Jurors.

§ 9-25. Grand juries in certain counties.—At the first fall and spring terms of the criminal courts held for the counties of Craven, Gaston, Guilford, Mecklenburg, Moore, Pitt, Richmond, New Hanover, McDowell, Durham, Cumberland, Lenoir, Columbus, Nash, Johnston, Vance, Wayne, Iredell, and Wake, grand juries shall be drawn, the presiding judge shall charge them as provided by law, and they shall serve during the remaining fall and spring terms, respectively. In the event of vacancies occurring in the grand jury of Pitt or McDowell county, the judge holding the court of said county may, in his discretion, order a new juror drawn to take the oaths prescribed and to fill any vacancy occurring thereon.

A grand jury for Montgomery county shall be selected at each July term of the superior court in the usual manner, which said grand jury shall serve for a period of one year from the time of their selection. In the event a vacancy or vacancies shall occur in the grand jury of Montgomery county, the resident judge of the fifteenth judicial district or the judge holding the court of said county may, in his discretion, order a new juror or jurors drawn to take the oaths prescribed and to fill any vacancy or vacancies occurring thereon. The resident judge of the fifteenth judicial district or the presiding judge shall have the power, in his discretion, to appoint an assistant foreman of the grand jury in Montgomery county and said assistant foreman so appointed shall, in the case of death, absence, or disqualification for any reason of the foreman, discharge the duties of the foreman of said grand jury.

(1945, c. 535; 1947, c. 119.)

Local Modification.—Scotland: 1947, c. 641; Washington: 1947, c. 373.

Editor's Note.—The 1945 amendment inserted the words "or McDowell" in the second sentence of the first paragraph. The 1947 amendment added the second and third sentences of the eighteenth paragraph. As the other paragraphs were not affected by the amendments they are not set out.

§ 9-26. Exceptions for disqualifications.

As to arbitrary exclusion of Negroes from grand jury, see State v. Speller, 229 N. C. 67, 47 S. E. (2d) 537.

§ 9-28. Grand jury to visit jail and county home.—Every grand jury, while the court is in session, shall visit the county home for the aged and infirm, the workhouse, if there is one, and the jail, examine the same, and especially the apartments in which inmates and prisoners shall be confined; and they shall report to the court the condition thereof and of the inmates and prisoners confined therein, and also the manner in which the jailer or superintendent has discharged his duties.

It shall not be necessary for any grand jury in any county to make any inspections or submit any reports with respect to any county offices or agencies other than those required by the first paragraph of this section, nor for any judge of the superior court to charge the grand jury with respect thereto. (Rev., s. 1972; Code, s. 785; R. C., c. 30, s. 3; 1816, c. 911, s. 3; 1949, c. 208; C. S. 2337.)

Editor's Note.—The 1949 amendment added the second paragraph.

Art. 5. Special Venire.

§ 9-29. Special venire to sheriff in capital cases.

Discretion of Court.—A motion for a special venire, both as a matter of practice and under this section and § 9-30, is addressed to the sound discretion of the trial court, and denial of the motion is not reviewable except upon abuse of discretion. State v. Strickland, 229 N. C. 201, 49 S. E. (2d) 469.

Freeholders.—An order for a special venire properly specifies that the veniremen are to be freeholders. State v. Anderson, 228 N. C. 720, 47 S. E. (2d) 1.

The failure of the trial judge to sign the order for a special venire does not alone invalidate the special venire, it having been ordered and summoned in all other respects in conformity with statute. State v. Anderson, 228 N. C. 720, 47 S. E. (2d) 1.

Order Substantially a Special Writ of Venire Facias.—A written order entitled as of the action, commanding the sheriff to summon a special venire of twenty-five freeholders from the body of the county to appear on a specified date to act as jurors in the case, is in substance a special writ of venire facias. State v. Anderson, 228 N. C. 720, 47 S. E. (2d) 1.

Cited in State v. Lord, 225 N. C. 354, 34 S. E. (2d) 205.

§ 9-30. Drawn from jury box in court by judge's order.

Applied in State v. Strickland, 229 N. C. 201, 49 S. E. (2d) 469, treated under § 9-29.

Cited in State v. Lord, 225 N. C. 354, 34 S. E. (2d) 205.

Chapter 10. Notaries.

§ 10-4. Powers of notaries.

Certificate Prima Facie Evidence.—The certificate of the notary establishes prima facie that electors were sworn as required by statute when they signed the affidavits accompanying their absentee ballots. State v. Chaplin, 229 N. C. 797, 48 S. E. (2d) 37.

§ 10-7. Expiration of commission to be stated after signature.

Cited in Crissman v. Palmer, 225 N. C. 472, 35 S. E. (2d) 422.

§ 10-11. Acts of certain notaries prior to qualification validated.

—All acknowledgments taken and other official acts done by any person who has heretofore been appointed as a notary public, but who at the time of acting had failed to qualify as provided by law, shall, notwithstanding, be in all respects valid and sufficient; and property conveyed by instruments in which the acknowledgments were taken by such notary public are hereby validated and shall convey the properties therein purported to be conveyed as intended thereby. (1945, c. 665.)

§ 10-12. Acts of notaries public in certain instances validated.

—(a) The acts of any person heretofore performed after appointment as a notary public and prior to qualification as a notary public

(1) In taking any acknowledgment, or
(2) In notarizing any instrument, or
(3) In performing any act purportedly in the capacity of a notary public

are hereby declared to be valid and of the same legal effect as if such person had qualified as a notary public prior to performing any such acts.

(b) All instruments with respect to which any such person as is described in subsection (a) of this section has purported to act in the capacity of a notary public shall have the same legal effect as if such person acting as a notary public had in fact qualified as a notary public prior to performing any acts with respect to such instruments. (1947, c. 313; 1949, c. 1.)

Editor's Note.—The 1949 amendment re-enacted this section without change.

Chapter 11. Oaths.

Art. 2. Forms of Official and Other Oaths.

§ 11-11. Oaths of sundry persons; forms.

Jury—Officer of

You swear (or affirm) that you will keep every person sworn on this jury in some private and convenient place when in your charge. You shall not suffer any person to speak to them, neither shall you speak to them yourself, unless it be to ask them whether they are agreed in their verdict, but with leave of the court; so help you, God.

(1947, c. 71.)

Editor's Note.—The 1947 amendment changed the form of oath provided for a jury officer. As the rest of the section was not affected by the amendment it is not set out.

Chapter 12. Statutory Construction.

§ 12-1. No public-local or private act may amend or repeal public law unless latter is referred to in caption.

Cited in Carroll v. North Carolina State Firemen's Ass'n, 230 N. C. 436, 53 S. E. (2d) 524.

§ 12-3. Rules for construction of statutes.

VI. DEFINITIONS.

Juror.—A woman is incompetent to serve as a juror. State v. Emery, 224 N. C. 581, 31 S. E. (2d) 858, discussed in note in 23 N. C. Law Rev. 152.

Chapter 14. Criminal Law.

Art. 1. Felonies and Misdemeanors.

§ 14-1. Felonies and misdemeanors defined.

An assault with intent to commit rape is a felony. State v. Gay, 224 N. C. 141, 143, 29 S. E. (2d) 458.

Applied in State v. Johnson, 227 N. C. 587, 42 S. E. (2d) 685.

Cited in State v. Gregory, 223 N. C. 415, 27 S. E. (2d) 140; State v. Bentley, 223 N. C. 563, 27 S. E. (2d) 738 (con. op.); State v. Mounce, 226 N. C. 159, 36 S. E. (2d) 918.

§ 14-2. Punishment of felonies.

Cited in State v. Mounce, 226 N. C. 159, 36 S. E. (2d) 918.

§ 14-3. Punishment of misdemeanors, infamous offenses, offenses committed in secrecy and malice, etc.

Infamous Offense.—A statute, which names the punishment for all misdemeanors, where no specific punishment is prescribed, and provides that if the offense be "infamous," it shall be punished as a felony, necessarily refers to the degrading nature of the offense, and not to the measure of punishment. State v. Surles, 230 N. C. 272, 52 S. E. (2d) 880.

An attempt to commit burglary constitutes a felony and is punishable by imprisonment in the state prison for a term not in excess of ten years, since it is an infamous offense or done in secrecy and malice, or both, within the purview of the statute. State v. Surles, 230 N. C. 272, 52 S. E. (2d) 880.

Excessive Punishment.—

In a prosecution charging assault with intent to commit rape, where at the conclusion of the State's evidence defendant tendered a plea of guilty of an assault upon a female, and the court accepted defendant's plea and found as a fact that the female referred to was a child nine years of age and defendant was thirty-four years of age, and also that the assault was aggravated, shocking and outrageous, the accepted plea is for a misdemeanor under § 14-33, and judgment that defendant be confined to the State's Prison for not less than eight nor more than ten years, is a violation of N. C. Const., Art. I, sec. 14, and this section. State v. Tyson, 223 N. C. 492, 27 S. E. (2d) 113.

Applied in State v. Mounce, 226 N. C. 159, 36 S. E. (2d) 918.

Cited in State v. Perry, 225 N. C. 174, 33 S. E. (2d) 869.

Art. 2. Principals and Accessories.

§ 14-7. Accessories after the fact; trial and punishment.

One cannot become an accessory after the fact until the offense has become an accomplished fact. Thus, a person cannot be convicted as an accessory after the fact to a murder because he aided the murderer to escape, when the aid was rendered after the mortal wound was given but before death ensued, as a murder is not complete until the death results. State v. Williams, 229 N. C. 348, 49 S. E. (2d) 617.

Art. 4. Subversive Activities.

§ 14-12.1. Certain subversive activities made unlawful.

—It shall be unlawful for any person to:

1. By word of mouth or writing advocate, advise or teach the duty, necessity or propriety of overthrowing or overturning the government of the United States or a political subdivision of the United States by force or violence; or,

2. Print, publish, edit, issue or knowingly circulate, sell, distribute or publicly display any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that the government of the United States or a political subdivision of the United States should be overthrown by force, violence or any unlawful means; or,

3. Organize or help to organize or become a member of or voluntarily assemble with any society, group or assembly of persons formed to teach or advocate the doctrine that the government of the United States or a political subdivi-

sion of the United States should be overthrown by force, violence or any unlawful means.

Any person violating the provisions of this section shall be guilty of a felony and upon conviction shall be fined or imprisoned, or both, in the discretion of the court.

Whenever two or more persons assemble for the purpose of advocating or teaching the doctrine that the government of the United States or a political subdivision of the United States should be overthrown by force, violence or any unlawful means, such an assembly is unlawful, and every person voluntarily participating therein by his presence, aid or investigation, shall be guilty of a felony and punishable by a fine or imprisonment, or both, in the discretion of the court.

Every editor or proprietor of a book, newspaper or serial and every manager of a partnership or incorporated association by which a book, newspaper or serial is issued, is chargeable with the publication of any matter contained in such book, newspaper or serial. But in every prosecution therefor, the defendant may show in his defense that the matter complained of was published without his knowledge or fault and against his wishes, by another who had no authority from him to make the publication and whose act was disavowed by him as soon as known.

No person shall be employed by any department, bureau, institution or agency of the state of North Carolina who has participated in any of the activities described in this section, and any person now employed by any department, bureau, institution or agency and who has been or is engaged in any of the activities described in this section shall be forthwith discharged. Evidence satisfactory to the head of such department, bureau, institution or agency of the state shall be sufficient for refusal to employ any person or cause for discharge of any employee for the reasons set forth in this paragraph. (1947, c. 1028.)

Art. 6. Homicide.

§ 14-17. Murder in the first and second degree defined; punishment.—A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the state's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the state's prison. (Rev., s. 3631; 1893, cc. 85, 281; 1949, c. 299, s. 1; C. S. 4200.)

I. EDITOR'S NOTE.

The 1949 amendment rewrote this section and inserted the proviso to the first sentence. Section 5 of the amendatory act provides that it shall be effective as of March 11, 1949, no excepting trials for offenses committed prior thereto. For brief comment on amendment, see 27 N. C. Law Rev. 449.

For a brief history of this section in connection with sufficiency of indictment for murder in the first degree, see State v. Kirksey, 227 N. C. 445, 42 S. E. (2d) 613.

II. MURDER IN GENERAL.

Applied in State v. Montgomery, 227 N. C. 100, 40 S. E. (2d) 614; State v. Lampkin, 227 N. C. 620, 44 S. E. (2d) 30; State v. Parrott, 228 N. C. 752, 46 S. E. (2d) 851.

Cited in State v. Gause, 227 N. C. 26, 40 S. E. (2d) 463; State v. Ewing, 227 N. C. 107, 40 S. E. (2d) 600.

III. MURDER IN THE FIRST DEGREE.

Death Sentence Is Mandatory.—Upon conviction of murder in the first degree the law commands the sentence of death. State v. Nash, 226 N. C. 608, 39 S. E. (2d) 596; State v. Anderson, 228 N. C. 720, 47 S. E. (2d) 1.

Unless Jury Recommends Life Imprisonment.—The 1949 amendment inserted the proviso relating to life imprisonment. See 27 N. C. Law Rev. 449.

Deliberation and Premeditation—Presumption.—When a homicide is perpetrated by means of poison, lying in wait, imprisonment, starving or torture, the means and method used involves planning and purpose. Hence, the law presumes premeditation and deliberation. The act speaks for itself. State v. Dunheen, 224 N. C. 738, 32 S. E. (2d) 322.

Malice "Aforethought."—In criminal prosecution charging murder, failure of the court to use adjective "aforethought" in defining murder in the first degree, was not error. "Malice aforethought" was a term used in defining murder prior to the time of the adoption of the statute dividing murder into degrees. As then used it did not mean an actual, express or preconceived disposition; but imported an intent, at the moment, to do without lawful authority, and without the pressure of necessity, that which the law forbade. As used in C. S., 4200, now this section, the term "premeditation and deliberation" is more comprehensive and embraces all that is meant by "aforethought," and more. Therefore, the use of "aforethought" is no longer required. State v. Hightower, 226 N. C. 62, 64, 36 S. E. (2d) 649.

Killing in Perpetration of Robbery.—When the evidence offered in a criminal prosecution tends to show a homicide committed in the perpetration or attempt to perpetrate a robbery, the offense is murder in the first degree within the specific language of this section. State v. Biggs, 224 N. C. 722, 32 S. E. (2d) 352.

Killing in Perpetration of Rape.—Proof that a homicide was committed in the perpetration or attempted perpetration of rape makes the crime murder in the first degree and dispenses with the necessity of proof of premeditation and deliberation. State v. Mays, 225 N. C. 486, 35 S. E. (2d) 494; State v. King, 226 N. C. 241, 37 S. E. (2d) 684.

All Conspirators Are Guilty, etc.—Where there is a conspiracy to rob and one of the conspirators kills in the attempt to perpetrate the robbery, each of the conspirators is guilty. State v. Bennett, 226 N. C. 82, 36 S. E. (2d) 708.

IV. MURDER IN THE SECOND DEGREE.

Same—Presumption.—Where evidence establishes killing with deadly weapon, the presumption of malice goes no further than murder in the second degree, and if state seeks conviction of murder in the first degree it has the burden of proving beyond a reasonable doubt that the homicide was committed with deliberation and premeditation. State v. Floyd, 226 N. C. 571, 39 S. E. (2d) 598, 599.

Instruction held reversible error. State v. Clark, 225 N. C. 52, 33 S. E. (2d) 245.

V. PLEADING AND PRACTICE.

Form of Indictment.—This section does not require an allegation or count to be contained in the bill of indictment as to the means used in committing the murder. The statute only classifies the crime as to degree and punishment in the manner therein set forth. State v. Smith, 223 N. C. 457, 27 S. E. (2d) 114.

Evidence of Killing in Perpetration of Rape.—In a prosecution for murder in the first degree, testimony that in his voluntary confession defendant stated he entered deceased's house to rape her was competent to show that killing was done in perpetration or attempt to perpetrate rape, which constitutes murder in first degree without proof of premeditation and deliberation. State v. King, 226 N. C. 241, 37 S. E. (2d) 684.

Sufficiency of Evidence for Submission to Jury.—Evidence tending to show that defendant perpetrated or attempted to perpetrate the crime of arson upon a dwelling house, and thereby proximately caused the deaths of the occupants, is sufficient to be submitted to the jury on the charge of murder in the first degree. State v. Anderson, 228 N. C. 720, 47 S. E. (2d) 1.

Where Jury May Be Instructed to Return First Degree Verdict, etc.—

Where there was abundant evidence tending to establish that homicide was committed in the perpetration of capital felony rape, and that defendant was the one who committed the offense, and no element of murder in the second degree or manslaughter was made to appear, court properly limited the possible verdicts to guilty of murder in first degree or not guilty. State v. Mays, 225 N. C. 486, 35 S. E. (2d) 494.

Where evidence tends to show murder committed in the perpetration of robbery pursuant to a conspiracy and that both defendants were present and participated in the crime, the court properly limited the jury to verdicts of guilty of murder in the first degree or not guilty. State v. Matthews, 226 N. C. 639, 39 S. E. (2d) 819.

Art. 7. Rape and Kindred Offenses.

§ 14-21. Punishment for rape.—Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the state's prison, and the court shall so instruct the jury. (Rev., s. 3637; Code, s. 1101; R. C., c. 34, s. 5; 18 Eliz., c. 7; 1868-9, c. 167, s. 2; 1917, c. 29; 1949, c. 299, s. 4; C. S. 4204.)

Cross References.—

The cross reference in the original to § 14-214 should be to § 15-169.

Editor's Note.—The 1949 amendment rewrote this section. Section 5 of the amendatory act provides that it shall be effective as of March 11, 1949, not excepting trials for offenses committed prior thereto. For brief comment on amendment, see 27 N. C. Law Rev. 449.

Age of Consent.—

Carnally knowing any female of the age of twelve years or more by force and against her will is rape; and carnally knowing and abusing any female child under the age of twelve years is also rape. State v. Johnson, 226 N. C. 671, 40 S. E. (2d) 113.

Under the second clause of this section relating to unlawfully and carnally knowing and abusing any female child under the age of twelve years, neither force nor lack of consent need be alleged or proven, and such child is by virtue of this section presumed incapable of consenting. State v. Johnson, 226 N. C. 266, 37 S. E. (2d) 678, 679.

Necessary Allegations—"By Force and against Her Will."—An indictment for rape must use the words "by force" or their equivalent in describing the manner in which the assault was accomplished. State v. Benton, 226 N. C. 745, 40 S. E. (2d) 617.

An indictment for rape of a female twelve years of age or more which charged that defendants did violently and feloniously ravish and carnally know but failed to charge that offense was committed forcibly and against her will is fatally defective, it being necessary in order to support the death penalty that both elements be alleged and proven. State v. Johnson, 226 N. C. 266, 37 S. E. (2d) 678.

When indictment charging rape is insufficient for failure to allege that offense was committed "forcibly" and "against her will," the allowance of motion in arrest of judgment does not preclude subsequent trial of defendants upon proper bills. Id.

"Forcibly" Can Be Supplied by Any Equivalent Word.—The absence of both "forcibly" and "against her will" in the indictment is fatal, but "forcibly" can be supplied by any equivalent word. It is not supplied by the use of the word "ravish," but is sufficiently charged by the words "feloniously and against her will." State v. Johnson, 226 N. C. 266, 37 S. E. (2d) 678, 679.

Instructions.—

An instruction which fails to charge that the carnal knowledge of the prosecutrix must have been accomplished by force and against her will to constitute the crime of rape must be held for reversible error. State v. Simmons, 228 N. C. 258, 45 S. E. (2d) 121.

In a prosecution against two defendants for rape of prosecutrix, at different times on the same night, where the State's evidence tended to show that the assaults were made separately, without evidence that either defendant aided and abetted the other, there was reversible error in a charge that, if the intent to ravish and carnally know prosecutrix existed in the mind of one of defendants, or both of them, at any time during the assault, they would be guilty of an assault with intent to commit rape. State v. Walsh, 224 N. C. 218, 29 S. E. (2d) 743.

Sufficiency of Evidence.—In State v. Farrell, 223 N. C. 804, 809, 28 S. E. (2d) 560, it was held that all the evidence showed carnal knowledge and abuse of a female child under the age of twelve years.

In State v. Brown, 227 N. C. 383, 42 S. E. (2d) 402, the court held that there was sufficient evidence to sustain the verdict of guilty of rape.

Applied in State v. Gibson, 229 N. C. 497, 50 S. E. (2d) 520.

Cited in State v. Swink, 229 N. C. 123, 47 S. E. (2d) 852.

§ 14-22. Punishment for assault with intent to commit rape.

In General.—

In accord with 3rd paragraph in original. See State v. Gay, 224 N. C. 141, 29 S. E. (2d) 458; State v. Moore, 227 N. C. 326, 42 S. E. (2d) 84; State v. Overcash, 226 N. C. 632, 39 S. E. (2d) 810.

A jury may not convict an accused of assault with intent to commit rape without evidence and findings, upon proper instructions, that defendant committed an assault upon the person of prosecutrix with intent at the time to ravish and carnally know her, by force and against her will, notwithstanding any resistance she might make. State v. Walsh, 224 N. C. 218, 29 S. E. (2d) 743.

Instruction that the mere touching of prosecutrix, without regard to her consent, would be an assault with intent to commit rape if the defendant at the time intended to ravish in the event it became necessary to do so to accomplish his purpose, was erroneous for disregarding the essential element of unlawfulness, rudeness or violence which makes the taking hold of a female an assault. State v. Overcash, 226 N. C. 632, 39 S. E. (2d) 810, 811.

Evidence Held Insufficient.—In State v. Moore, 227 N. C. 326, 42 S. E. (2d) 84, the court held that the evidence was insufficient to sustain a verdict of assault with intent to commit rape.

Applied in State v. Johnson, 227 N. C. 587, 42 S. E. (2d) 685.

§ 14-26. Obtaining carnal knowledge of virtuous girls between twelve and sixteen years old.

Editor's Note.—Session Laws 1947, c. 383, amending §§ 14-319, 51-2 and 51-3 provides that its provisions shall in no wise affect this section.

The state need not charge or prove that accused knew female child was under age of consent. One having carnal knowledge of such a child, does so at his peril, and his opinion as to her age, is immaterial. State v. Wade, 224 N. C. 760, 762, 32 S. E. (2d) 314.

Use of term "statutory rape" in the charge was not prejudicial error where charge contained correct definition, and properly placed burden of proof on the state, as to each essential element of the offense. State v. Bullins, 226 N. C. 142, 36 S. E. (2d) 915.

Failure to give a correct charge on the element of age is error in a prosecution under this section. State v. Sutton, 230 N. C. 244, 52 S. E. (2d) 921.

Or Chastity.—Where defendant, in a prosecution for carnal knowledge of a girl over twelve and under sixteen years of age, offers evidence of the immoral character of the prosecutrix and denies his identity as the perpetrator of the offense, an instruction which omits the age and chastity of prosecutrix as elements of the offense fails to meet the mandatory requirements of § 1-180, and an exception thereto will be sustained. State v. Sutton, 230 N. C. 244, 52 S. E. (2d) 921.

Instruction Held Prejudicial.—In a prosecution under this section, where defendant offered evidence of the immoral character of the prosecutrix and her sister and aunt, a charge that such testimony was not competent upon the question of guilt or innocence, but that it was material as bearing upon the likelihood of defendant indulging in such conduct, was prejudicial error. State v. Sutton, 230 N. C. 244, 52 S. E. (2d) 921.

Evidence of Improper Advances of Similar Nature.—In a prosecution under this section allegedly committed upon defendant's daughter, testimony of an older daughter, that within the past three years defendant several times had made to her improper advances of a similar nature, was competent solely for the purpose of showing intent or guilty knowledge. State v. Edwards, 224 N. C. 527, 31 S. E. (2d) 516.

Evidence held sufficient to support conviction in a prosecution under this section. State v. Bryant, 228 N. C. 641, 46 S. E. (2d) 847.

Variance as to Time.—

Time is not of the essence of the offense denounced by this section, and on trial of an indictment for carnal knowledge of a female under 16 years of age a variance between allegation and proof as to the date is not material, the statute of limitations not being involved. State v. Baxley, 223 N. C. 210, 25 S. E. (2d) 621.

§ 14-27. Jurisdiction of court; offenders classed as delinquents.

Editor's Note.—Session Laws 1947, c. 383, amending §§ 14-319, 51-2 and 51-3 provides that its provisions shall in no wise affect this section.

Art. 8. Assaults.

§ 14-29. Castration or other maiming without malice aforethought.

"To wound" is distinguished from "to maim" in that the latter implies a permanent injury to a member of the body or renders a person lame or defective in bodily vigor. State v. Malpass, 226 N. C. 403, 38 S. E. (2d) 156, 157.

Where there was no evidence of permanent injury to the privy parts of the prosecuting witness, it was error for the court to submit to jury the question of the guilt of defendant under this section. Id.

§ 14-31. Maliciously assaulting in a secret manner.

Cited in State v. Perry, 225 N. C. 174, 33 S. E. (2d) 869; State v. Williams, 229 N. C. 348, 49 S. E. (2d) 617.

§ 14-32. Assault with deadly weapon with intent to kill resulting in injury.

The law of self-defense in cases of homicide applies also in cases of assault with intent to kill, and an unsuccessful attempt to kill cannot be justified unless the homicide would have been excusable if death had ensued. It follows that where an accused has inflicted wounds upon another with intent to kill such other, he may be absolved from criminal liability for so doing upon the principle of self-defense only in case he was in actual or apparent danger of death or great bodily harm at the hands of such other. State v. Anderson, 230 N. C. 54, 51 S. E. (2d) 895.

An indictment which follows substantially the language of this section as to its essential elements meets the requirements of law. State v. Randolph, 228 N. C. 228, 45 S. E. (2d) 132.

In an indictment charging an assault with intent to kill "and murder" the words "and murder" are surplusage and place no additional burden on the state. State v. Plemmons, 230 N. C. 56, 52 S. E. (2d) 10.

"A certain knife" is a sufficient description of the weapon in an indictment for assault with a deadly weapon with intent to kill. State v. Randolph, 228 N. C. 228, 45 S. E. (2d) 132.

Injury Need Not Be Described in Indictment.—In an indictment, under this section, it is not necessary to describe the injury further than in the words of the statute. State v. Gregory, 223 N. C. 415, 27 S. E. (2d) 140.

Omission of "Assault with a Deadly Weapon" from Charge to Jury.—When accused is indicted, under this section, for an assault with intent to kill and with a deadly weapon, the omission, by the court in its charge, of "assault with a deadly weapon" from the catalogue of permissible verdicts, does not deprive the jury of the statutory authority to consider it. State v. Bentley, 223 N. C. 563, 27 S. E. (2d) 738.

The term "intent to kill" is self-explanatory and the trial court is not required to define the term in its charge. State v. Plemmons, 230 N. C. 56, 52 S. E. (2d) 10.

The deadly character of a weapon may be inferred by the jury from the manner of its use and the injury inflicted, and evidence of slashes with a knife across the upper arm and lower back along the belt line, producing cuts requiring 16 stitches to close, is sufficient for the jury to infer that the knife was a deadly weapon. State v. Randolph, 228 N. C. 228, 45 S. E. (2d) 132.

Admissibility of Evidence.—See State v. Oxendine, 224 N. C. 825, 32 S. E. (2d) 648.

The introduction in evidence of the weapon used is not requisite to the admission of testimony as to the manner of its use and the injuries inflicted in establishing the character of the weapon as deadly. State v. Randolph, 228 N. C. 228, 45 S. E. (2d) 132.

Sufficiency of Evidence.—

In a prosecution under this section it was held that the evidence was amply sufficient to sustain a verdict of "guilty of an assault with a deadly weapon." State v. Cody, 225 N. C. 38, 33 S. E. (2d) 71.

Applied in State v. Jones, 229 N. C. 276, 49 S. E. (2d) 463; State v. Muse, 229 N. C. 536, 50 S. E. (2d) 311.

Cited in State v. Perry, 225 N. C. 174, 33 S. E. (2d) 869; State v. Williams, 229 N. C. 348, 49 S E. (2d) 617.

§ 14-33. Punishment for assault.—(a) In all cases of an assault, with or without intent to kill or injure, the person convicted shall be punished by fine or imprisonment, or both, at the discretion of the court, subject to the provisions of subsection (b).

(b) Notwithstanding the provisions of subsection (a), the punishment in cases of assaults, assaults and batteries, and affrays shall not exceed a fine of fifty dollars ($50.00) or imprisonment for thirty days, when no deadly weapon has been used and no serious damage done except in cases of:

(1) Assault with intent to kill, or

(2) Assault with intent to commit rape, or

(3) Assault or assault and battery by any man or boy over eighteen years old on any female person, or

(4) The person committing the assault, (excluding and excepting parents, school teachers, guardians or persons in loco parentis), is eighteen years old or over, and the person on whom the assault is committed is under the age of twelve years.

(c) In all cases of assault, assault and battery, and affrays, wherein deadly weapons are used and serious injury is inflicted, and the plea of the defendant is self-defense, evidence of former threats against the defendant by the person alleged to have been assaulted by him, if such threats shall have been communicated to the defendant before the altercation, shall be competent as bearing upon the reasonableness of the claim of apprehension by the defendant of death or serious bodily harm, and also as bearing upon the amount of force which reasonably appeared necessary to the defendant, under the circumstances, to repel his assailant. (Rev., s. 3620; Code, s. 987; 1870-1, c. 43, s. 2; 1873-4, c. 176, s. 6; 1879, c. 92, ss. 2, 6; 1911, c. 193; 1933, c. 189; 1949, c. 298; C. S. 4215.)

Editor's Note.—The 1949 amendment rewrote this section. See 27 N. C. Law Rev. 450.

This section creates no new offense and relates only to punishment. Under its provisions all assaults and assaults and batteries not made felonious by other statutes are general misdemeanors punishable in the discretion of the court, except where no deadly weapon had been used and no serious damage done, the punishment may not exceed a fine of $50 or imprisonment for 30 days, unless the assault is committed upon a female by a man or boy over 18 years of age. Assaults and assaults and batteries upon a female by a man or boy over 18 years of age are expressly excluded from the proviso or exception and they remain general misdemeanors. State v. Jackson, 226 N. C. 66, 67, 36 S. E. (2d) 706.

Punishment—Extent.—

Where in a trial of an indictment, under the preceding section, defendant is convicted of an assault with intent to kill and judgment rendered that defendant serve not less than three nor more than four years in the State's prison, there is error, as the offense described in the verdict is at most a misdemeanor punishable by fine and imprisonment, or both, in the discretion of the court as provided by this section. State v. Gregory, 223 N. C. 415, 27 S. E. (2d) 140.

When no time is fixed by the statute, imprisonment for two years, as in the case of an assault with a deadly weapon, will not be held to be cruel and unusual, and violative of article I, section 14 of the constitution. State v. Crandall, 225 N. C. 148, 150, 33 S. E. (2d) 861.

Where the offense charged, an assault wherein serious damage was inflicted, was a misdemeanor, conviction thereof

did not support judgment of imprisonment in the state's prison from two to five years. State v. Malpass, 226 N. C. 403, 38 S. E. (2d) 156.

Effect of Acquittal on Part of Verdict.—The fact that the jury convicted defendant of assault with a deadly weapon, after it had acquitted him in a previous part of the verdict of assault with a deadly weapon doing serious injury, does not entitle him to his discharge on his motion in arrest of judgment. State v. Bentley, 223 N. C. 563, 27 S. E. (2d) 738.

Jurisdiction Where No Deadly Weapon Used and No Serious Injury Done.—Long prior to the enactment of the preceding section, the Legislature had dealt with the general subject of assault—including assault as known at the common law—and had attempted to lay down a schedule of punishments according to the aggravation of the offense, and at the same time, by the first proviso of this section, taken in connection with Art. IV, sec. 27, of the Constitution, carved out of the general jurisdiction of assaults given the courts an original and exclusive jurisdiction in the courts of the justice of the peace, where no deadly weapon had been used and no serious injury inflicted. State v. Gregory, 223 N. C. 415, 418, 27 S. E. (2d) 140.

Presumption That Accused Is over Eighteen.—Where a male defendant is charged with an assault upon a female there is a rebuttable presumption that defendant is over 18 years of age, which presumption, in the absence of evidence to the contrary, is evidence to be considered by the jury; but this does not imply that the jury is not required to determine defendant's age. State v. Lewis, 224 N. C. 774, 32 S. E. (2d) 334, citing State v. Lefler, 202 N. C. 700, 163 S. E. 873; State v. Jones, 181 N. C. 546, 106 S. E. 817.

Jury to Determine Defendant's Age.—In order to support the sentence as for a general misdemeanor it is required that the jury determine in its verdict specifically or by reference to the charge, that defendant is a male and was over eighteen years of age at the time of the assault. State v. Grimes, 226 N. C. 523, 39 S. E. (2d) 394.

Where there is no finding by jury that defendant was a man or boy over eighteen years of age at the time of the assault, judgment is not supported by the verdict, and a venire de novo will be ordered. Id.

Evidence Sufficient under Section.—

Where a female was approached at night on a city street by defendant, who made improper proposals and indecently exposed his person, without touching the said female, who thereupon ran a short distance to her home, the evidence is insufficient to support a conviction of assault with intent to commit rape, although it would warrant a conviction of an assault upon a female. State v. Gay, 224 N. C. 141, 29 S. E. (2d) 458.

In a criminal prosecution upon an indictment charging defendant with assault with intent to commit rape wherein defendant tendered to the court a plea of guilty of an assault upon a female, it was held that while the court found that the assault was aggravated, shocking and outrageous to the sensibilities and decencies of right-thinking citizens, the court did not find the offense to be infamous and that the plea tendered by defendant, and accepted by the court, did not constitute a plea of guilty to an infamous offense, but, on the contrary, constituted a plea of guilty of a misdemeanor punishable as provided in this section. State v. Tyson, 223 N. C. 492, 493, 27 S. E. (2d) 113.

In State v. Moore, 227 N. C. 326, 42 S. E. (2d) 84, the court held the evidence sufficient to sustain a verdict of guilty of assault upon a female.

Evidence Insufficient.—In State v. Silver, 227 N. C. 352, 42 S. E. (2d) 208, the court held the evidence insufficient to sustain a verdict of guilty of an assault upon a female.

Cited in State v. Perry, 225 N. C. 174, 33 S. E. (2d) 869.

§ 14-34. Assaulting by pointing gun.

Accidental Discharge of Gun, etc.—

In accord with 1st paragraph in original. See State v. Boldin, 227 N. C. 594, 595, 42 S. E. (2d) 897.

Art. 10. Kidnapping and Abduction.

§ 14-39. Kidnapping.

Definition.—Under this section kidnapping is the taking and carrying away of a human being by physical force or by fraud, done unlawfully or without lawful authority, and a charge to jury defining the offense as forcibly taking and carrying away of a human being is erroneous as being incomplete definition of the crime. State v. Witherington, 226 N. C. 211, 37 S. E. (2d) 497.

Taking and Carrying Away.—Under this section, regardless of the means used, by which the taking and carrying away of a human being is effected, there must be further finding that such taking and carrying away was unlawful or done without lawful authority, or effected by fraud. State v. Witherington, 226 N. C. 211, 213, 37 S. E. (2d) 497.

§ 14-41. Abduction of children.

Use of Wrong Expression in Charge to Jury.—The rule that what the court says to the jury is to be considered in its entirety and contextually saves from successful attack the use, on a trial for abduction, of the expression "taken out," where the jury must have understood from the entire charge that the court meant thereby "taken away." State v. Truelove, 224 N. C. 147, 29 S. E. (2d) 460.

Art. 11. Abortion and Kindred Offenses.

§ 14-44. Using drugs or instruments to destroy unborn child.

This section and § 14-45 create separate and distinct offenses, the first statute being designed to protect the life of a child in ventre sa mere, and the second being primarily for the protection of the woman. State v. Jordon, 227 N. C. 579, 42 S. E. (2d) 674; State v. Green, 230 N. C. 381, 53 S. E. (2d) 285.

The words "either pregnant or quick with child" contained in this section mean "pregnant with child that is quick," since otherwise the words "or quick with child" would be merely confusing surplusage, and since the sine qua non of the offense is the intent to destroy the child in ventre sa mere, which must be quick before it has independent life. State v. Jordon, 227 N. C. 579, 42 S. E. (2d) 674; State v. Green, 230 N. C. 381, 53 S. E. (2d) 285.

Thus, evidence that defendant, with intent to produce a miscarriage, gave a certain drug to a woman within thirty days after she had conceived, is insufficient to be submitted to the jury in a prosecution under this section since in such instance the child could not be quick. State v. Jordon, 227 N. C. 579, 42 S. E. (2d) 674.

Joinder of Offenses.—

Upon the trial on an indictment charging the performance of an operation on a woman (1) quick with child, with intent to destroy the child, and (2) with intent to procure a miscarriage, there was a verdict of guilty, and upon the jury being polled, each juror stated that the verdict related to the first count, which verdict was entered; and upon retirement and further consideration of the second count, as instructed, the verdict on that count was not guilty, the defendant is not prejudiced thereby. State v. Dilliard, 223 N. C. 446, 27 S. E. (2d) 85.

Nonsuit for Variance.—Where warrant charged that defendant feloniously advised a woman pregnant with child to take certain medicines with intent to destroy such child, and the evidence tended to show that this was prior to the time the child was quick, nonsuit for fatal variance should have been allowed. State v. Green, 230 N. C. 381, 53 S. E. (2d) 285.

§ 14-45. Using drugs or instruments to produce miscarriage or injure pregnant woman.

Cross Reference.—

See annotations under § 14-44.

Evidence.—In a prosecution for aiding and abetting in an abortion, it was held that the evidence was sufficient to take the case to the jury. State v. Manning, 225 N. C. 41, 33 S. E. (2d) 239; State v. Choate, 228 N. C. 491, 46 S. E. (2d) 476.

Where defendant's defense to a charge of criminal abortion is that the operation was necessary to save the life of the mother, evidence that defendant had committed previous abortions is competent to show animus; but where defendant denies he performed the operation charged, evidence of previous abortions committed by him is incompetent. State v. Choate, 228 N. C. 491, 46 S. E. (2d) 476.

Art. 14. Burglary and Other Housebreaking.

§ 14-51. First and second degree burglary.

In General.—

Burglary is a common law offense, the elements of which are the breaking and entering during the nighttime of a dwelling or sleeping apartment with intent to commit a felony therein and whether the building is occupied at the time affects only the degree. State v. Mumford, 227 N. C. 132, 41 S. E. (2d) 201.

The purpose of the statute is to protect the habitations of men, where they repose and sleep, from meditated harm. State v. Surles, 230 N. C. 272, 52 S. E. (2d) 880.

The sleeping apartment referred to in this section is one in which a person regularly sleeps. State v. Foster, 129 N. C. 704, 40 S. E. 209. And a room in a storehouse in which there is a cot occasionally occupied at night by a guard is not a sleeping apartment within the terms of the statute. United States v. Brandenburg, 144 F. (2d) 656.

Evidence held sufficient to overrule defendant's motion to nonsuit in a prosecution for burglary. State v. Surles, 230 N. C. 272, 52 S. E. (2d) 880.

The jury may convict of an attempt to commit burglary in the second degree where the prosecution is for burglary in the first degree. State v. Surles, 230 N. C. 272, 52 S. E. (2d) 880.

Verdict of Guilty in First Degree upon Trial for Burglary in Second Degree Set Aside.—Where defendant was tried for burglary in the second degree on indictment charging burglary in the first degree, and the verdict, as rendered, showed defendant was convicted of burglary in the first degree, or was guilty "as charged in the bill of indictment," the fact that clerk certified "that defendant was guilty of second degree burglary as charged in the bill of indictment" which was merely the clerk's interpretation of verdict, rather than a precise certification of it, was not sufficient to deny motion to set aside verdict. State v. Jordan, 226 N. C. 155, 37 S. E. (2d) 111.

Cited in State v. Mathis, 230 N. C. 508, 53 S. E. (2d) 666.

§ 14-52. Punishment for burglary.

—Any person convicted, according to due course of law, of the crime of burglary in the first degree shall suffer death: Provided, if the jury when rendering its verdict in open court shall so recommend, the punishment shall be imprisonment for life in the state's prison, and the court shall so instruct the jury. Anyone so convicted of burglary in the second degree shall suffer imprisonment in the state's prison for life, or for a term of years, in the discretion of the court. (Rev., s. 3330; Code, s. 994; 1889, c. 434, s. 2; 1870-1, c. 222; 1941, c. 215, s. 1; 1949, c. 299, s. 2; C. S. 4233.)

Editor's Note.—The 1949 amendment rewrote this section. Section 5 of the amendatory act provides that it shall be effective as of March 11, 1949, not excepting trials for offenses committed prior thereto. For brief comment on amendment, see 27 N. C. Law Rev. 449.

It is error for the court to fail to charge the jury in a prosecution for burglary in the first degree that it may return a verdict of guilty of burglary in the first degree with recommendation of imprisonment for life. State v. Mathis, 230 N. C. 508, 53 S. E. (2d) 666.

Permissible Verdicts When Jury Finds Facts Constituting Burglary in First Degree.—Taking §§ 14-52 and 15-171 together, when in a case in which the charge is burglary in the first degree the jury finds from the evidence and beyond a reasonable doubt facts constituting burglary in the first degree, one of three verdicts may be returned: (1) Guilty of burglary in the first degree, which carries a mandatory death sentence; (2) guilty of burglary in the first degree, with recommendation of imprisonment for life, which calls for a sentence to life imprisonment; and (3) if the jury "deem it proper so to do," guilty of burglary in the second degree, for which the sentence may be life imprisonment, or imprisonment for a term of years in the discretion of the judge. State v. Mathis, 230 N. C. 508, 53 S. E. (2d) 666.

Formerly a verdict of guilty of burglary in the first degree made a death sentence mandatory. But since the enactment of the proviso in 1941, when the jury recommends imprisonment for life, the death penalty is thereby eliminated, and sentence of life imprisonment is mandatory. State v. Mathis, 230 N. C. 508, 53 S. E. (2d) 666.

Applied in In re McKnight, 229 N. C. 303, 49 S. E. (2d) 753.

Cited in State v. Jordan, 226 N. C. 155, 37 S. E. (2d) 111.

§ 14-54. Breaking into or entering houses otherwise than burglariously.

Intent Must Be Shown.—

Felonious intent is an essential element of the crime defined in this section. It must be alleged and proved, and the felonious intent proven must be the felonious intent alleged, which is the "intent to steal." State v. Friddle, 223 N. C. 258, 260, 25 S. E. (2d) 751.

Proof of Breaking Not Essential.—Housebreaking or nonburglarious breaking is a statutory and not a common law offense, and under this section it is unlawful to enter a dwelling with intent to commit a felony therein, either with or without a breaking, and therefore while evidence of a breaking, when available, is always relevant, proof of a breaking is not essential to sustain conviction. State v. Mumford, 227 N. C. 132, 41 S. E. (2d) 201.

Indictment under This Section or § 14-51.—Where on appeal defendant's motion to set aside the verdict should have been allowed for want of evidence of defendant's guilt of second degree burglary and want of charge of second degree burglary in the indictment, upon the new trial ordered, defendant may be tried upon the original bill of burglary in the first degree, or upon an indictment under this section. State v. Locklear, 226 N. C. 410, 38 S. E. (2d) 162.

Applied in State v. Minton, 228 N. C. 518, 46 S. E. (2d) 296.

Cited in In re McKnight, 229 N. C. 303, 49 S. E. (2d) 753.

§ 14-55. Preparation to commit burglary or other housebreakings.

Under this section, the gravamen of the offense is the possession of burglar's tools without lawful excuse, and the burden is on the State to show two things: (1) That the person charged was found having in his possession an implement or implements of housebreaking enumerated in, or which come within the meaning of the statute; and (2) that such possession was without lawful excuse. State v. Boyd, 223 N. C. 79, 83, 25 S. E. (2d) 456.

But the phrase "without lawful excuse" must be construed in the spirit of this section, and, even though the possession of the pistols and blackjack be unlawful, and even though defendants possessed the pistols and blackjack for the purpose of personal protection in the unlawful transportation of intoxicating liquor, such possession is not within the meaning of this section. State v. Boyd, 223 N. C. 79, 85, 25 S. E. (2d) 456.

Separate Offenses.—The offense of being armed with any dangerous weapon with intent to break and enter a dwelling or other building and commit a felony therein, and the offense of possessing, without lawful excuse, implements of housebreaking, are separate and distinct offenses, under this section, the first requiring a presently existing intent to break and enter, and the second mere possession, without lawful excuse, of implements of housebreaking, which infers no personal intent but rather the purpose for which the implements are kept. State v. Baldwin, 226 N. C. 295, 37 S. E. (2d) 898.

Judicial Knowledge of Housebreaking Implements.—Although a Stillson wrench, a brace, drills of varying sizes, detonating caps, flashlight batteries, gloves, dynamite, bullets, a drill chuck key, and other like articles, are articles having legitimate uses, the court will take judicial knowledge that they are, in combination, implements of housebreaking. State v. Baldwin, 226 N. C. 295, 37 S. E. (2d) 898.

Sufficiency of Evidence.—In State v. Boyd, 223 N. C. 79, 84, 25 S. E. (2d) 456, it was held that the evidence failed to show that any of the articles found in the automobile was an implement made and designed for the express purpose of housebreaking, within the terms of this section.

Evidence tending to show that officers searched a car owned by defendant and to which defendant had the key, and found therein implements which, in combination, as a matter of common knowledge, are implements of housebreaking, is sufficient to overrule defendant's motion to nonsuit in a prosecution under this section. State v. Baldwin, 226 N. C. 295, 37 S. E. (2d) 898.

Cited in State v. Surles, 230 N. C. 272, 52 S. E. (2d) 880.

§ 14-57. Burglary with explosives.

"Burglary with explosives" was unknown to the common law. Obviously, it is separate and distinct from the crime of burglary named in § 14-51. United States v. Brandenburg, 144 F. (2d) 656.

Applied in In re McKnight, 229 N. C. 303, 49 S. E. (2d) 753.

Art. 15. Arson and Other Burnings.

§ 14-58. Punishment for arson.

—Any person convicted according to due course of law of the crime of arson shall suffer death: Provided, if the jury shall so recommend, at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the state's prison, and the court shall so instruct the jury. (Rev., s. 3335; Code, s. 985; R. C., c. 34, s. 2; 1870-1, c.

222; 1941, c. 215, s. 2; 1949, c. 299, s. 3; C. S. 4238.)

Editor's Note.—The 1949 amendment rewrote this section. Section 5 of the amendatory act provides that it shall be effective as of March 11, 1949, not excepting trials for offenses committed prior thereto. For brief comment on amendment, see 27 N. C. Law Rev. 449.

Evidence held admissible in prosecution for arson as tending to show ill will towards occupants of house burned and as being part of res gestae. State v. Smith, 225 N. C. 78, 33 S. E. (2d) 472.

The death sentence is mandatory upon a verdict of guilty of arson when there is no recommendation by the jury in respect to the punishment. State v. Anderson, 228 N. C. 720, 47 S. E. (2d) 1.

Art. 16. Larceny.

§ 14-71. Receiving stolen goods.—If any person shall receive any chattel, property, money, valuable security or other thing whatsoever, the stealing or taking whereof amounts to larceny or a felony, either at common law or by virtue of any statute made or hereafter to be made, such person knowing the same to have been feloniously stolen or taken, he shall be guilty of a criminal offense, and may be indicted and convicted, whether the felon stealing and taking such chattels, property, money, valuable security or other thing, shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and any such receiver may be dealt with, indicted, tried and punished in any county in which he shall have, or shall have had, any such property in his possession or in any county in which the thief may be tried, in the same manner as such receiver may be dealt with, indicted, tried and punished in the county where he actually received such chattel, money, security, or other thing; and such receiver shall be punished as one convicted of larceny. (Rev., s. 3507; Code, s. 1074; R. C., c. 34, s. 56; 1797, c. 485, s. 2; 1949, c. 145, s. 1; C. S. 4250.)

Editor's Note.—The 1949 amendment substituted "criminal offense" for "misdemeanor" in line eight. For brief comment on amendment, see 27 N. C. Law Rev. 448.

As to elements of crime of receiving stolen goods, see 26 N. C. Law Rev. 192.

The criminality of the action denounced by this section consists in receiving with guilty knowledge and felonious intent goods which previously had been stolen. Sufficient evidence of all the essential elements of the offense must be made to appear in order to sustain a conviction. State v. Yow, 227 N. C. 585, 587, 42 S. E. (2d) 661.

Test of Felonious Intent.—In a prosecution under this section, the test of felonious intent is whether the prisoners knew, or must have known, that the goods were stolen, not whether a reasonably prudent person would have suspected strangers calling at a very early morning hour. State v. Oxendine, 223 N. C. 659, 27 S. E. (2d) 814.

The Inference or Presumption, etc.—

In accord with original. See State v. Yow, 227 N. C. 585, 587, 42 S. E. (2d) 661.

Recent possession of stolen property, without more, raises no presumption in a prosecution for receiving stolen goods with knowledge that they had been feloniously stolen, and an instruction that recent possession raised no presumption of guilt but raised a presumption of fact to be considered by the jury in passing upon the guilt or innocence of defendant, must be held for reversible error. State v. Larkin, 229 N. C. 126, 47 S. E. (2d) 697.

Conviction of Larceny Is Tantamount to Acquittal on Charge of Receiving.—Upon an indictment for larceny and for receiving property, knowing the same to have been stolen, a verdict of guilty of larceny is tantamount to an acquittal on the charge of receiving. State v. Holbrook, 223 N. C. 622, 27 S. E. (2d) 725.

Evidence held sufficient to go to jury upon charge of receiving stolen property with knowledge that it had been feloniously stolen. State v. Larkin, 229 N. C. 126, 47 S. E. (2d) 697.

Punishment.—Upon a plea of nolo contendere to a charge of receiving cigarettes of the value of $75.00 knowing them to have been stolen, a sentence of imprisonment at hard labor for not less than three years nor more than five years is within the limits prescribed by this section and §§ 14-1, 2 and 3, and therefore defendant's contention that the punishment imposed is excessive for the offense charged is not meritorious. State v. Mounce, 226 N. C. 159, 36 S. E. (2d) 918.

Applied in State v. Law, 228 N. C. 443, 45 S. E. (2d) 374.

Cited in State v. Law, 227 N. C. 103, 40 S. E. (2d) 699.

§ 14-72. Larceny of property, or the receiving of stolen goods, not exceeding one hundred dollars in value.—The larceny of property, or the receiving of stolen goods knowing them to be stolen, of the value of not more than one hundred dollars, is hereby declared a misdemeanor, and the punishment therefor shall be in the discretion of the court. If the larceny is from the person, or from the dwelling by breaking and entering, this section shall have no application: Provided, that this section shall not apply to horse stealing. In all cases of doubt the jury shall, in the verdict, fix the value of the property stolen. (Rev., s. 3506; 1895, c. 285; 1913, c. 118, s. 1; 1941, c. 178, s. 1; 1949, c. 145, s. 2; C. S. 4251.)

Editor's Note.—The 1949 amendment substituted "one hundred" for "fifty" in the catchline of this section and also in the first sentence. For brief comment on amendment, see 27 N. C. Law Rev. 448.

Evidence.—In a prosecution for larceny and receiving of paper, evidence of size, weight, quantity and value of the paper, from experienced witnesses, who based their opinions on personal observation, is admissible to show a value of more than $50 (now $100) to establish a felony under this section. State v. Weinstein, 224 N. C. 645, 31 S. E. (2d) 920.

Cited in State v. Jones, 227 N. C. 47, 40 S. E. (2d) 458.

§ 14-73. Jurisdiction of the superior courts in cases of larceny and receiving stolen goods.—The superior courts shall have exclusive jurisdiction of the trial of all cases of the larceny of property, or the receiving of stolen goods knowing them to be stolen, of the value of more than one hundred dollars. (1913, c. 118, s. 2; 1941, c. 178, s. 2; 1949, c. 145, s. 3; C. S. 4252.)

Editor's Note.—The 1949 amendment substituted "one hundred" for "fifty" near the end of the section. For brief comment on amendment, see 27 N. C. Law Rev. 448.

For subsequent law affecting this section, see § 14-73.1.

§ 14-73.1. Jurisdiction generally in cases of larceny and receiving stolen goods; petty misdemeanors.—The offenses of larceny and the receiving of stolen goods knowing the same to have been stolen, which are made misdemeanors by article 16, subchapter V, chapter 14 of the General Statutes, as amended, are hereby declared to be petty misdemeanors, and jurisdiction to hear, try and finally dispose of such offenses committed within their respective territorial jurisdictions, is hereby vested in all courts established by a special act of the legislature or pursuant to the provisions of chapter 7 of the General Statutes which now possess jurisdiction of misdemeanors which are punishable in the discretion of the court. (1949, c. 145, s. 4.)

Editor's Note.—For brief comment on section, see 27 N. C. Law Rev. 448.

§ 14-75. Larceny of chose in action.—If any person shall feloniously steal, take and carry away, or take by robbery, any bank-note, check or other order for the payment of money issued by or drawn on any bank or other society or corporation within this state or within any of the United States, or any treasury warrant, debenture, certificate of stock or other public security, or cer-

tificate of stock in any corporation, or any order, bill of exchange, bond, promissory note or other obligation, either for the payment of money or for the delivery of specific articles, being the property of any other person, or of any corporation (notwithstanding any of the said particulars may be termed in law a chose in action), such felonious stealing, taking and carrying away, or taking by robbery, shall be a crime of the same nature and degree and in the same manner as it would have been if the offender had feloniously stolen, or taken by robbery, money, goods or property of the same value, and the offender for every such offense shall suffer the same punishment and be subject to the same pains, penalties and disabilities as he should or might have suffered if he had feloniously stolen or taken by robbery money, goods or other property of such value. (Rev., s. 3498; Code, s. 1064; R. C., c. 34, s. 20; 1811, c. 814, s. 1; 1945, c. 635; C. S. 4254.)

Editor's Note.—The 1945 amendment substituted the word "crime" for the word "felony" in line seventeen and the words "the same value" for the words "any value" in line twenty-one. It also inserted the word "such" before the word "value" in the last line.

Art. 17. Robbery.

§ 14-87. Robbery with firearms or other dangerous weapons.

The primary purpose and intent of the legislature in enacting this section, was to provide for more severe punishment for the commission of robbery when such offense is committed or attempted with the use or threatened use of firearms or other dangerous weapons. It does not add to or subtract from the common law offense of robbery except to provide that when firearms or other dangerous weapons are used in the commission or attempted commission of the offense sentence shall be imposed as therein directed. State v. Jones, 227 N. C. 402, 405, 42 S. E. (2d) 465.

The main element of the offense is force or intimidation occasioned by the use or threatened use of firearms. State v. Mull, 224 N. C. 574, 31 S. E. (2d) 764.

It is not necessary to describe accurately or prove the particular identity or value of the property, further than to show it was the property of the person assaulted or in his care, and had a value. State v. Mull, 224 N. C. 574, 31 S. E. (2d) 764.

An indictment for robbery with firearms will support a conviction of the lesser offenses of common law robbery, assault, larceny from the person, or simple larceny, if there is evidence of guilt of such lesser offenses. State v. Bell, 228 N. C. 659, 46 S. E. (2d) 834. See §§ 15-169, 15-170, and notes.

Evidence.—Upon a conviction of robbery with firearms, the verdict conforming to the charge and evidence, there is no error where evidence, of a demand on the victim for property not mentioned in the indictment, was admitted without objection and referred to in the court's charge. State v. Mull, 224 N. C. 574, 31 S. E. (2d) 764.

Art. 18. Embezzlement.

§ 14-90. Embezzlement of property received by virtue of office or employment.

The offense of embezzlement is exclusively statutory, and this section does not embrace a vendor in an executory contract of purchase and sale. State v. Blair, 227 N. C. 70, 40 S. E. (2d) 460.

Fraudulent intent which constitutes a necessary element of embezzlement, within the meaning of this section, is the intent of the agent to embezzle or otherwise willfully and corruptly use or misapply the property of the principal or employer for purposes other than those for which the property is held. State v. Gentry, 228 N. C. 643, 46 S. E. (2d) 863.

Evidence Sufficient to Go to Jury.—The evidence tended to show that prosecuting witness requested defendant to refinance a chattel mortgage on the witness' automobile, that defendant agreed to do so for a fee, that defendant obtained cash from a finance company on a second chattel mortgage and notes executed by the witness or purported to have been executed by him, and advised the witness that he had sent the money to pay off the prior mortgage, that the prior mortgage was not paid, and that defendant refused to reimburse the witness. It was held that the evidence was sufficient to be submitted to the jury on the charge of embezzlement by defendant of funds received by him as agent of the prosecuting witness. State v. Gentry, 228 N. C. 643, 46 S. E. (2d) 863.

§ 14-96.1. Report to commissioner.—Whenever any insurance company, its manager, general agent or other representative knows or has reasonable cause to believe that any agent, broker or other representative of such company is guilty under the preceding section, it shall be the duty of such company, its manager, general agent or other representative, within thirty days after acquiring such knowledge to file with the commissioner a complete statement of all the relevant facts and circumstances. All such reports shall be privileged communications, and when filed in good faith shall in nowise subject the company or individuals making the same to any liability whatsoever. The commissioner may suspend the license to do business in this state of any insurance company, its general manager, agent or other representative who willfully fails to comply with this section. (1945, c. 382.)

Art. 19. False Pretenses and Cheats.

§ 14-100. Obtaining property by false tokens and other false pretenses.

Elements of the Crime.—

In accord with 1st paragraph in original. See State v. Davenport, 227 N. C. 475, 492, 42 S. E. (2d) 686.

The Indictment.—

Indictment held sufficient in State v. Davenport, 227 N. C. 475, 42 S. E. (2d) 686.

Evidence held insufficient to sustain conviction in prosecution under this section. State v. Yancey, 228 N. C. 313, 45 S. E. (2d) 348.

§ 14-101. Obtaining signatures by false pretenses.—If any person, with intent to defraud or cheat another, shall designedly, by color of any false token or writing, or by any other false pretense, obtain the signature of any person to any written instrument, the false making of which would be punishable as forgery, he shall be punishable by fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the state's prison for a term of not less than one year nor more than five years, or both, at the discretion of the court. (Rev., s. 3433; Code, s. 1026; 1871-2, c. 92; 1945, c. 635; C. S. 4278.)

Editor's Note.—Prior to the 1945 amendment this section also applied to obtaining property by false pretenses.

§ 14-104. Obtaining advances under promise to work and pay for same.

Warrant Must Allege Intent to Cheat.—A warrant charging defendant with obtaining a money advance under promise to do certain work, and with failure to perform the work, without alleging that the advance was obtained with intent to cheat or defraud, is fatally defective. State v. Phillips, 228 N. C. 446, 45 S. E. (2d) 535.

§ 14-106. Obtaining property in return for worthless check, draft or order.

Cited in Melton v. Rickman, 225 N. C. 700, 36 S. E. (2d) 276, 162 A. L. R. 793.

§ 14-107. Worthless checks.

The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank or depository for the payment of

any such check or draft. The part of this section in brackets shall only apply to Pitt county, Robeson county, Iredell county, Martin county, Lee county, Rutherford county, Bladen county, Cumberland county, Mecklenburg county, Catawba county, Sampson county, Alleghany county, Lenoir county, Randolph county, Gaston county, Hoke county, Madison county, Burke county, Transylvania county, Rockingham county, Halifax county, Hertford county, Richmond county, Chatham county, Pamlico county, Wake county, Haywood county, Granville county, Davidson county, Anson county, Carteret county, Davie county, Forsyth county, Greene county, Jackson county, Henderson county, Stokes county, Onslow county, Macon county, Currituck county, Chowan county, Vance county, Edgecombe county, Northampton county, Stanly county, Cabarrus county, Mitchell county, Yancey county, Avery county, Alamance county, Franklin county, Yadkin county, Caldwell county, Gates county, Ashe county, Washington county, Nash county, Johnston county, Duplin county, Wayne county, Guilford county, Rowan county, Bertie county, Moore county, Harnett county, Columbus county, Watauga county, Lincoln county, Caswell county, Orange county, Buncombe county, Wilkes county, Hyde county, Swain county, Clay county, Graham county, Cherokee county, Scotland county, Union county, Surry county, Jones county and Beaufort county. (1925, c. 14; 1927, c. 62; 1929, c. 273, ss. 1, 2; 1931, cc. 63, 138; 1933, cc. 43, 64, 93, 170, 265, 362, 458; 1939, c. 346; 1949, cc. 183, 332.)

Editor's Note.—The first 1949 amendment added Jones county and the second 1949 amendment added Beaufort county to the list of counties set out in the third paragraph. As only this paragraph was affected by the amendments the rest of the section is not set out.

It is not the attempted payment of a debt that is condemned by the statute, but the giving of a worthless check and its consequent disturbance of business integrity. State v. White, 230 N. C. 513, 53 S. E. (2d) 436.

Punishment.—A sentence to 18 months' labor on the roads entered upon defendant's plea of guilty to a charge of drawing and uttering a worthless check was held not to be "cruel and unusual" in a constitutional sense. State v. White, 230 N. C. 513, 53 S. E. (2d) 436.

Art. 20. Frauds.

§ 14-117.1. Use of words "army" or "navy" in name of mercantile establishment.—It shall be unlawful for any person, firm, or corporation, to use the words "army" or "navy" or either, or both, in the name or as a part of the name of any mercantile establishment in this state which is not in fact operated by the United States government or a duly authorized agency thereof.

Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not less than twenty-five dollars ($25.00) nor more than five hundred dollars ($500.00) for the first offense, and not less than fifty dollars ($50.00) nor more than one thousand dollars ($1,000.00) for each subsequent such offense. (1945, c. 879.)

Local Modification.—Beaufort: 1949, c. 857.

§ 14-118. Blackmailing.

Circumstantial evidence held to sustain conviction of blackmail. State v. Strickland, 229 N. C. 201, 49 S. E. (2d) 469.

Art. 22. Trespasses to Land and Fixtures.

§ 14-134. Trespass on land after being forbidden; license to look for estrays.

Applied in State v. Marsh, 225 N. C. 648, 36 S. E. (2d) 244.

§ 14-135. Cutting, injuring or reviewing another's timber.

As to larceny of wood from land, see § 14-80.

§ 14-136. Setting fire to grass and brush lands and woodlands.

Editor's Note.—
For comment on the 1943 amendment, see 21 N. C. Law Rev. 346.

§ 14-140. Certain fires to be guarded by watchman.

Cited in State v. Swanson, 223 N. C. 442, 27 S. E. (2d) 122.

Art. 26. Offenses against Public Morality and Decency.

§ 14-177. Crime against nature.

Cited in State v. Reid, 230 N. C. 561, 53 S. E. (2d) 849.

§ 14-178. Incest between certain near relatives.

Evidence.—
In a prosecution under this section allegedly committed upon defendant's daughter, testimony of an older daughter, that within the past three years defendant several times had made to her improper advances of a similar nature, was competent solely for the purpose of showing intent or guilty knowledge. State v. Edwards, 224 N. C. 527, 31 S. E. (2d) 516.

§ 14-180. Seduction.

Three Elements of Offense.—
In accord with original. See State v. Smith, 223 N. C. 199, 25 S. E. (2d) 619.

Requirement as to Innocence and Virtue.—Where there was evidence of the good reputation of prosecutrix before and at the time of the alleged illicit intercourse, it was held that this meets the requirement of this section on the element of innocence and virtue. State v. Smith, 223 N. C. 199, 201, 25 S. E. (2d) 619.

Testimony of Woman Must Be Corroborated as to Each Element.—
To convict defendant of seduction as defined in this statute the testimony of prosecutrix alone is not sufficient. There must be independent supporting evidence of each essential element of the crime. State v. Smith, 223 N. C. 199, 201, 25 S. E. (2d) 619.

Supporting Evidence Need Not Be Direct.—
Testimony supporting prosecutrix, on an indictment for seduction under this section, need not be in the form of direct evidence, for it is seldom possible to produce such proof in respect to some of the elements of the offense. Facts and circumstances tending to support her statements are sufficient. State v. Smith, 223 N. C. 199, 25 S. E. (2d) 619.

Cited in State v. Hill, 223 N. C. 711, 28 S. E. (2d) 100.

§ 14-183. Bigamy.

Constitutionality.—This section, making bigamous cohabitation in this State a felony is valid and offends neither the Federal nor State Constitutions. State v. Williams, 224 N. C. 183, 29 S. E. (2d) 744, aff'd in Williams v. State, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366.

Second Marriage Out of State.—
In a prosecution for bigamous cohabitation based upon a second marriage in another state, the state must prove beyond a reasonable doubt, each of the essential elements of the offense. State v. Setzer, 223 N. C. 216, 37 S. E. (2d) 513.

Aiding and Abetting by Marrying Outside of State.—In a prosecution upon an indictment charging defendant with aiding and abetting bigamy by entering into a marriage with a person then married and not divorced, evidence tending to show that the bigamous marriage was contracted in another state ousts the jurisdiction of the courts and requires dismissal. State v. Jones, 227 N. C. 94, 40 S. E. (2d) 700.

Foreign Divorces.—
In first paragraph in original the citation should be "175 N. C. 754."

While decrees of divorce granted citizens of this State by the courts of another state, standing alone, are taken as prima facie valid, they are not conclusive; and, when challenged in a prosecution under this section, for bigamous cohabitation, the burden is on defendants to show to the satisfaction of the jury that they had acquired bona fide domiciles in the State granting their divorces and that such divorces are valid. State v. Williams, 224 N. C. 183, 29 S. E. (2d) 744, aff'd in Williams v. State, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366.

A man and a woman, domiciled in North Carolina, left their spouses in North Carolina, obtained decrees of divorce in Nevada, married and returned to North Carolina to live. Prosecuted in North Carolina for bigamous cohabitation, they pleaded the Nevada divorce decrees in defense but were convicted. The court held that, upon the record, the judgments of conviction were not invalid as denying the Nevada divorce decrees the full faith and credit required by Art. IV, § 1 of the Constitution. Williams v. State, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366, aff. State v. Williams, 224 N. C. 183, 29 S. E. (2d) 744.

Prima Facie Case Made Out.—Upon issues of traverse on indictment for bigamous cohabitation, the prosecution offering evidence tending to show that defendants had been previously married, that their respective spouses were still living, that defendants had undertaken to contract a marriage in another state and thereafter had cohabited with each other in this State, a prima facie case is made out and a demurrer to the evidence was properly overruled. State v. Williams, 224 N. C. 183, 29 S. E. (2d) 744, aff'd in Williams v. State, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366.

Plea of Former Jeopardy Properly Overruled.—Where, in a criminal prosecution for bigamous cohabitation, there is a conviction and judgment chiefly on the grounds of insufficient service, which on appeal is affirmed by the Supreme Court and reversed by the Supreme Court of the United States and remanded, upon the second trial on the issue of domicile only, the plea of former jeopardy and motion to dismiss were properly overruled. State v. Williams, 224 N. C. 183, 29 S. E. (2d) 744, aff'd in Williams v. State, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366.

Venue.—
The last line in this paragraph in original should be "87 L. Ed. 279."

Where the bigamous cohabitation took place in one county and the parties were apprehended in another county, the prosecution may be instituted in the county of their apprehension. State v. Williams, 224 N. C. 183, 29 S. E. (2d) 744, aff'd in Williams v. State, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366.

§ 14-184. Fornication and adultery.

For history of section, see State v. Davis, 229 N. C. 386, 50 S. E. (2d) 37.

Offense Is Statutory. — The offense of fornication and adultery is statutory. State v. Ivey, 230 N. C. 172, 52 S. E. (2d) 346.

"Lewdly and lasciviously cohabit" implies habitual intercourse in the manner of husband and wife, and together with the fact of not being married to each other, constitutes the offense, and in plain words draws the distinction between single or nonhabitual intercourse and the offense the statute means to denounce. State v. Davenport, 225 N. C. 13, 17, 33 S. E. (2d) 136; State v. Ivey, 230 N. C. 172, 52 S. E. (2d) 346.

Both defendants need not be convicted of mutual intent to violate the law before conviction of one of them can be sustained. State v. Davenport, 225 N. C. 13, 33 S. E. (2d) 136.

The warrant or indictment must set forth the essential elements of the offense of fornication and adultery. State v. Ivey, 230 N. C. 172, 52 S. E. (2d) 346.

A warrant charging that defendant did lewdly and lasciviously associate with a woman to whom he was not married and "did engage in an act of intercourse" with her, fails to charge the statutory offense of fornication and adultery, and judgment against defendant was arrested by the supreme court ex mero motu. Id.

Evidence.—
On a prosecution upon indictment charging fornication and adultery, where the state's evidence tended to show that defendants were constantly together, day and night, on the streets and in several different homes maintained by the male defendant, and that they were arrested late at night in one of these homes, no other person being in the house at the time, both defendants coming out of the same bedroom, there was sufficient evidence to support a conviction. State v. Davenport, 225 N. C. 13, 33 S. E. (2d) 136.

Where defendant was charged with fornication and adultery with one of the orphanage girls under his supervision, testimony of another orphanage girl that defendant made improper advances to her is competent for the purpose of showing attitude, animus and purpose of defendant, and as corroborative of the state's case. State v. Davis, 229 N. C. 386, 50 S. E. (2d) 37.

Circumstantial Evidence.—
The guilt of defendants or of a defendant, in a prosecution for fornication and adultery, must be established in almost every case by circumstantial evidence. It is never essential to conviction that a single act of intercourse be shown by direct testimony. State v. Davenport, 225 N. C. 13, 33 S. E. (2d) 136.

The proviso in this section relates to extra-judicial declarations, and does not prevent a woman jointly charged with the offense from testifying as a witness at the trial of her paramour to facts, otherwise competent, which are within her personal knowledge, where at the time she testifies her plea of nolo contendere has been accepted by the state, and she is no longer on trial. The prohibition of the proviso is directed not to the person testifying but against the use in evidence of such person's previous admissions or confessions. State v. Davis, 229 N. C. 386, 50 S. E. (2d) 37, discussed in 27 N. C. Law Rev. 365.

Corroboration of Paramour.—Where, in a prosecution for fornication and adultery, the person jointly charged has testified as to the facts forming the basis of the prosecution, testimony that she had made substantially the same statements to another upon the investigation is competent for the purpose of corroboration. State v. Davis, 229 N. C. 386, 50 S. E. (2d) 37.

Testimony of an admission made by defendant that "he was guilty" of another charge based upon sexual relations with the other party, is competent as an admission of acts which with other similar acts tend to prove the offense of fornication and adultery. State v. Davis, 229 N. C. 386, 50 S. E. (2d) 37.

Proper Instruction.—In a prosecution for fornication and adultery, an instruction that if the jury found beyond a reasonable doubt that defendant and his alleged paramour, not being married to each other, engaged in sexual intercourse with each other, with such frequency during the period to which the testimony related, that these illicit relations were habitual, they should return a verdict of guilty, is without error. State v. Davis, 229 N. C. 386, 50 S. E. (2d) 37.

§ 14-197. Using profane or indecent language on public highways, counties exempt.—If any person shall, on any public road or highway and in the hearing of two or more persons, in a loud and boisterous manner, use indecent or profane language, he shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. The following counties shall be exempt from the provisions of this section: Brunswick, Camden, Cleveland, Craven, Dare, Macon, Martin, Pasquotank, Pitt, Stanly, Swain, Tyrell and Washington. (1913, c. 40; Pub. Loc. Ex. Sess. 1924, c. 65; 1933, c. 309; 1937, c. 9; 1939, c. 73; 1945, c. 398; 1947, cc. 144, 959; 1949, c. 845; C. S. 4352.)

Editor's Note.—
The 1945 amendment struck out Transylvania from the list of exempted counties, the 1947 amendments struck out Beaufort and Orange and the 1949 amendment struck out Watauga.

§ 14-199. Obstructing way to places of public worship.—If any person shall maliciously stop up or obstruct the way leading to any place of public worship, or to any spring or well commonly used by the congregation, he shall be guilty of a misdemeanor. (Rev., s. 3776; Code, s. 3669; R. C., c. 97, s. 5; 1785, c. 241; 1945, c. 635; C. S. 4354.)

Editor's Note.—The 1945 amendment struck out the

words "and shall be fined not more than fifty dollars or imprisoned not more than thirty days" formerly appearing at the end of this section.

Art. 27. Prostitution.

§ 14-203. Definition of terms.

Cited in State v. Harrill, 224 N. C. 477, 31 S. E. (2d) 353.

§ 14-204. Prostitution and various acts abetting prostitution unlawful.

Sufficiency of Evidence.—In a criminal prosecution for permitting property to be used for prostitution where the State's evidence tended to show that defendant owned the property so used, which was across the road from his residence, that defendant's wife was one of the operators of the place of ill fame and that its general reputation was bad, motion for judgment as of nonsuit was held properly denied. State v. Herndon, 223 N. C. 208, 25 S. E. (2d) 611.

§ 14-206. Reputation and prior conviction admissible as evidence.

Stated in State v. Harrill, 224 N. C. 477, 31 S. E. (2d) 353.

Art. 28. Perjury.

§ 14-209. Punishment for perjury.

Definition of Perjury.—Perjury, as defined by common law and enlarged by this section, is a false statement under oath, knowingly, willfully and designedly made, in a proceeding in a court of competent jurisdiction, or concerning a matter wherein the affiant is required by law to be sworn, as to some matter material to the issue or point in question. State v. Smith, 230 N. C. 198, 52 S. E. (2d) 348.

Essential Elements.—

This section does not specifically define perjury or state all the elements essential to constitute the crime. It enlarges the scope of the criminality of a false oath, and prescribes punishment. The definition is derived from the common law. State v. Smith, 230 N. C. 198, 52 S. E. (2d) 348.

False Statement Must Be Material to Issue.—A false statement under oath must be so connected with the fact directly in issue as to have a legitimate tendency to prove or disprove such fact, in order to be material to the issue and constitute a basis for a prosecution for perjury. State v. Smith, 230 N. C. 198, 52 S. E. (2d) 348.

In a prosecution for willful failure of defendant to support his illegitimate child, defendant swore he had not had sexual intercourse with prosecutrix and was not the father of her child, and testified as to the number of times he had visited prosecutrix. In a subsequent prosecution for perjury it was made to appear that defendant had visited prosecutrix or had been seen with her more times than he had admitted under oath, but there was no evidence that he was the father of the child. It was held that the proof of false testimony did not relate to matters determinative of the issue in the first prosecution, and the evidence was insufficient to withstand nonsuit in the prosecution for perjury. Id.

§ 14-210. Subornation of perjury.

The suborner of perjury and the perjurer stand on an equal footing, especially in respect of turpitude and punishment. State v. Cannon, 227 N. C. 338, 42 S. E. (2d) 344.

Art. 31. Misconduct in Public Office.

§ 14-250. Publicly owned vehicle to be marked.—It shall be the duty of the executive head of every department of the State Government, and of any county, or of any institution or agency of the State, to have painted on every motor vehicle owned by the State, or by any county, or by any institution or agency of the State, a statement with letters of not less than three inches in height, that such car belongs to the State or to some county, or institution or agency of the State, and that such car is "for official use only." Provided, however, that no automobile used by any officer or official in any county in the State for the purpose of transporting, apprehending or arresting persons charged with violations of the laws of the State of North Carolina, shall be required to be lettered. Provided, further, that in lieu of the above method of marking vehicles owned by any agency or department of the State government, it shall be deemed a compliance with the law if such vehicles have painted or affixed on the side thereof a circle not less than eight inches in diameter showing a replica of the Seal of the State and the designation of the department or agency to which the vehicle belongs. (1925, c. 239, s. 4; 1929, c. 303, s. 1; 1945, c. 866.)

Editor's Note.—
The 1945 amendment added the last proviso.

Art. 33. Prison Breach and Prisoners.

§ 14-257. Permitting escape of or maltreating hired convicts.—If any person charged in any way with the control or management of convicts, hired for service outside of the state's prison, shall negligently permit them to escape, or shall maltreat them, he shall be guilty of a misdemeanor; but this provision shall not be held to relieve any person from any other criminal liability. (Rev., s. 3659; Code, s. 3450; 1881, c. 127, s. 2; 1947, c. 781; C. S. 4405.)

Editor's Note.—The 1947 amendment inserted the word "other" in the last line.

Art. 35. Offenses against the Public Peace.

§ 14-269. Carrying concealed weapons.—If anyone, except when on his own premises, shall willfully and intentionally carry concealed about his person any bowie knife, dirk, dagger, slung shot, loaded cane, brass, iron or metallic knuckles, razor, pistol, gun or other deadly weapon of like kind, he shall be guilty of a misdemeanor and shall be fined or imprisoned at the discretion of the court. Upon conviction or submission, the deadly weapon with reference to which the defendant shall have been convicted shall be ordered disposed of by the presiding judge at the trial in one of the following ways:

(a) If the deadly weapon with reference to which the defendant shall have been convicted is a pistol or gun, and the rightful owner of the same is a person other than the defendant, such rightful owner may, at the time of defendant's conviction or submission, file a petition with the judge presiding at the trial for the recovery of such weapon and the same shall be returned to said owner upon a finding by the court (1) that he is now entitled to possession of same, and (2) that he was unlawfully deprived of possession without his consent or acquiescence.

(b) If the deadly weapon with reference to which the defendant shall have been convicted is a bowie knife, dirk, dagger, slung shot, loaded cane, brass, iron or metallic knuckles, razor or weapon of like kind, the same shall be destroyed. However, pistols or guns may be confiscated and ordered turned over to the clerk of the superior court of the county in which the trial is held by the judge presiding at the trial. Under the direction of said clerk of the superior court the weapon shall be sold after one advertisement in a newspaper having a general circulation in the county, at public auction, which shall be held at least once a year. The proceeds of the sale of the weapon or weapons shall go to the general fund of the county in which the weapon or weapons were confiscated and sold. The clerk of the superior court shall keep a record and in-

ventory of all weapons received by him and sold under his direction; provided, however, that in any case the presiding judge may, if the facts so justify, order any pistol or gun returned to the defendant.

This section shall not apply to the following persons: Officers and enlisted personnel of the armed forces of the United States when in discharge of their official duties as such and acting under orders requiring them to carry arms or weapons, civil officers of the United States while in the discharge of their official duties, officers and soldiers of the militia and the state guard when called into actual service, officers of the state, or of any county, city, or town, charged with the execution of the laws of the state, when acting in the discharge of their official duties. (Rev., s. 3708; Code, s. 1005; 1917, c. 76; 1919, c. 197, s. 8; 1923, c. 57; Ex. Sess. 1924, c. 30; 1929, cc. 51, 224; 1947, c. 459; 1949, c. 1217; C. S. 4410.)

Editor's Note.—Prior to the 1947 amendment the confiscation and destruction of a weapon carried by a person convicted under this section was mandatory in all cases, even though the weapon may have been stolen by the convicted person from one who had a right to possess it. See 25 N. C. Law Rev. 402.

The 1949 amendment rewrote this section. See 27 N. C. Law Rev. 450.

§ 14-271. Engaging in and betting on prize fights.

Local Modification.—Carteret: 1947, c. 174.

§ 14-275.1. Disorderly conduct at bus or railroad station or airport.—Any person shall be guilty of a misdemeanor punishable by a fine of not more than fifty dollars ($50.00) or imprisonment for not more than thirty days, in the discretion of the court, if such person while at, or upon the premises of, (1) any bus station, depot or terminal, or (2) any railroad passenger station, depot or terminal, or (3) any airport or air terminal used by any common carrier, or (4) any airport or air terminal owned or leased, in whole or in part, by any county, municipality or other political subdivision of the state, or privately owned airport shall (a) engage in disorderly conduct, or (b) use vulgar, obscene or profane language, or (c) on any one occasion, without having necessary business there, loiter and loaf upon the premises after being requested to leave by any peace officer or by any person lawfully in charge of such premises. (1947, c. 310.)

Editor's Note.—The title of the act inserting this section refers only to airports and airport terminals.

Art. 37. Lotteries and Gaming.

§ 14-290. Dealing in lotteries.

In General.—

This section refers to persons who promote, make or draw, publicly or privately, a lottery, by whatever name, while C. S., 14-291.1, deals only with those persons who shall "sell, barter or cause to be sold or bartered, any ticket, token, certificate or order," etc. Thus it is apparent that the two statutes not only act upon different persons and serve purposes which are not the same but also they deal with different conditions. One inveighs against trafficking in lottery tickets and the other is designed to affect those persons engaged in promoting a particular kind of lottery. State v. Robinson, 224 N. C. 412, 414, 30 S. E. (2d) 320.

Sufficiency of Evidence.—Evidence held insufficient to show violation of this section. State v. Heglar, 225 N. C. 220, 34 S. E. (2d) 76.

Applied in State v. King, 224 N. C. 329, 30 S. E. (2d) 230.

§ 14-291. Selling lottery tickets and acting as agent for lotteries.

Sufficiency of Evidence.—Evidence held insufficient to show violation of this section. State v. Heglar, 225 N. C. 220, 34 S. E. (2d) 76.

§ 14-291.1. Selling "numbers" tickets; possession prima facie evidence of violation.

See annotations under § 14-290.

Sufficiency of Evidence.—Evidence held insufficient to show violation of this section. State v. Heglar, 225 N. C. 220, 34 S. E. (2d) 76.

Punishment.—A sentence and fine imposed upon conviction of violating this section are in personam; an order of confiscation entered under § 14-299 is in rem and is no part of the personal judgment against the accused. State v. Richardson, 228 N. C. 426, 45 S. E. (2d) 536. See note to § 14-299.

§ 14-299. Property exhibited by gamblers to be seized; disposition of same.

A confiscation order entered under this section is no part of the personal judgment imposed under § 14-291.1. Hence, a defendant may comply with the personal judgment entered against him upon conviction of violating § 14-291.1, and at the same time prosecute an appeal from an order of confiscation entered under this section, whether embraced in the same judgment or not; but the failure to appeal the personal judgment, while not estopping him for further contesting the order of confiscation, forever precludes him from contesting the fact of guilt. State v. Richardson, 228 N. C. 426, 45 S. E. (2d) 536.

§ 14-302. Punchboards, vending machines, and other gambling devices; separate offenses.

Applied in State v. Marsh, 225 N. C. 648, 36 S. E. (2d) 244.

§ 14-303. Violation of two preceding sections a misdemeanor.

Applied in State v. Marsh, 225 N. C. 648, 36 S. E. (2d) 244.

§ 14-304. Manufacture, sale, etc., of slot machines and devices.

Testimony.—In a prosecution under this section it is competent for witnesses who have examined and studied the machines in question to testify as to their physical description and operation. State v. Davis, 229 N. C. 552, 50 S. E. (2d) 668.

§ 14-306. Slot machine or device defined.

Evidence.—Where it was admitted that the machines in question were owned by one defendant and rented by him to the other defendants, testimony of an officer, who had examined and studied the machines, that from his observation they could be converted, or reconverted, to coin slot operated machines by simple mechanical changes was evidence sufficient to overrule defendants' demurrer, and the fact that the witness failed to complete a demonstration of the conversion of such a machine because of lack of soldering tools, did not amount to a failure of the state's evidence upon the critical issue. State v. Davis, 229 N. C. 552, 50 S. E. (2d) 668.

Art. 39. Protection of Minors.

§ 14-319. Marrying females under sixteen years old.—If any person shall marry a female under the age of sixteen years, he shall be guilty of a misdemeanor. (Rev., s. 3368; Code, s. 1083; R. C., c. 34, s. 46; 1820, c. 1041, ss. 1, 2; 1947, c. 383, s. 1; C. S. 4444.)

The 1947 amendment raised the minimum marriage age of females from fourteen to sixteen.

§ 14-320. Separating child under six months old from mother.—It shall be unlawful for any person to separate or aid in separating any child under six months old from its mother for the purpose of placing such child in a foster home or institution, or with the intent to remove it from the state for such purpose, without the written consent of either the county superintendent of public welfare

of the county in which the mother resides, or of the county in which the child was born, or of a private child-placing agency duly licensed by the state board of public welfare; but the written consent of any of the officials named in this section shall not be necessary for a child when the mother places the child with relatives or in a boarding home or institution inspected and licensed by the state board of public welfare. Such consent when required shall be filed in the records of the official or agency giving consent. Any person or agency violating the provisions of this section shall, upon conviction, be fined not exceeding five hundred dollars ($500.00) or imprisoned for not more than one year, or both, in the discretion of the court. (1917, c. 59; 1919, c. 240; 1939, c. 56; 1945, c. 669; 1949, c. 491; C. S. 4445.)

Editor's Note.—The 1949 amendment rewrote this section.

Art. 40. Protection of the Family.

§ 14-322. Abandonment by husband or parent.—If any husband shall willfully abandon his wife without providing her with adequate support, or if any father or mother shall willfully abandon his or her child or children, whether natural or adopted, without providing adequate support for such child or children, he or she shall be guilty of a misdemeanor: Provided, that the abandonment of children by the father or mother shall constitute a continuing offense and shall not be barred by any statute of limitations until the youngest living child shall arrive at the age of eighteen years. (Rev., s. 3355; Code, s. 970; 1868-9, c. 209, s. 1; 1873-4, c. 176, s. 10; 1879, c. 92; 1925, c. 290; 1949, c. 810; C. S. 4447.)

Editor's Note.—The 1949 amendment rewrote this section and made it applicable to abandonment by mother. It also made the offense of abandoning a child apply to both natural and adopted children. See 27 N. C. Law Rev. 451.

The Purpose of This Section.—In accord with original. See State v. Carson, 228 N. C. 151, 44 S. E. (2d) 721.

Section Must Be Strictly Construed.—State v. Carson, 228 N. C. 151, 153, 44 S. E. (2d) 721.

It relates only to legitimate children. An illegitimate child is not protected thereby. Allen v. Hunnicutt, 230 N. C. 49, 52 S. E. (2d) 18, citing State v. Gardner, 219 N. C. 331, 13 S. E. (2d) 529.

Husband's duty to provide support is not a debt in the legal sense of the word, but an obligation imposed by law, and penal sanctions are provided by this section for its wilful neglect or abandonment. Ritchie v. White, 225 N. C. 450, 35 S. E. (2d) 414.

Abandonment Must Be Willful.—In accord with original. See State v. Carson, 228 N. C. 151, 153, 44 S. E. (2d) 721.

Continuing Offense.—Due to continuing nature of the crime under this section, a person, arrested in Georgia and sought to be extradited to North Carolina, who temporarily came into the state after the commission of the crime, although for an innocent purpose, was a fugitive from justice when he again departed from the state. Daugherty v. Hornsby, 151 F. (2d) 799, 800.

Both Abandonment and Non-Support Must Be Proved.—The husband's act becomes criminal when and only when he, having willfully or wrongfully separated himself from his wife, intentionally and without just cause or excuse, ceases to provide adequate support for her according to his means and station in life. State v. Carson, 228 N. C. 151, 152, 44 S. E. (2d) 721, citing State v. Hooker, 186 N. C. 761, 120 S. E. 449.

Presence in State When Crime Committed.—In habeas corpus proceeding, in which petitioner, charged with a violation of this section was held under warrant of governor of Georgia, evidence did not carry petitioner's burden of showing that he was not in North Carolina when the crime was committed. Daugherty v. Hornsby, 151 F. (2d) 799, 800.

An instruction which omits the element of willful abandonment as a necessary predicate for a verdict of guilty is reversible error. State v. Gilbert, 230 N. C. 64, 51 S. E. (2d) 887.

§ 14-325. Failure of husband to provide adequate support for family.

Husband's duty to provide support is not a debt in the legal sense of the word, but an obligation imposed by law, and penal sanctions are provided by this section for its wilful neglect or abandonment. Ritchie v. White, 225 N. C. 450, 35 S. E. (2d) 414.

Art. 42. Public Drunkenness.

§ 14-335. Local: Public drunkenness.—

1. By a fine of not more than fifty dollars, or by imprisonment for not more than thirty days, in the counties of Alamance, Ashe, Brunswick, Burke, Cherokee, Clay, Cleveland, Dare, Davidson, Davie, Duplin, Franklin, Gaston, Greene, Harnett, Haywood, Henderson, Hyde, Johnson, Lincoln, Madison, McDowell, Mitchell, Moore, Northampton, Orange, Pitt, Richmond, Rutherford, Scotland, Stanly, Union, Vance, Warren, Washington, Wayne, Wilkes and Yadkin, and at Pungo in Beaufort county. (1907, cc. 305, 785, 900, 976; 1908, c. 113; 1909, c. 815; Pub. Loc. 1915, c. 790; Pub. Loc. 1917, cc. 447, 475; Pub. Loc. 1919, cc. 148, 200; Ex. Sess. 1924, c. 5; 1929, c. 135; 1931, c. 219; 1935, c. 49, s. 1; 1935, c. 208; 1937, cc. 46, 96, 286, 329, 443; 1941, cc. 334, 336; 1945, cc. 215, 254; 1947, c. 12, s. 1; c. 109; 1949, cc. 215, 217, 1193; C. S. 4458.)

5. By fine of not more than fifty dollars ($50.00) or imprisonment for not more than thirty days, in Wake county. (1907, c. 908; 1949, c. 246; C. S. 4458.)

8. By a fine of fifteen dollars or imprisonment for ten days for the first offense; by a fine of twenty-five dollars or imprisonment for twenty days for the second offense; by a fine of fifty dollars or imprisonment for thirty days for the third and subsequent offenses, in the King high school district, Stokes county and in Graham county. (1933, c. 287; 1949, c. 215.)

10. In Caldwell, Catawba, Mecklenburg, Montgomery, Nash, Pender, and Wilson counties, by a fine, for the first offense of not more than fifty dollars, or imprisonment for not more than thirty days; for the second offense within a period of twelve months by a fine of not more than one hundred dollars, or imprisonment for not more than sixty days; and for the third offense within any twelve months' period, such third offense is to be declared a misdemeanor, punishable within the discretion of the court. (1935, cc. 284, 350; 1943, c. 268, ss. 1-3; 1945, cc. 215, 254; 1949, c. 1154.)

12. In Edgecombe and Lenoir counties, by a fine, for the first offense, of not more than fifty dollars ($50.00), or imprisonment for not more than thirty days; for the second offense within a period of twelve months, by a fine of not more than one hundred dollars ($100.00), or imprisonment for not more than sixty days; and for the third offense within any twelve months' period such offense is declared a misdemeanor, punishable as a misdemeanor within the discretion of the court. (1937, c. 95; 1949, c. 217.)

15. It shall be unlawful for any person to be drunk and disorderly in any public place or on any public road or street in Avery county, and any person convicted of a violation hereof shall be guilty of a misdemeanor and fined not less than ten dollars ($10.00) nor more than fifty dol-

lars ($50.00) for each offense, or be imprisoned not exceeding thirty days, at the discretion of the court. (1947, c. 12, s. 2; c. 445; 1949, c. 891.)

Editor's Note.—The first 1945 amendment transferred Catawba County from subsection 1 to subsection 10. The second 1945 amendment transferred Harnett County from subsection 10 to subsection 1. The 1947 amendments struck out "Avery" from the list of counties in subsection 1, inserted "Lenoir" therein and added subsection 15.

The 1949 amendments inserted "Davidson" in the list of counties in subsection 1; transferred Graham County from subsection 1 to subsection 8; transferred Lenoir County from subsection 1 to subsection 12; increased the maximum punishment in Wake County; made "Caldwell" subject to subsection 10; and changed the law relating to Avery County. Chapter 1193 of Session Laws 1949 superseded chapter 49, which provided for the insertion of Davidson County in subsection 11.

Only the subsections affected by the amendments are set out.

Public-Local Laws 1929, c. 1, and Public-Local Laws 1931, c. 32, changed the punishment for conviction of public drunkenness in Macon County, as provided in subsection 13 of this section, to a fine of not less than ten dollars, nor more than fifty dollars, or imprisonment for 30 days.

Art. 43. Vagrants and Tramps.

§ 14-336. Persons classed as vagrants.

Insufficient Warrant.—A warrant charging defendant with living in the county without visible means of support and without working is insufficient to charge defendant with vagrancy. State v. Harris, 229 N. C. 413, 50 S. E. (2d) 1.

Sufficiency of Evidence.—Evidence in a prosecution under this section held insufficient to support a conviction. State v. Oldham, 224 N. C. 415, 30 S. E. (2d) 318.

Art. 46. Regulation of Landlord and Tenant.

§ 14-358. Local: Violation of certain contracts between landlord and tenant.—If any tenant or cropper shall procure advances from his landlord to enable him to make a crop on the land rented by him, and then willfully abandon the same without good cause and before paying for such advances with intent to defraud the landlord; or if any landlord shall contract with a tenant or cropper to furnish him advances to enable him to make a crop, and shall willfully fail or refuse, without good cause, to furnish such advances according to his agreement with intent to defraud the tenant, he shall be guilty of a misdemeanor and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. Any person employing a tenant or cropper who has violated the provisions of this section, with knowledge of such violation, shall be liable to the landlord furnishing such advances for the amount thereof, and shall also be guilty of a misdemeanor, and fined not exceeding fifty dollars or imprisoned not exceeding thirty days. This section shall apply to the following counties only: Alamance, Alexander, Beaufort, Bertie, Bladen, Cabarrus, Camden, Caswell, Chatham, Chowan, Cleveland, Columbus, Craven, Cumberland, Currituck, Duplin, Edgecombe, Gaston, Gates, Greene, Halifax, Harnett, Hertford, Johnston, Jones, Lee, Lenoir, Lincoln, Martin, Mecklenburg, Montgomery, Nash, Northampton, Onslow, Pamlico, Pender, Perquimans, Pitt, Randolph, Robeson, Rockingham, Rowan, Rutherford, Sampson, Stokes, Surry, Tyrrell, Vance, Wake, Warren, Washington, Wayne and Wilson. (Rev., s. 3366; 1905, cc. 297, 383, 445, 820; 1907, c. 84, s. 1; 1907, c. 595, s. 1; 1907, cc. 8, 639, 719, 869; Ex. Sess. 1920, c. 26; 1925, c. 285, s. 2; Pub. Loc. 1925, c. 211; Pub. Loc. 1927, c. 614; 1931, c. 136, s. 1; 1945, c. 635; C. S. 4480.)

Editor's Note.—

The 1945 amendment inserted the words "with intent to defraud the landlord" in line six, and the words "with intent to defraud the tenant" following the word "agreement" in line eleven. It also rearranged the names of the various counties in the section so as to appear in alphabetical order.

Yadkin County was added to the list of counties contained in this section by Public-Local Laws, 1915, c. 18.

§ 14-359. Local: Tenant neglecting crop; landlord failing to make advances; harboring or employing delinquent tenant.—If any tenant or cropper shall procure advances from his landlord to enable him to make a crop on the land rented by him, and then willfully refuse to cultivate such crops or negligently or willfully abandon the same without good cause and before paying for such advances with intent to defraud the landlord; or if any landlord who induces another to become tenant or cropper by agreeing to furnish him advances to enable him to make a crop, shall willfully fail or refuse without good cause to furnish such advances according to his agreement with intent to defraud the tenant, or if any person shall entice, persuade or procure any tenant, lessee or cropper, who has made a contract agreeing to cultivate the land of another, to abandon or to refuse or fail to cultivate such land with intent to defraud the landlord, or after notice shall harbor or detain on his own premises, or on the premises of another, any such tenant, lessee or cropper, he shall be guilty of a misdemeanor and shall be fined not more than fifty dollars or imprisoned not more than thirty days. Any person who employs a tenant or cropper who has violated the provisions of this section, with knowledge of such violation, shall be liable to the landlord furnishing such advances for the amount thereof. This section shall apply only to the following counties: Alamance, Anson, Cabarrus, Davidson, Franklin, Granville, Halifax, Harnett, Hertford, Hoke, Hyde, Lee, Lincoln, Moore, Person, Randolph, Richmond, Rockingham, Rowan, Rutherford, Sampson, Stanly, Stokes, Union, Vance, Wake and Washington. (Rev., s. 3367; 1905, c. 299, ss. 1-7; 1907, c. 84, s. 2; 1907, c. 238, s. 1; 1907, c. 595, s. 2; 1907, cc. 543, 810; Ex. Sess. 1920, cc. 20, 26; 1923, c. 32; 1925, c. 285, s. 3; Pub. Loc. 1927, c. 614; 1929, c. 5, s. 1; 1931, c. 44; 1931, c. 136, s. 2; 1939, c. 95; 1945, c. 635; 1949, c. 83; C. S. 4481.)

Editor's Note.—

The 1945 amendment inserted provisions relating to intent to defraud, and rearranged the names of the various counties in the section so as to appear in alphabetical order. The 1949 amendment made this section applicable to Hoke County.

Art. 48. Animal Diseases.

§ 14-364: Repealed by Session Laws 1945, c. 635.

Art. 52. Miscellaneous Police Regulations.

§ 14-387: Repealed by Session Laws 1945, c. 635.

§ 14-394. Anonymous or threatening letters, mailing or transmitting.

Circumstantial evidence of defendant's guilt of transmitting a threatening letter held sufficient to sustain conviction and overrule defendant's motion for judgment as of nonsuit. State v. Strickland, 229 N. C. 201, 49 S. E. (2d) 469.

§ 14-401.3. Inscription on gravestone or monument charging commission of crime.—It shall be

illegal for any person to erect or cause to be erected any gravestone or monument bearing any inscription charging any person with the commission of a crime, and it shall be illegal for any person owning, controlling or operating any cemetery to permit such gravestone to be erected and maintained therein. If such gravestone has been erected in any graveyard, cemetery or burial plot, it shall be the duty of the person having charge thereof to remove and obliterate such inscription. Any person violating the provisions of this section shall be guilty of a misdemeanor and fined or imprisoned, or both, in the discretion of the court. (1949, c. 1075.)

§ 14-401.4. Identifying marks on machines and apparatus.—Whoever removes, alters, defaces, covers, or destroys the manufacturer's serial number, or any other manufacturer's number or distinguishing number or identification mark, upon any machine or other apparatus, for the purpose of concealing or destroying the identity of any such machine or other apparatus, or takes in his possession any such machine or apparatus from which the manufacturer's serial number, or any other manufacturer's number or distinguishing number or identification mark, has been removed, altered, defaced, covered, or destroyed for the purpose of concealing or destroying the identity of such machine or other apparatus, knowing at the time of taking possession, of such removal, alteration, defacement, covering, or destruction and with the intent to defraud shall be guilty of a misdemeanor, and upon plea of guilty or conviction shall be punished in the discretion of the court: Provided, that this section shall not be construed to apply to electric storage batteries. (1949, c. 928.)

Art. 53. Sale of Weapons.

§ 14-402. Sale of certain weapons without permit forbidden.—It shall be unlawful for any person, firm, or corporation in this state to sell, give away, or dispose of, or to purchase or receive, at any place within the state from any other place within or without the state, unless a license or permit therefor shall have first been obtained by such purchaser or receiver from the clerk of the superior court of the county in which such purchase, sale, or transfer is intended to be made, any pistol, so-called pump-gun, bowie knife, dirk, dagger, slung-shot, blackjack or metallic knucks. (1947, c. 781.)

Editor's Note.—
The 1947 amendment inserted "slung-shot" and "blackjack" in the list of weapons in the first paragraph. As the second paragraph was not affected by the amendment it is not set out.

Art. 54. Sale, etc., of Pyrotechnics.

§ 14-410. Manufacture, sale and use of pyrotechnics prohibited; public exhibitions permitted; common carriers not affected.—It shall be unlawful for any individual, firm, partnership or corporation to manufacture, purchase, sell, deal in, transport, possess, receive, advertise, use or cause to be discharged any pyrotechnics of any description whatsoever within the state of North Carolina: Provided, however, that it shall be permissible for pyrotechnics to be exhibited, used or discharged at public exhibitions, such as fairs, carnivals, shows of all descriptions and public celebrations: Provided, further, that the use of said pyrotechnics in connection with public exhibitions, such as fairs, carnivals, shows of all descriptions and public celebrations, shall be under supervision of experts who have previously secured written authority from the board of county commissioners of the county in which said pyrotechnics are to be exhibited, used or discharged: Provided, further, that it shall not be unlawful for a common carrier to receive, transport, and deliver pyrotechnics in the regular course of its business. (1947, c. 210, s. 1.)

§ 14-411. Sale deemed made at site of delivery.—In case of sale or purchase of pyrotechnics, where the delivery thereof was made by a common or other carrier, the sale shall be deemed to be made in the county wherein the delivery was made by such carrier to the consignee. (1947, c. 210, s. 2.)

§ 14-412. Possession prima facie evidence of violation. — Possession of pyrotechnics by any person, for any purpose other than those permitted under this article, shall be prima facie evidence that such pyrotechnics are kept for the purpose of being manufactured, sold, bartered, exchanged, given away, received, furnished, otherwise disposed of, or used in violation of the provisions of this article. (1947, c. 210, s. 3.)

§ 14-413. Permits for use at public exhibitions.—For the purpose of enforcing the provisions of this article, the board of county commissioners of any county are hereby empowered and authorized to issue permits for use in connection with the conduct of public exhibitions, such as fairs, carnivals, shows of all descriptions and public exhibitions, but only after satisfactory evidence is produced to the effect that said pyrotechnics will be used for the aforementioned purposes and none other. (1947, c. 210, s. 4.)

§ 14-414. Pyrotechnics defined; exceptions.—For the proper construction of the provisions of this article, "pyrotechnics," as is herein used, shall be deemed to be and include any and all kinds of fireworks and explosives, which are used for exhibitions or amusement purposes: Provided, however, that nothing herein contained shall prevent the manufacture, purchase, sale, transportation, and use of explosives or signaling flares used in the course of ordinary business or industry, or shells or cartridges used as ammunition in firearms. (1947, c. 210, s. 5.)

§ 14-415. Violation made misdemeanor.—Any person violating any of the provisions of this article, except as otherwise specified in said article, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court. (1947, c. 210, s. 6.)

Art. 55. Handling of Poisonous Reptiles.

§ 14-416. Handling of poisonous reptiles declared public nuisance and criminal offense.—The intentional exposure of human beings to contact with reptiles of a venomous nature being essentially dangerous and injurious and detrimental to public health, safety and welfare, the indulgence

in and inducement to such exposure is hereby declared to be a public nuisance and a criminal offense, to be abated and punished as provided in this article. (1949, c. 1084, s. 1.)

§ 14-417. Regulation of ownership or use of poisonous reptiles.—It shall be unlawful for any person to own, possess, use, or traffic in any reptile of a poisonous nature whose venom is not removed, unless such reptile is at all times kept securely in a box, cage, or other safe container in which there are no openings of sufficient size to permit the escape of such reptile, or through which such reptile can bite or inject its venom into any human being. (1949, c. 1084, s. 2.)

§ 14-418. Prohibited handling of reptiles or suggesting or inducing others to handle.—It shall be unlawful for any person to intentionally handle any reptile of a poisonous nature whose venom is not removed, by taking or holding such reptile in bare hands or by placing or holding such reptile against any exposed part of the human anatomy, or by placing their own or another's hand or any other part of the human anatomy in or near any box, cage, or other container wherein such reptile is known or suspected to be. It shall also be unlawful for any person to intentionally suggest, entice, invite, challenge, intimidate, exhort or otherwise induce or aid any person to handle or expose himself to any such poisonous reptile in any manner defined in this article. (1949, c. 1084. s. 3.)

§ 14-419. Investigation of suspected violations; seizure and examination of reptiles; destruction or return of reptiles.—In any case in which any law enforcement officer has reasonable grounds to believe that any of the provisions of this article have been or are about to be violated, it shall be the duty of such officer and he is hereby authorized, empowered, and directed to immediately investigate such violation or impending violation and to forthwith seize the reptile or reptiles involved, and all such officers are hereby authorized and directed to deliver such reptiles to the respective county health authorities for examination and tests of such reptiles by such authorities or other qualified authorities to which the county health authorities may refer the same, for the purpose of ascertaining whether said reptiles contain venom and are poisonous. If such health authorities, or other qualified authorities designated by them to make such examinations and tests, find that said reptiles are dangerously poisonous, it shall be the duty of the officers making the seizure, and they are hereby authorized and directed to forthwith destroy such reptiles; but if said health authorities, or other qualified authorities by them designated to make such examination and tests, find that the reptiles are not dangerously poisonous, and are not and cannot be harmful to human life, safety, health or welfare, then it shall be the duty of such officers to return the said reptiles to the person from whom they were seized. (1949, c. 1084, s. 4.)

§ 14-420. Arrest of persons violating provisions of article.—If the examination and tests made by the county health or other qualified authorities as provided herein show that such reptiles are dangerously poisonous, it shall be the duty of the officers making the seizure, in addition to destroying such reptiles, also to arrest all persons violating any of the provisions of this article. (1949, c. 1084, s. 5.)

§ 14-421. Exemptions from provisions of article.—This article shall not apply to the possession, exhibition, or handling of reptiles by employees or agents of duly constituted museums, laboratories, educational or scientific institutions in the course of their educational or scientific work. (1949, c. 1084, s. 6.)

§ 14-422. Violation made misdemeanor.—Any person violating any of the provisions of this article shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court. (1949, c. 1084, s. 7.)

Chapter 15. Criminal Procedure.

Art. 1. General Provisions.

§ 15-4. Accused entitled to counsel.

Right Is a Mandate in Capital Felony Cases.—The right to have counsel as well as the right of confrontation is guaranteed. Art. I, sec. 11, N. C. Const. Where the crime charged is a capital felony this right becomes a mandate. State v. Farrell, 223 N. C. 321, 327, 26 S. E. (2d) 322; State v. Hedgebeth, 228 N. C. 259, 45 S. E. (2d) 563; In re Taylor, 229 N. C. 297, 49 S. E. (2d) 749; In re Taylor, 230 N. C. 566, 53 S. E. (2d) 857. See note to § 15-5. As to right made statutory, see § 15-4.1.

And Discretionary in Cases Less than Capital.—The appointment of counsel for a defendant charged with felonies less than capital is within the discretion of the trial court. In re Taylor, 230 N. C. 566, 53 S. E. (2d) 857.

A defendant has the constitutional right to be represented by counsel, and to have counsel assigned if requested where the circumstances are such as to show apparent necessity of counsel to protect his rights, but in the absence of request the propriety of providing counsel for a person accused of an offense less than a capital felony rests in the

sound discretion of the trial judge. State v. Chesson, 228 N. C. 259, 45 S. E. (2d) 563.

Petition for Writ of Coram Nobis Granted for Failure to Appoint Counsel.—Where verified petition for leave to apply to the superior court for writ of error coram nobis, the record in the cases in which petitioner was convicted, and habeas corpus proceedings instituted by him, make it appear that petitioner was confronted with indictments for capital offenses and indictments for felonies less than capital, and that the trial court failed to appoint counsel to represent him notwithstanding his alleged inability to employ counsel and his request for counsel, the petition will be allowed in respect of the capital felonies and denied in respect of the felonies less than capital upon such prima facie showing. In re Taylor, 230 N. C. 566, 53 S. E. (2d) 857.

Counsel Allowed Reasonable Time to Prepare Case.—The two—the right to counsel and the right of confrontation—are closely interrelated and, together, form an integral part of a fair trial. Hence, this requirement as incorporated in this section, was not intended to be a mere formality. It does not contemplate that counsel shall "be compelled to act without being allowed reasonable time within which to understand the case and prepare for the defense." State v. Farrell, 223 N. C. 321, 327, 26 S. E. (2d) 322. See note to Art. I, § 11, N. C. Const.

§ 15-4.1. Appointment of counsel for indigent defendants in capital cases; continuance where appointment delayed.—When any person is bound over to the superior court to await trial for an offense for which the punishment may be death, the clerk of the superior court in the county shall, if he believes that the accused may be unable to employ counsel, within five days notify the resident judge of the district or any superior court judge holding the courts of the district and request the immediate appointment of counsel to represent the accused. If the judge is satisfied that the accused is unable to employ counsel, he shall appoint counsel to represent the accused as soon as may be practicable. He may appoint counsel at any time regardless of whether notified by the clerk and before preliminary examination.

In any capital case where the appointment of counsel is delayed until the term of court at which the accused is arraigned, on motion of counsel for the accused the case shall be continued until the next ensuing term of criminal court. (1949, c. 112.)

Editor's Note.—For brief comment on section, see 27 N. C. Law Rev. 422.

§ 15-5. Fees allowed counsel assigned to defend in capital case.

Counsel in Capital Cases Mandatory.—This section indicates that in capital felonies the provisions of § 11, Article I of the Constitution and G. S., § 15-4 relative to counsel are regarded as not merely permissive but mandatory. State v. Hedgebeth, 228 N. C. 259, 45 S. E. (2d) 563.

§ 15-10.1. Detainer; purpose; manner of use.—Any person confined in the state prison of North Carolina, subject to the authority and control of the state highway and public works commission, or any person confined in any other prison of North Carolina, may be held to account for any other charge pending against him only upon a written order from the court in which the charge originated upon a case regularly docketed, directing that such person be held to answer the charge pending in such court; and in no event shall the prison authorities hold any person to answer any charge upon a warrant or notice when the charge has not been regularly docketed in the court in which the warrant or charge has been issued: Provided, that this section shall not apply to any state agency exercising supervision over such person or prisoner by virtue of a judgment, order of court or statutory authority. (1949, c. 303.)

Art. 3. Warrants.

§ 15-18. Who may issue warrant.

Local Modification.—City of Concord: 1945, c. 82.

§ 15-21. Where warrant may be executed.

Editor's Note.—For statute affecting this section as to warrants issued by a justice of the peace or by the chief officer of a city or town, see § 15-22 as amended by Session Laws 1949, c. 168.

§ 15-22. Warrant indorsed or certified and served in another county.

Whenever a justice of the peace or the chief officer of a city or town shall attach to his warrant a certificate under the hand and seal of the clerk of the superior court of his county certifying that he is a justice of the peace of the county or the chief officer of a city or town in the county and that the warrant bears his genuine signature, the warrant may be executed in any part of the state in like manner as warrants issued by justices of the supreme court, judges of the superior court, or judges of criminal courts without any indorsement of any justice of the peace or magistrate of the county in which it may be served. (Rev., s. 3160; Code, s. 1136; 1917, c. 30; 1901, c. 668; 1868-9, c. 178, subc. 3, s. 5; 1949, c. 168; C. S. 4526.)

Editor's Note.—The 1949 amendment added the above sentence at the end of this section. As the rest of the section was not affected by the amendment it is not set out. See 27 N. C. Law Rev. 451.

Art. 4. Search Warrants.

§ 15-25. In what cases issued, and where executed.—If any credible witness shall prove, upon oath, before any justice of the peace, or mayor of any city, or chief magistrate of any incorporated town, or the clerk of any court inferior to the superior court, that there is a reasonable cause to suspect that any person has in his possession, or on his premises, any property stolen, or any and all personal property and all tickets, books, papers and documents used in connection with and operation of lotteries or any gaming or gambling, or any false or counterfeit coin resembling, or apparently intended to resemble, or pass for, any current coin of the United States, or of any other state, province or country, or any instrument, tool or engine whatsoever, adapted or intended for the counterfeiting of any such coin; or any false and counterfeit notes, bills or bonds of the United States, or of the state of North Carolina, or of any other state or country, or of any county, city or incorporated town; or any instrument, tool or engine whatsoever, adapted or intended for the counterfeiting of such note, bill or bond, it shall be lawful for such justice, mayor or chief magistrate of any incorporated town to grant a warrant, to be executed within the limits of his county or of the county in which such city or incorporated town is situated, and for the clerk of any court inferior to the superior court to grant a warrant, to be executed within the territorial jurisdiction of such court, all such warrants to be directed to any proper officer, authorizing him to search for such property, and to seize the same, and to arrest the person having in possession or on whose premises may be found such stolen property, or any and all personal property and all tickets, books, papers and documents used in connection with and operation of lotteries or any gaming or gambling, counter-

feit coin, counterfeit notes, bills or bonds, or the instruments, tools or engines for making the same, and to bring them before any magistrate of competent jurisdiction, to be dealt with according to law. (Rev., s. 3163; Code, s. 1171; 1868-9, c. 178, subc. 3, s. 38; 1941, c. 53; 1949, c. 1179; C. S. 4529.)

Editor's Note.—The 1949 amendment authorized the issuance of search warrants by clerks of courts inferior to the superior court.

Ordinarily officers of the law may not invade one's home except under authority of a search warrant issued in accord with pertinent statutory provisions. In re Walters, 229 N. C. 111, 47 S. E. (2d) 709.

Respondent refused to permit officers to enter his home for the purpose of serving civil process on a third person. There was no evidence that the person sought was actually in respondent's home at the time. It was held that respondent was within his rights in refusing admittance to the officers, and his act in so doing cannot be held for contempt of court on the ground that it tended to obstruct or embarrass the administration of justice. Id.

Art. 6. Arrest.

§ 15-39. Persons present may arrest for breach of peace.

Cited in State v. Phillips, 229 N. C. 538, 50 S. E. (2d) 306.

§ 15-41. When officer may arrest without warrant.

Applied in State v. Hooper, 227 N. C. 633, 44 S. E. (2d) 42.

§ 15-46. Procedure on arrest without warrant.

Duty of City Police Officer.—A police officer within the limits of his city may summarily and without warrant arrest a person for a misdemeanor committed in his presence. But in such case it is the duty of the officer to inform the person arrested of the charge against him and immediately take him before someone authorized to issue criminal warrants and have warrant issued, giving him opportunity to provide bail and communicate with counsel and friends. Perry v. Hurdle, 229 N. C. 216, 49 S. E. (2d) 400.

§ 15-47. Arresting officer to inform offender of charge, allow bail except in capital cases, and permit communication with counsel or friends.

Where accused persons were informed of the charge against them as required by this section and none of them made a request to be allowed to communicate with relatives or friends or to obtain counsel, objection to the failure of officers to inform them of the charge against them and their right to have counsel, cannot be sustained. State v. Thompson, 224 N. C. 661, 32 S. E. (2d) 24.

Art. 8. Extradition.

§ 15-55. Definitions.

Cross Reference.—

The cross reference in original to Appendix VI should be to Appendix IV.

§ 15-78. Costs and expenses.

Where defendant paid expenses of sheriff in returning him to state without extradition, it was held error to order the state to pay such expenses of the sheriff under this section. State v. Patterson, 224 N. C. 471, 31 S. E. (2d) 380.

§ 15-79. Immunity from service of process in certain civil actions.

A nonresident defendant is not exempt from service of civil process while his presence in the state is in compliance with the conditions of a bail bond. Hare v. Hare, 228 N. C. 740, 46 S. E. (2d) 840.

A nonresident defendant in a criminal proceeding pending in the state is immune from personal service of process in a civil action arising out of the same facts as the criminal proceeding only when he is brought into the state by, or after waiver of extradition proceeding. By the same token, if such defendant be immune from personal service of such process only under those circumstances, his property within the state would be immune from attachment and garnishment only when so brought into the state by defendant. White v. Ordille, 229 N. C. 490, 50 S. E. (2d) 499.

§ 15-82. No right of asylum; no immunity from other criminal prosecution while in this state.

Quoted in Hare v. Hare, 228 N. C. 740, 46 S. E. (2d) 840.
Cited in White v. Ordille, 229 N. C. 490, 50 S. E. (2d) 499.

Art. 9. Preliminary Examination.

§ 15-89. Prisoner examined; advised of rights.

Application of Section.—The provisions of this section are applicable only to preliminary judicial examinations. State v. Grass, 223 N. C. 31, 32, 25 S. E. (2d) 193.

Distinction between Examination under This Section and That under § 8-54.—There is a distinction between the statement made by a prisoner on his preliminary examination before a magistrate under this section, and his testimony given under § 8-54, as a witness on the trial of the cause. On the former, he is to be advised of his rights, the examination is not under oath, and, should it be taken contrary to the statute, it may not be used against him at the trial. On the latter, accused, at his own request, but not otherwise, is competent but not compellable to testify and his testimony thus given is under oath and may be used at any subsequent stage of the prosecution. State v. Farrell, 223 N. C. 804, 28 S. E. (2d) 560.

Confession Admissible Though Defendant Not Advised of His Rights.—In a prosecution for murder, where defendant confessed shortly after the homicide to officers, one of whom was the coroner, such confession is not inadmissible because defendant was not advised of his rights under this section. State v. Grass, 223 N. C. 31, 25 S. E. (2d) 193.

§ 15-91. Answers in writing, read to prisoner, signed by magistrate.

Cross Reference.—As to testimony being used as evidence, see § 15-100 and notes.

§ 15-100. Proceedings certified to court; used as evidence.

In General.—

The effect of this section and §§ 15-88 and 15-91 is to extend the common-law principle, and their purpose was to make these preliminary examinations, when properly taken, certified and filed, in the nature of an official record, to be read in evidence on mere identification, and they do not and were not intended to restrict or entrench upon the common-law principle that evidence of this kind, when repeated by a witness under proper oath, and who can and does swear that his statements contain the substance of the testimony as given by the dead or absent witness, shall be received in evidence on the second trial. And well considered authority is to the effect that stenographers' notes, when the stenographer who took them goes on the stand and swears that they are accurate and correctly portray the evidence as given by the witness, come well within the principle. State v. Ham, 224 N. C. 128, 131, 29 S. E. (2d) 449.

Art. 10. Bail.

§ 15-102. Officers authorized to take bail, before imprisonment.

Accused May Deposit Cash in Lieu of Bond.—The law contemplates that a defendant in a criminal prosecution may give security for his appearance to answer to the charge and the supreme court has held that the fact that defendant of his own volition, chooses to deposit the amount of the bond required in cash is not a violation of the statute, but a compliance with its spirit and meaning. White v. Ordille, 229 N. C. 490, 50 S. E. (2d) 499, citing State v. Mitchell, 151 N. C. 716, 66 S. E. 202.

Cash deposited by accused as security for his appearance remains his property subject to the conditions of a recognizance, the justice of the peace becoming the custodian of the cash for the benefit of the state only in so far as the debt of accused to the state is concerned. If defendant fails to perform the conditions, the deposit will be subject to forfeiture. But if he perform the conditions, the cash deposit would be returnable to him. This is a right which he may enforce against the custodian of the deposit. White v. Ordille, 229 N. C. 490, 50 S. E. (2d) 499.

And Is Liable to Attachment.—A defendant in a criminal prosecution in a justice of the peace court of the state of North Carolina, who is a nonresident of the state, and who voluntarily deposits with the justice of the peace cash in lieu of bond for his appearance before the justice of the peace for a preliminary hearing, has such property right and interest in the deposit as is liable to attachment and

garnishment at the instance of his creditor pending such preliminary hearing. White v. Ordille, 229 N. C. 490, 50 S. E. (2d) 499.

§ 15-105. Bail allowed on preliminary examination.

Recognizance Explained.—
A recognizance in a criminal proceeding is an acknowledgment by the defendant that he is indebted to the state in an amount fixed by the court, conditioned upon his personal appearance at a time and place specified by the court to answer the charge against him, to stand and abide the judgment of the court and not to depart without leave of court. White v. Ordille, 229 N. C. 490, 50 S. E. (2d) 499.

§ 15-107. Sheriff or deputy may take bail.

Local Modification.—Haywood: 1945, c. 875.

Art. 11. Forfeiture of Bail.

§ 15-116. Judges may remit forfeited recognizances.

Trial Judge Has Discretion.—
In accord with 2nd paragraph in original. See State v. Clarke, 222 N. C. 744, 24 S. E. (2d) 619; State v. Wiggins, 228 N. C. 76, 44 S. E. (2d) 471.

Art. 13. Venue.

§ 15-134. Improper venue met by plea in abatement; procedure.

Crime Where Alleged.—
Where there is no challenge to the indictment prior to a plea of guilty, under this section the offense is deemed to have been committed in the county alleged in the indictment. State v. McKeon, 223 N. C. 404, 26 S. E. (2d) 914.

Art. 15. Indictment.

§ 15-143. Bill of particulars.

Granting Order Is within Court's Discretion.—
The granting or denial of motions for bills of particulars is within the discretion of the court and not subject to review except for palpable and gross abuse thereof. State v. Lippard, 223 N. C. 167, 25 S. E. (2d) 594.

§ 15-144. Essentials of bill for homicide.

What Is Sufficient under Section.—
An indictment of murder in the first degree need not allege deliberation and premeditation, an indictment in the form prescribed by this section being sufficient. State v. Kirksey, 227 N. C. 445, 446, 42 S. E. (2d) 613.

Statements Not Necessary.—
A bill of indictment, drawn in the statutory form as required by this section, includes the charge of murder committed in the perpetration of a robbery, without a specific allegation or count to that effect. State v. Smith, 223 N. C. 457, 27 S. E. (2d) 114.

Variance between Allegata and Probata.—Where indictment charged capital felony of murder in the language of this section and contained every necessary averment, proof that murder was committed in the perpetration of felony constituted no variance between allegata and probata. State v. Mays, 225 N. C. 486, 35 S. E. (2d) 494.

§ 15-152. Separate counts; consolidation.

When Order of Consolidation Made in Capital Cases.—
An order of consolidation in capital cases will be made when seasonably brought to the court's attention, and not at a time when the validity of the whole trial might be threatened by the consolidation. State v. Harris, 223 N. C. 697, 28 S. E. (2d) 232.

Motion to Consolidate Is Not an Assent to a Mistrial.—
A motion to consolidate three capital cases in medias res pending the taking of testimony on the trial of one of them, is not an assent to a mistrial in order to effect a consolidation. State v. Harris, 223 N. C. 697, 28 S. E. (2d) 232.

Consolidation Is within Discretionary Power of Trial Court.—
Upon the consolidation and trial together over defendants' objection of two indictments the first against all three of defendants for abduction of a fourteen-year-old girl, and the second against two of the three defendants for an assault with intent to commit rape upon the abducted child during the abduction, while a verdict of guilty on the first charge and a verdict of not guilty on the second would seem to render the exception to the consolidation feckless, the right to consolidate was in the sound discretion of the trial court. State v. Truelove, 224 N. C. 147, 29 S. E. (2d) 460.

Entering Judgment on Each Offense upon General Verdict of Guilty.—
Ordinarily where separate bills of indictment are returned and the bills are consolidated for trial, as authorized by this section, the counts contained in the respective bills will be treated as though they were separate counts in one bill, and where there are several counts and each count is for a distinct offense, a general verdict of guilty will authorize the imposition of a judgment on each count. State v. Braxton, 230 N. C. 312, 52 S. E. (2d) 895.

§ 15-153. Bill or warrant not quashed for informality.

II. GENERAL EFFECT.

Liberal Construction.—
This section provides against quashal for mere informality or refinement, and judgments are no longer stayed or reversed for non-essential or minor defects. State v. Davenport, 227 N. C. 475, 491, 42 S. E. (2d) 686.

Where the Indictment Contains Sufficient Matter, etc.—
In accord with original. See State v. Davenport, 227 N. C. 475, 491, 42 S. E. (2d) 686.

Applied in State v. Blanton, 227 N. C. 517, 42 S. E. (2d) 663.

III. DEFECTS CURED.

A. In General.

Stripping Nonessential Words from Warrant.—A warrant which, stripped of nonessential words, charges defendant with unlawful possession of a quantity of nontax-paid whiskey, is sufficient to survive a motion to quash. State v. Camel, 230 N. C. 426, 53 S. E. (2d) 313.

B. Omissions and Mistakes.

Wrong County in Caption.—
In accord with original. See State v. Davis, 225 N. C. 117, 33 S. E. (2d) 623.

The omission of the caption of a bill of indictment does not constitute ground for arrest of judgment. State v. Davis, 225 N. C. 117, 33 S. E. (2d) 623.

§ 15-155. Defects which do not vitiate.

When Time Need Not Be Charged.—
While an appeal from conviction in a recorder's court upon a warrant, charging unlawful possession on a certain date of intoxicating liquors for the purpose of sale, was pending in the Superior Court, that court had jurisdiction to try defendant on a bill of indictment of a later date charging the same offense, where the record contains nothing to show that the offenses are identical. Time is not of the essence and need not be specified in the indictment. State v. Suddreth, 223 N. C. 610, 27 S. E. (2d) 623.

Art. 17. Trial in Superior Court.

§ 15-165. Challenge to special venire same as to tales jurors.

Cited in State v. Lord, 225 N. C. 354, 34 S. E. (2d) 205; State v. Anderson, 228 N. C. 720, 47 S. E. (2d) 1.

§ 15-169. Conviction of assault, when included in charge.

Cross Reference.—As to arbitrary right of jury to convict defendant of lesser degree of the crime charged, see § 15-170 and note thereto.

When Section Applicable.—
In accord with original. See State v. Sawyer, 224 N. C. 61, 29 S. E. (2d) 34.

Same—Assault with Intent to Rape.—
Upon an indictment for an assault with intent to commit rape, even though the evidence is insufficient to support a verdict, motion for judgment of dismissal or nonsuit cannot be granted, as defendant may be convicted of an assault. State v. Gay, 224 N. C. 141, 29 S. E. (2d) 458.

Where in a prosecution under a bill of indictment charging assault with intent to commit rape the evidence discloses an assault but is insufficient to prove the intent necessary for a conviction of this offense, defendant is entitled to nonsuit on the offense charged, but is not entitled to his discharge, since he may be convicted under the bill of indictment for assault upon a female as though this offense had been separately charged in the bill. State v. Moore, 227 N. C. 326, 42 S. E. (2d) 84.

Where Jury's Verdict Is for an Offense of Lesser Degree.—Where all the evidence points to a graver crime and

the jury's verdict is for an offense of a lesser degree, although illogical and incongruous, it will not be disturbed, since it is favorable to accused. State v. Bentley, 223 N. C. 563, 27 S. E. (2d) 738.

Applied in State v. Johnson, 227 N. C. 587, 42 S. E. (2d) 685; State v. Lunsford, 229 N. C. 229, 49 S. E. (2d) 410, treated in note under § 15-170.

Cited in State v. Gregory, 223 N. C. 415, 27 S. E. (2d) 140; State v. Farrell, 223 N. C. 804, 28 S. E. (2d) 560; State v. Bell, 228 N. C. 659, 46 S. E. (2d) 834, treated under § 15-170.

§ 15-170. Conviction for a less degree or an attempt.

Indictment for Attempt or Complete Offense.—In accord with original. See State v. Parker, 224 N. C. 524, 31 S. E. (2d) 531.

Defendant Entitled to Complete Charge.—In accord with 2nd paragraph in original. See State v. DeGraffenreid, 223 N. C. 461, 27 S. E. (2d) 130.

And Conviction of Offense Charged Does Not Cure Error.—A verdict of guilty of the offense charged in the indictment does not cure error of the court in failing to submit to the jury the question of defendant's guilt of less degrees of the crime. State v. McNeill, 229 N. C. 377, 49 S. E. (2d) 733.

The general rule of practice is, that when it is permissible under the indictment to convict the defendant of "a less degree of the same crime," and there is evidence to support the milder verdict, the defendant is entitled to have the different views arising on the evidence presented to the jury under proper instructions, and an error in this respect is not cured by a verdict finding the defendant guilty of a higher degree of the same crime, for in such case, it cannot be known whether the jury would have convicted of the lesser degree if the different views, arising on the evidence, had been correctly presented in the court's charge. State v. Childress, 228 N. C. 208, 45 S. E. (2d) 42.

Evidence Must Justify Conviction in Lesser Degree.—In accord with 3rd paragraph in original. See State v. Sawyer, 224 N. C. 61, 29 S. E. (2d) 34.

A defendant may be convicted of a less degree of the crime charged, or for which he is being tried, when there is evidence to support the milder verdict. State v. Jordan, 226 N. C. 155, 37 S. E. (2d) 111, 112; State v. Locklear, 226 N. C. 410, 38 S. E. (2d) 162, 163.

Where the evidence was sufficient to carry the case to the jury upon the charge of assault with intent to commit rape but the jury returned a verdict of guilty of an assault upon a female, the defendant being a male person over 18 years of age, such verdict was authorized by this section. State v. Morgan, 225 N. C. 549, 35 S. E. (2d) 621.

Where the evidence justified such action, the court properly charged the jury that defendant might be acquitted of felonious assault and battery with intent to kill charged in the indictment, and convicted of an assault of lower degree, namely, an assault with a deadly weapon. State v. Anderson, 230 N. C. 54, 51 S. E. (2d) 895.

Uncontradicted Evidence Showing Defendant Guilty of More Serious Offense.—This and the preceding section were not intended to give to the jury the arbitrary right or discretion to convict a defendant of a lesser degree of the crime charged or of a less serious offense than that charged, if the uncontradicted evidence shows beyond a reasonable doubt that the defendant is guilty of the more serious offense charged in the bill of indictment. State v. Brown, 227 N. C. 383, 42 S. E. (2d) 402.

Where all the evidence tends to show that defendants feloniously took money from the person of prosecuting witness by violence and against his will through the use or threatened use of firearms, the court properly limits the jury to a verdict of guilty of robbery with firearms or a verdict of not guilty, there being no evidence warranting court in submitting the question of defendants' guilt of less degrees of the crime. State v. Bell, 228 N. C. 659, 46 S. E. (2d) 834.

It would be without precedent to try defendant for one offense and to convict him of another and greater offense, even though the conviction be of a higher degree of the same offense for which he is being tried. State v. Jordan, 226 N. C. 155, 37 S. E. (2d) 111, 112.

Instruction Limiting Verdict to Less Degree.—In accord with original. See State v. Gay, 224 N. C. 141, 29 S. E. (2d) 458.

In a prosecution for murder, where the evidence raises a question as to whether or not the killing was intentional, this section requires that the question of the defendant's guilt of manslaughter be submitted to the jury with proper instructions. State v. McNeill, 229 N. C. 377, 49 S. E. (2d) 733.

Where there is evidence to support a charge of murder and evidence to support the defendant's plea of homicide by misadventure, and also evidence of manslaughter, this section requires that the "less degree of the same crime" be submitted to the jury with proper instructions. State v. Childress, 228 N. C. 208, 45 S. E. (2d) 42.

In a prosecution for burglary in the first degree, it is permissible for the jury to convict the defendant of an attempt to commit burglary in the second degree. State v. Surles, 230 N. C. 272, 52 S. E. (2d) 880.

In Prosecution for Robbery.—Testimony of defendants in a prosecution for robbery that they took the pistol from prosecuting witness to prevent him from harming them or some other person, requires the court to submit the question of each defendant's guilt of simple assault to the jury as a lesser offense included in the crime charged, since such verdict would be justified in the event the jury should find that defendants took the pistol without intent to steal it, but were not warranted in doing so on the principle of self-protection. State v. Lunsford, 229 N. C. 229, 49 S. E. (2d) 410.

Applied in State v. Jones, 227 N. C. 402, 42 S. E. (2d) 465; State v. Jones, 229 N. C. 276, 49 S. E. (2d) 463.

Cited in State v. Gregory, 223 N. C. 415, 27 S. E. (2d) 140; State v. Bentley, 223 N. C. 563, 27 S. E. (2d) 738 (con. op.); State v. Farrell, 223 N. C. 804, 28 S. E. (2d) 560; State v. Grimes, 226 N. C. 523, 39 S. E. (2d) 394; State v. Lunsford, 229 N. C. 229, 49 S. E. (2d) 410; State v. Fowler, 230 N. C. 470, 53 S. E. (2d) 853.

§ 15-171. Burglary in the first degree charged, verdict for second degree.

This section relates to indictments for burglary in the first degree only, and has no bearing on an appeal from a verdict of guilty of rape. State v. Brown, 227 N. C. 383, 385, 42 S. E. (2d) 402.

Instruction as to Second Degree Burglary Mandatory.—This section gives the jury the right to render a verdict of guilty of burglary in the second degree, not only where the evidence tends to show certain facts, but, "upon the findings of facts sufficient to constitute burglary in the first degree as defined by the statute—if they deem it proper so to do." This instruction is mandatory. State v. Brown, 227 N. C. 383, 385, 42 S. E. (2d) 402; State v. Hooper, 227 N. C. 633, 635, 44 S. E. (2d) 42.

Thus, the right of the jury under this section is not dependent upon the finding of certain facts as set forth in a charge on burglary in the second degree. State v. Hooper, 227 N. C. 633, 635, 44 S. E. (2d) 42.

Conviction in Second Degree Authorized.—Under this section as amended a defendant is entitled, as a matter of right, to have the jury instructed that they may elect to render a verdict of guilty of burglary in the second degree if they deem it proper so to do. State v. McLean, 224 N. C. 704, 32 S. E. (2d) 227.

Conviction of Attempt to Commit Burglary in Second Degree.—In a prosecution for burglary in the first degree, it is permissible for the jury to convict the defendant of an attempt to commit burglary in the second degree. State v. Surles, 230 N. C. 272, 52 S. E. (2d) 880.

Permissible Verdicts When Jury Finds Facts Constituting Burglary in First Degree.—Taking §§ 14-52 and this section together, when in a case in which the charge is burglary in the first degree the jury finds from the evidence and beyond a reasonable doubt facts constituting burglary in the first degree, one of three verdicts may be returned: (1) Guilty of burglary in the first degree, which carries a mandatory death sentence; (2) guilty of burglary in the first degree, with recommendation of imprisonment for life, which calls for a sentence to life imprisonment; and (3) if the jury "deem it proper so to do," guilty of burglary in the second degree, for which the sentence may be life imprisonment, or imprisonment for a term of years in the discretion of the judge. State v. Mathis, 230 N. C. 508, 53 S. E. (2d) 666.

Verdict of Guilty in First Degree upon Trial for Burglary in Second Degree Set Aside.—See this catchline in note to § 14-51.

Cited in State v. Jordan, 226 N. C. 155, 37 S. E. (2d) 111.

§ 15-172. Verdict for murder in first or second degree.

Sufficiency of Indictment.—For a brief history of this section in connection with sufficiency of indictment for first degree murder, see State v. Kirksey, 227 N. C. 445, 42 S. E. (2d) 613.

Evidence.—
In accord with original. See State v. Gause, 227 N. C. 26, 40 S. E. (2d) 463.

§ 15-173. Demurrer to the evidence.

Compared with Section 1-183.—
In accord with original. See State v. Hill, 225 N. C. 74, 33 S. E. (2d) 470.

Ascertaining Whether Any Competent Evidence.—When the court is to rule upon a demurrer to the evidence in a criminal case, it is required merely to ascertain whether there is any competent evidence to sustain the allegations of the indictment, the evidence being construed in the light most favorable to the state. State v. Murdock, 225 N. C. 224, 34 S. E. (2d) 69.

A trial judge, in passing upon a motion for a judgment as of nonsuit, under the provisions of this section is not bound by the measure or quantum of proof by which the state must prove a defendant's guilt before the jury can convict him. State v. Davenport, 227 N. C. 475, 493, 42 S. E. (2d) 686.

Sufficiency of Evidence May Be Challenged if Motion Timely Made.—
A motion for judgment as of nonsuit, in a criminal case under this section must be made at the close of the state's evidence and, if denied, renewed at the close of all the evidence, otherwise the benefit of the exception to the court's refusal to grant the motion is lost. State v. Hill, 225 N. C. 74, 33 S. E. (2d) 470.

To present the question of the sufficiency of the evidence upon appeal, a motion to nonsuit should be made at the close of the state's evidence, and exception noted upon its denial, and if defendant introduces evidence the motion should be renewed at the close of all the evidence, and if again overruled another exception should be noted, in which event the assignment of error should be based upon the second exception. State v. Perry, 226 N. C. 530, 39 S. E. (2d) 460; State v. Weaver, 228 N. C. 39, 40, 44 S. E. (2d) 360.

Motion Must Be Renewed—Waiver.—
When defendants in a criminal prosecution, at the close of the State's evidence, move to dismiss and for nonsuit, and, after these motions are overruled, introduce evidence but fail to renew such motions at the close of all evidence, the exceptions to the refusal of such motions at the close of the State's evidence are waived. State v. Epps, 223 N. C. 740, 28 S. E. (2d) 219. See also, State v. Jackson, 226 N. C. 760, 40 S. E. (2d) 417.

Only Incriminating Evidence Need Be Considered, etc.—
On a demurrer to the evidence only the State's evidence is to be considered, and the defendant's evidence is not to be taken into account, unless it tends to explain or make clear that offered by the State. State v. Oldham, 224 N. C. 415, 416, 30 S. E. (2d) 318.

When Motion Denied.—
A motion for judgment of nonsuit must be denied, if there be any substantial evidence—more than a scintilla—to prove the allegations of the indictment. State v. Weinstein, 224 N. C. 645, 31 S. E. (2d) 920.

On trial upon an indictment for assault with a deadly weapon with intent to kill, motion for judgment of nonsuit was properly denied. State v. Oxendine, 224 N. C. 825, 32 S. E. (2d) 648.

When an intentional killing with a deadly weapon has been established, the law implies malice, and the state cannot be nonsuited. State v. Brooks, 228 N. C. 68, 71, 44 S. E. (2d) 482.

Where the evidence was substantially similar to that introduced at a former trial, decision of the supreme court on the former appeal that evidence was sufficient to be submitted to the jury is res judicata on question of nonsuit or sufficiency of evidence. State v. Stone, 226 N. C. 97, 36 S. E. (2d) 704.

Where the indictments contain two separate charges and the state takes a voluntary nonsuit upon the first count, defendant's contention that the nonsuit established his innocence of acts charged under that count which also constituted essential elements of the offense charged in the second count, must be presented by a plea of former jeopardy or former acquittal, and not by motion for judgment as of nonsuit, under this section, and the failure of a plea of former jeopardy amounts to a waiver of his rights in the premises. State v. Baldwin, 226 N. C. 295, 37 S. E. (2d) 898.

Where a complete defense is established by the State's case, on a criminal indictment, the defendant should be allowed to avail himself of a motion for nonsuit under this section. State v. Boyd, 223 N. C. 79, 25 S. E. (2d) 456; State v. Watts, 224 N. C. 771, 32 S. E. (2d) 348.

The evidence of accomplices is sufficient to carry the case to the jury and to justify a refusal of motion to nonsuit. State v. Rising, 223 N. C. 747, 28 S. E. (2d) 221.

Sufficiency of Evidence.—
In accord with 1st paragraph in original. See State v. Johnson, 226 N. C. 671, 40 S. E. (2d) 113.

On appeal in criminal cases supreme court cannot pass upon the weight of the evidence but only whether there is sufficient evidence to support conviction. State v. Shoup, 226 N. C. 69, 36 S. E. (2d) 697.

On a motion for judgment as of nonsuit in a criminal case the evidence must be considered in the light most favorable to the State. State v. Herndon, 223 N. C. 208, 25 S. E. (2d) 611. See State v. McMahan, 224 N. C. 476, 31 S. E. (2d) 357.

In a criminal prosecution, under §§ 14-290, 14-291, and 14-291.1, the court erred in the refusal of defendants' motion of nonsuit. State v. Heglar, 225 N. C. 220, 34 S. E. (2d) 76.

On a motion for judgment of nonsuit the evidence must be considered in the light most favorable for the state, and if there be any competent evidence to support the charge contained in the bill of indictment the case is one for the jury. State v. Scoggins, 225 N. C. 71, 33 S. E. (2d) 473.

On the trial of several defendants, upon an indictment for robbery, where the evidence against one of the defendants raises no more than a suspicion of his guilt, a motion to dismiss as to such defendant should be allowed. State v. Ham, 224 N. C. 128, 29 S. E. (2d) 449.

Same—Prosecution for Homicide.—In a prosecution for felonious slaying evidence held sufficient to go to the jury. State v. Stone, 224 N. C. 848, 32 S. E. (2d) 651.

Defendant's motion to nonsuit is properly denied when the evidence tends to show an intentional killing with a deadly weapon, since the credibility and sufficiency of the defendant's evidence in mitigation or excuse is for the jury to consider and decide. State v. Robinson, 226 N. C. 95, 36 S. E. (2d) 655.

Where defendant, in a prosecution for murder, admitted that he intentionally and without provocation fired the gun which resulted in the death of deceased, a police officer, to prevent deceased from arresting him, and offered no excuse or explanation in mitigation for his act, except that he did not make up his mind and determine to kill deceased, there is evidence of premeditation and deliberation and evidence sufficient to sustain a verdict of murder in the first degree, and motion for nonsuit, was properly overruled. State v. Matheson, 225 N. C. 109, 33 S. E. (2d) 590.

In a prosecution of two persons for murder, where the state's evidence tended to show that deceased was standing near another person on a city sidewalk, when the first defendant called upon deceased to stop bothering his cousin and the deceased said he was not bothering anyone, whereupon the first defendant shot a pistol at deceased twice, and then the second defendant took the gun from the first defendant and shot at deceased twice, deceased falling to the ground at the second shot and dying on the way to the hospital, there being only one wound on deceased, a shot through the heart, there is ample evidence for the jury and the first defendant's motion for judgment as of nonsuit was properly denied. State v. Williams, 225 N. C. 182, 33 S. E. (2d) 880.

Same—Murder in Perpetration of Robbery.—Where two witnesses saw two of defendants enter a store, both witnesses being present, hold up the proprietor with pistols and shoot and kill him and flee, and two other witnesses saw both of these defendants run out of the store and enter and drive away in a car with third defendant, all four of these witnesses picking out defendants from a number of prisoners in a city jail about 30 days after the homicide and positively identifying them and their car, without denial on the part of the prisoners, and other persons identifying same defendants as the perpetrators of another hold-up just before their arrest, there was sufficient identification and evidence of murder for the jury and motion for nonsuit was properly denied. State v. Biggs, 224 N. C. 722, 32 S. E. (2d) 352.

Same—Assault with Intent to Kill.—
In a prosecution for assault with a deadly weapon with intent to kill, resulting in injury, it was held that there was ample evidence to sustain conviction and motion to dismiss under this section was properly denied. State v. Cody, 225 N. C. 38, 33 S. E. (2d) 71.

In a criminal prosecution for a felonious assault with intent to kill, where the state's evidence tended to show that defendant, while the prosecuting witness was having a row in her place of business with one of her servants, left the room and returned almost immediately with a shotgun and shot the prosecuting witness at close range,

inflicting serious injury, there was sufficient evidence for the jury, and motion for judgment as of nonsuit was properly denied. State v. Murdock, 225 N. C. 224, 34 S. E. (2d) 69.

Same—Seduction.—In a prosecution for seduction it was held that where facts and circumstances tended to support prosecutrix's statements a motion for nonsuit should be denied. State v. Smith, 223 N. C. 199, 201, 25 S. E. (2d) 619.

Same—Rape.—

Positive testimony of rape by prosecutrix is sufficient to carry the case to the jury, even when her evidence is denied by defendant and nonsuit under this section was held properly denied. State v. Vicks, 223 N. C. 384, 26 S. E. (2d) 873.

Evidence of defendant's guilt of rape held sufficient to overrule his motion to nonsuit. State v. Speller, 230 N. C. 345, 53 S. E. (2d) 294.

Same—Receiving Stolen Goods.—In a prosecution for larceny and receiving, where the state's evidence tended to show that strangers to defendants stole a barrel of molasses, hid it among some trees in a pasture, offered to sell it to defendants, who agreed to buy at a price considerably below the market and went in the nighttime to inspect and remove their purchase and were in the act of having it rolled out to their truck when the officer arrived, there is sufficient evidence to convict of an attempt to feloniously receive stolen property, knowing it to have been stolen, and motion of nonsuit was properly refused. State v. Parker, 224 N. C. 524, 31 S. E. (2d) 531.

Same—Recent Possession of Stolen Goods.—

Where three defendants bought goods, paying full value, about 2 a. m. from two strangers, who represented that they must dispose promptly of the merchandise from their business because both had been called to the armed forces, and one defendant promptly admitted all the facts to the officers while the other two first denied and then admitted the purchase, the State's witness who accompanied the thieves saying on cross-examination that the accused persons had no knowledge of the theft, the element of scienter is wanting and demurrer should have been sustained. State v. Oxendine, 223 N. C. 659, 27 S. E. (2d) 814.

Same—Evidence Raising Suspicion Only.—

Upon a motion for nonsuit under this section, if there be any evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, the case should be submitted to the jury. But where there is merely a suspicion or conjecture in regard to the charge in the bill of indictment, the motion should be allowed. State v. Boyd, 223 N. C. 79, 25 S. E. (2d) 456; State v. Kirkman, 224 N. C. 778, 32 S. E. (2d) 328; State v. Murphy, 225 N. C. 115, 33 S. E. (2d) 588.

Where the evidence, taken in the light most favorable to the state, on motion by defendants for judgment as of nonsuit in a criminal prosecution, raises no more than a suspicion as to the guilt of defendants, the same is insufficient to support a verdict of guilty and the motion must be allowed. State v. Hegler, 225 N. C. 220, 34 S. E. (2d) 76.

Same—Assault with Intent to Rape.—

In accord with original. See State v. Gay, 224 N. C. 141, 29 S. E. (2d) 458; State v. Johnson, 227 N. C. 587, 42 S. E. (2d) 685.

Same—Refusal to Support Child.—In proceeding on indictment instituted more than 13 years after the birth of an illegitimate child, charging defendant with willful neglect and refusal to support the child, whose paternity had been established in bastardy proceeding instituted under C. S., 265-279, the action was held barred under § 49-4 and motion for judgment of nonsuit was sustained. State v. Dill, 224 N. C. 57, 29 S. E. (2d) 145.

Same—Unlawful Sale of Intoxicating Liquors.—In a criminal prosecution for the unlawful possession of intoxicating liquors for the purpose of sale, where all the evidence tended to show that accused had concealed in the apartment occupied as a residence by himself and family, above a store operated by him, five pints of tax-paid liquor the seals on which had not been broken, and a sixth pint was found by officers at the back door of the store, where an unknown person was seen to "set something down," and some empty bottles, apparently wine bottles, were also found in the store, motion of defendant for judgment of nonsuit should have been sustained. State v. Suddreth, 223 N. C. 610, 27 S. E. (2d) 623.

In a prosecution for possession of intoxicating liquor for purpose of sale, where the evidence tended to show only that there was found in the yard of defendant's house an automobile containing 42 gallons of liquor, upon which no tax had been paid, defendant testifying that the car was not his, but was driven by a stranger, got out of order and defendant helped push it onto his premises, where it remained several days while he was away from home, and it was subsequently driven away by someone unknown to him, the refusal of defendant's motion for judgment of nonsuit was error. State v. Kirkman, 224 N. C. 778, 32 S. E. (2d) 328.

Where defendant at time of arrest said illicit whiskey belonged to him but at trial denied any knowledge of the liquor or its ownership, an issue of fact was presented for jury and motion to dismiss under this section was properly overruled. State v. Stutts, 225 N. C. 647, 35 S. E. (2d) 881.

Same—Operation of Motor Vehicle after License Suspended.—In a criminal prosecution for the operation of a motor vehicle after the operator's license had been revoked, where the state's evidence tended to show that defendant was tried and convicted in recorder's court, for operating a motor vehicle while under the influence of intoxicants, as James Stewart had his license revoked for one year, that the records show no license issued to James Stewart but show one to James Tyree Stewart of the same county as defendant, who admitted that his name was James Tyree Stewart when the highway patrolman went to take up his license, and that defendant was seen operating a motor vehicle upon the public highway within one year of such conviction and there had been no reinstatement of the revocation, there is sufficient evidence to sustain a conviction and motion for nonsuit, was properly refused. State v. Stewart, 224 N. C. 528, 31 S. E. (2d) 534.

Same—Violation of Hit and Run Drivers' Law.—In a prosecution under G. S., § 20-166, the state introduced testimony of a statement by defendant that he had just driven the highway in question but that he had no knowledge or notice that he had struck any vehicle or injured any person during the trip. This statement was not contradicted or shown to be false by any other fact or circumstance in evidence. The statement was held binding upon the state, and defendant's motion for judgment of nonsuit was sustained in the supreme court for want of evidence that defendant knew he had been involved in an accident resulting in injury to a person. State v. Ray, 229 N. C. 40, 47 S. E. (2d) 494.

Conflicting Evidence.—

In a criminal prosecution for larceny and receiving a bicycle, where the evidence tended to show that the bicycle was taken in the night from a parked truck, and was found near the same place about eight months thereafter in the possession of defendants, who made contradictory and false statements about how they came by it, there is not sufficient evidence to convict and a motion for nonsuit should have been granted. State v. Cameron, 223 N. C. 449, 27 S. E. (2d) 81.

Testimony by state witness that defendant made a declaration of innocence does not entitle defendant to judgment as of nonsuit, since such self-serving declaration does not rebut any proof by the state. State v. Baldwin, 226 N. C. 295, 37 S. E. (2d) 898.

Variance.—

Where it was alleged that defendant committed larceny of money and valuable papers, and the evidence tended to show, at most, an attempt to commit larceny of two suitcases or baggage, it was held that there was a fatal variance between the allegata and the probata, of which defect defendant could take advantage under his exception to the disallowance of his motion for judgment as of nonsuit. State v. Nunley, 224 N. C. 96, 97, 29 S. E. (2d) 17.

Demurrer to the Evidence Properly Sustained.—

See State v. Harvey, 228 N. C. 62, 44 S. E. (2d) 472, wherein the identity of the accused was not established; State v. Coffey, 228 N. C. 119, 44 S. E. (2d) 886, wherein it was held that taking all the state's evidence to be true did not exclude a reasonable hypothesis of defendant's innocence.

Demurrer to the Evidence Properly Denied.—

See State v. Dilliard, 223 N. C. 446, 27 S. E. (2d) 85, evidence showing guilt in abortion; State v. Gordon, 224 N. C. 304, 30 S. E. (2d) 43, wherein evidence showed possession of liquor with intent to sell same unlawfully; State v. King, 224 N. C. 329, 30 S. E. (2d) 230, wherein evidence sustained conviction of operating a lottery; State v. Rivers, 224 N. C. 419, 30 S. E. (2d) 322, wherein evidence tended to show that prisoner killed deceased, while the two were quarreling over some trivial matters, defendant admitting the killing but alleging that he shot deceased to repel an assault; State v. Peterson, 225 N. C. 540, 35 S. E. (2d) 645, wherein evidence offered held sufficient to repel the motion to dismiss under this section.

Applied in State v. Edwards, 224 N. C. 577, 31 S. E. (2d) 762; State v. Peterson, 226 N. C. 255, 37 S. E. (2d) 591;

State v. Malpass, 226 N. C. 403, 38 S. E. (2d) 156; State v. Little, 228 N. C. 417, 45 S. E. (2d) 542; State v. Minton, 228 N. C. 518, 46 S. E. (2d) 296; State v. Wooten, 228 N. C. 628, 46 S. E. (2d) 868; as to motion for nonsuit sustained on appeal, in State v. Palmer, 230 N. C. 205, 52 S. E. (2d) 908.

Cited in State v. Hunt, 223 N. C. 173, 25 S. E. (2d) 598; State v. Graham, 224 N. C. 351, 30 S. E. (2d) 154; State v. Ogle, 224 N. C. 468, 31 S. E. (2d) 444; State v. Curling, 225 N. C. 769, 35 S. E. (2d) 179; State v. Williams, 229 N. C. 348, 49 S. E. (2d) 617.

Art. 18. Appeal.

§ 15-177. Appeal from justice, trial de novo.

Cited in State v. Crandall, 225 N. C. 148, 33 S. E. (2d) 861.

§ 15-177.1. Appeal from justice of the peace or inferior court; trial anew or de novo.—In all cases of appeal to the superior court in a criminal action from a justice of the peace or other inferior court, the defendant shall be entitled to a trial anew and de novo by a jury, without prejudice from the former proceedings of the court below, irrespective of the plea entered or the judgment pronounced thereon. (1947, c. 482.)

§ 15-179. When state may appeal.—An appeal to the supreme or superior court may be taken by the state in the following cases, and no other. Where judgment has been given for the defendant—

1. Upon a special verdict.
2. Upon a demurrer.
3. Upon a motion to quash.
4. Upon arrest of judgment.
5. Upon a motion for a new trial on the ground of newly discovered evidence, but only on questions of law.
6. Upon declaring a statute unconstitutional. (Rev., s. 3276; Code, s. 1237; 1945, c. 701; C. S. 4649.)

Editor's Note.—

The 1945 amendment inserted the words "or superior" in line two and added subdivisions 5 and 6.

As to appeals by the state, see 23 N. C. Law Rev. 338.

Judgment Bases on Unconstitutionality of Statute.—Where the court enters judgment of not guilty, after a purported special verdict, on the conclusion that the statute on which the criminal prosecution was based is unconstitutional, the state has no right of appeal under this section. State v. Mitchell, 225 N. C. 42, 33 S. E. (2d) 134.

An appeal by the state from a judgment granting a new trial on the ground of newly discovered evidence falls within the expression "and no other," as used in this section, albeit the state seeks to present only a question of law. State v. Todd, 224 N. C. 776, 32 S. E. (2d) 313.

Applied in State v. Lovelace, 228 N. C. 186, 45 S. E. (2d) 48; State v. Glidden Co., 228 N. C. 664, 46 S. E. (2d) 860.

§ 15-180. Appeal by defendant to supreme court.

Appeals in Criminal Cases, etc.—

The statute does not provide for an appeal in criminal cases except from a final judgment. Hence, upon the indictment of members of the armed forces of the United States by state authorities, an appeal from an adverse ruling on objection to jurisdiction is premature. State v. Inman, 224 N. C. 531, 31 S. E. (2d) 641.

Applied in State v. Cannon, 227 N. C. 336, 42 S. E. (2d) 343.

§ 15-181. Defendant may appeal without security for costs.

Applied in State v. Lampkin, 227 N. C. 620, 44 S. E. (2d) 30; State v. Parrott, 228 N. C. 752, 46 S. E. (2d) 851.

Cited in State v. Brooks, 224 N. C. 627, 31 S. E. (2d) 754.

§ 15-182. Appeal granted; bail for appearance.

The affidavit for appeal in forma pauperis must be made during the trial term or within ten days after the adjournment thereof in order for the supreme court to acquire jurisdiction of the appeal, but in a capital case the supreme court will nevertheless examine the exception or exceptions defendant undertakes to have considered on the appeal. State v. Harrell, 226 N. C. 743, 40 S. E. (2d) 205.

Art. 19. Execution.

§ 15-187. Death by administration of lethal gas.

Cited in State v. Hawley, 229 N. C. 167, 48 S. E. (2d) 35; State v. Gibson, 229 N. C. 497, 50 S. E. (2d) 520.

§ 15-188. Manner and place of execution.

Cited in State v. Montgomery, 227 N. C. 100, 40 S. E. (2d) 614.

§ 15-189. Sentence of death; prisoner taken to penitentiary.

Judgment Must Show Degree of Murder.—Where the judgment upon a verdict of guilty of murder in the first degree states that the defendant had been convicted of murder, the cause must be remanded in order that it appear on the face of the judgment that the conviction was for murder in the first degree, since the judgment alone is certified to the warden of the state penitentiary. State v. Montgomery, 227 N. C. 100, 40 S. E. (2d) 614.

§ 15-190. A guard or guards or other person to be named and designated by the warden to execute sentence.

Cited in State v. Montgomery, 227 N. C. 100, 40 S. E. (2d) 614.

§ 15-194. Judgment sustained on appeal, reprieve, time for execution.

Upon appeal from sentence of death, it is necessary that the supreme court find that there was no error in the trial before the sentence can be carried out. State v. Hawley, 229 N. C. 167, 48 S. E. (2d) 35.

Art. 20. Suspension of Sentence and Probation.

§ 15-197. Suspension of sentence and probation.

An order suspending the imposition or execution of sentence on condition is favorable to the defendant, and when he sits by as the order is entered and does not appeal, he impliedly consents and thereby waives or abandons his right to appeal on the principal issue of his guilt or innocence and commits himself to abide by the stipulated conditions. He may not thereafter complain that his conviction was not in accord with due process of law. He is relegated to his right to contest imposition of judgment or execution of sentence for want of evidence to support a finding that conditions imposed have been breached, or that the conditions are unreasonable or unenforceable, or are for an unreasonable length of time. And the court may not pronounce judgment or invoke execution, after adjournment of the term, so long as defendant observes the conditions imposed. State v. Miller, 225 N. C. 213, 34 S. E. (2d) 143.

Where on conviction of defendant in a criminal case and judgment and execution are suspended on condition, without appeal taken, the court moves to impose sentence on the grounds of conditions broken, the defenses available to defendant involve questions of fact for the judge and not issues of fact for the jury, and no appeal is provided by statute from an adverse ruling, so that defendant's remedy is by certiorari or recordari. Id.

Cited in State v. Graham, 225 N. C. 217, 219, 34 S. E. (2d) 146; State v. Jackson, 226 N. C. 66, 36 S. E. (2d) 706.

Art. 21. Segregation of Youthful Offenders.

§ 15-210. Purpose of article.—It is the purpose of this article to improve the chances of rehabilitation of youthful offenders sentenced to imprisonment by preventing, as far as practicable, their association during their terms of imprisonment with older and more experienced criminals. (1947, c. 262, s. 1.)

Editor's Note.—For brief comment on article, see 25 N. C. Law Rev. 404. As to prison camp for youthful and first term offenders, see §§ 148-49.1 to 148-49.5.

§ 15-211. Definition of "youthful offender."—As used in this article a "youthful offender" is a person

(1) Who, at the time of imposition of sentence, is less than twenty-one years of age, and

(2) Who has not previously served a term or terms or parts thereof totaling more than six months in jail or other prison. (1947, c. 262, s. 1.)

§ 15-212. Sentence of youthful offender.—Any judge of any court who sentences a youthful offender to imprisonment in the state prison or to jail to be assigned to work under the state highway and public works commission, if in his opinion such person will be benefited by being kept separate, while performing his sentence, from prisoners other than youthful offenders, shall, as a part of the sentence of such person, provide that he shall be segregated as a youthful offender. (1947, c. 262, s. 1.)

§ 15-213. Duty of state highway and public works commission as to segregation of youthful offenders.—The state highway and public works commission shall segregate all youthful offenders whose sentences provide for such segregation and shall neither quarter nor work such prisoners, except in cases of emergency or when temporarily necessary, with other prisoners not coming within that classification.

The state highway and public works commission shall, in so far as is possible, provide personnel specially qualified by training, experience and personality to operate units that may be set up to effect the segregation provided in this article. (1947, c. 262, s. 1.)

§ 15-214. Extension to persons sentenced prior to July 1st, 1947.—(a) The benefits of this article, as far as practicable, shall also be extended to:

(1) All persons who on July 1st, 1947, shall be serving sentences in the state prison or sentences to jail with assignment to work under the state highway and public works commission, and

(2) All persons who shall be so sentenced prior to July 1st, 1947, even though they begin to serve such sentences after that date,

Provided such persons at the time of imposition of sentence came within the meaning of the term "youthful offender" as used in this article.

(b) The state highway and public works commission shall determine which of the prisoners coming within the provisions of subsection (a) of this section will probably be benefited by being segregated as provided in § 15-213, and such prisoners shall thereafter be so segregated as if their sentences so provided. (1947, c. 262, s. 1.)

§ 15-215. Termination of segregation.—The state highway and public works commission shall have authority to terminate the segregation as a youthful offender of any prisoner who, in the opinion of the commission, exercises a bad influence upon his fellow prisoners, or fails to take proper advantage of the opportunities offered by such segregation. (1947, c. 262, s. 1.)

§ 15-216. Persons to whom article not applicable.—(a) Since offenders who may be sentenced to terms of less than six months, but who come within the meaning of the term "youthful offender" as used in this article, may be placed upon probation if the judge imposing sentence is of the opinion that they may be rehabilitated, this article shall not apply to any person sentenced for a term of less than six months.

(b) Since special provision has already been made for suitable quarters for women prisoners, and since judges may specifically assign women convicted of offenses to such quarters, this article shall not apply to women. (1947, c. 262, s. 1.)

Chapter 17. Habeas Corpus.

Art. 2. Application.

§ 17-3. Who may prosecute writ.

Proceedings to obtain control of a minor child between persons with whom the child had been placed for adoption and welfare officers seeking to place the child with his family are not proceedings under this section, to set the infant free but is a proceeding to fix and determine the right of custody. In re Thompson, 228 N. C. 74, 44 S. E. (2d) 475.

§ 17-4. When application denied.

Habeas corpus is inappropriate to test the validity of a trial which resulted in conviction and final judgment against petitioner, both by reason of established procedure and also by this section. In re Taylor, 229 N. C. 297, 49 S. E. (2d) 749.

Art. 7. Habeas Corpus for Custody of Children in Certain Cases.

§ 17-39. Custody as between parents in certain cases; modification of order.

When Section Applies.—Habeas corpus to determine the right to the custody of a child applies only when the issue arises between husband and wife who are living in a state of separation without being divorced. Robbins v. Robbins, 229 N. C. 430, 50 S. E. (2d) 183. Such jurisdiction is ousted immediately upon the filing of the complaint in an action for divorce between the parties. Phipps v. Vannoy, 229 N. C. 629, 50 S. E. (2d) 906.

Proceeding Is Equitable.—A proceeding under this section, involving custody of children, is, notwithstanding the fact that it is statutory, equitable, in view of the wide latitude given the court, the definite personal nature of the orders, and the fact that the welfare and rights of infants are involved. In re Biggers, 226 N. C. 647, 39 S. E. (2d) 805, 806.

A decree awarding custody under this section does not oust the jurisdiction of the court under § 50-13 to hear and determine a motion in the cause for the custody of the child in a subsequent divorce action between the parties. Robbins v. Robbins, 229 N. C. 430, 50 S. E. (2d) 183.

Jurisdiction of Juvenile Court.—

Original jurisdiction has been conferred upon the juvenile court, under § 110-21, to find a child delinquent or neglected, but this statute does not repeal this section, and is not inconsistent therewith. The Superior Court as such has exclusive jurisdiction, by writ of habeas corpus, to hear and determine the custody of children of parents separated but not divorced. In re Prevatt, 223 N. C. 833. 28 S. E. (2d) 564.

Controversy between Father and Maternal Grandparents.—See In re McGraw, 228 N. C. 46, 44 S. E. (2d) 349.

Same—Jurisdiction of Juvenile Court.—It has been held that habeas corpus is not an appropriate writ to determine the custody of a child in a controversy between the father and the parents of his deceased wife, but that jurisdiction of such a case is vested exclusively in the juvenile court by § 110-21(3). Phipps v. Vannoy, 229 N. C. 629, 50 S. E. (2d) 906. But see next following paragraph.

Same—Effect of 1949 Amendment to § 50-13.—It seems

that the 1949 amendment to § 50-13 was intended to overrule Phipps v. Vannoy, 229 N. C. 629, 50 S. E. (2d) 906, in so far as it held that original jurisdiction was in the juvenile court under § 110-21(3) to determine custody of a child as between the father and the child's maternal grandparents, when the mother had secured custody in the divorce action but subsequently died. The amendment provides that controversies not provided for in this section or elsewhere in § 50-13 may be determined in a special proceeding instituted by either of the parents, or by the surviving parent if the other be dead, in the superior court of the county wherein the petitioner, or the respondent or the child is a resident at the time of filing the petition. 27 N. C. Law Rev. 452.

Modification of Earlier Order.—In a proceeding under this section the contention that entry of an earlier order was res judicata and therefore court had no authority to modify order at subsequent term without allegations or affidavits showing conditions had changed was without merit where earlier order specified that for change in conditions question of custody could be further heard and modification was based on finding of fact that there had been substantial change in circumstances of parties. Ridenhour v. Ridenhour, 225 N. C. 508, 35 S. E. (2d) 617.

Judgment Based on Consent of Parties.—When the jurisdiction of court is invoked, a judgment based on consent of parties is not a mere affirmation of a civil contract, but an order which carries with it the sanctions of the jurisdiction invoked, and one of those sanctions is imprisonment for contempt of court. In re Biggers, 226 N. C. 647, 39 S. E. (2d) 805, 806.

Effect of Failure to Give Notice.—In a proceeding under this section, the failure to give statutory notice of the hearing, when a full hearing was had, was held not to invalidate an order with respect to care and custody. Ridenhour v. Ridenhour, 225 N. C. 508, 35 S. E. (2d) 617.

No Action by Father of Illegitimate Child.—Habeas corpus will not lie at the instance of the father of an illegitimate child to obtain its custody and control from its mother. In re McGraw, 228 N. C. 46, 44 S. E. (2d) 349.

Applied in In re Barwick, 228 N. C. 113, 44 S. E. (2d) 599; In re Biggers, 228 N. C. 743, 47 S. E. (2d) 32.

Chapter 18. Regulation of Intoxicating Liquors.

Art. 1. The Turlington Act.

§ 18-1. Definitions; application of article.

The Turlington Act remains in full force and effect except as modified by the Alcoholic Beverage Control Act of 1937, codified as article 3 of this chapter, and as thus modified is the primary law in territory which has not elected to come under the A. B. C. Act. State v. Barnhardt, 230 N. C. 223, 52 S. E. (2d) 904.

The Two Acts Must Be Read Together.—To ascertain the status of the law regulating the possession, transportation, and sale or possession for the purpose of sale, of intoxicating beverages in nonconforming territory—territory where A. B. C. stores have not been established — the Turlington Act and the Alcoholic Beverage Control Act of 1937 must be read together. State v. Barnhardt, 230 N. C. 223, 52 S. E. (2d) 904.

Sloe Gin Is Intoxicating Liquor.—Testimony that defendant had in his possession sloe gin is evidence of possession of intoxicating liquor. State v. Holbrook, 228 N. C. 582, 46 S. E. (2d) 842.

Cited in McCotter v. Reel, 223 N. C. 486, 27 S. E. (2d) 149.

§ 18-2. Manufacture, sale, etc., forbidden; construction of law; non-beverage liquor.

State's Regulations in Relation to Interstate Commerce Clause.—Both by the Constitution of the United States (Amendment XXI) and this chapter liquor has been placed in a category somewhat different from other articles of commerce, and the State's regulations thereof should not be held obnoxious to the interstate commerce clause, unless clearly in conflict with granted federal powers and congressional action thereunder. State v. Hall, 224 N. C. 314, 30 S. E. (2d) 158.

The exemption from criminal liability for the transportation of liquor into or through a county not within the provisions of article 3 of this chapter applies to liquor being transported from a county which is under the provisions of § 18-49, or from without the state as provided in § 18-58. State v. Holbrook, 228 N. C. 582, 46 S. E. (2d) 842. See State v. Barnhardt, 230 N. C. 223, 52 S. E. (2d) 904.

The possession of nontax-paid liquor in any quantity anywhere in the state is, without exception, unlawful. State v. Barnhardt, 230 N. C. 223, 52 S. E. (2d) 904.

Possession of One Gallon of Tax-Paid Liquor for Personal Use.—A person living in a county which has not elected to come under the Alcoholic Beverage Control Act may lawfully transport to and keep in his private dwelling, for his own use, not more than one gallon of tax-paid liquor; but subject to this exception, possession within such territory of any quantity of liquor is prima facie evidence that its possession is in violation of this section. State v. Wilson, 227 N. C. 43, 40 S. E. (2d) 449.

A person living in nonconforming territory may lawfully transport, in sealed containers, to his own private dwelling for family uses, not in excess of one gallon of tax-paid liquor at any one time, provided it is acquired from an A. B. C. store in this state or legally purchased in another state (§§ 18-49, 18-58), and he may there keep and possess the same for family use. State v. Barnhardt, 230 N. C. 223, 52 S. E. (2d) 904.

Burden of Showing Right to Possess.—The Turlington Act contemplates that no person shall transport or have in his possession for the purpose of sale any intoxicating liquor. There are exceptions and, ordinarily, the burden is on him who asserts that he comes within the exception to show by way of defense that he is one of that class authorized by law to have intoxicants in his possession. State v. Gordon, 224 N. C. 304, 30 S. E. (2d) 43. See also notes to §§ 18-49 and 18-58.

Purchase or Sale in Mecklenburg County.—The Alcoholic Beverage Control Acts have not modified this section in such a manner as to permit the purchase or sale of intoxicating liquors in Mecklenburg County, which has not authorized the establishment of A. B. C. stores. State v. Gray, 223 N. C. 120, 25 S. E. (2d) 434.

Evidence That Liquor Is Not Tax-Paid Admissible.—In a prosecution under this section, evidence tending to show that the liquor in defendant's possession was not tax-paid is competent. State v. Wilson, 227 N. C. 43, 40 S. E. (2d) 449.

Testimony by officers searching without a warrant that they found a quantity of nontax-paid liquor in defendant's car was held competent. State v. Vanhoy, 230 N. C. 162, 52 S. E. (2d) 278.

Sufficiency of Evidence.—Evidence that officers found two full bottles of nontax-paid whiskey in defendant's car immediately after arresting him for driving the car recklessly and at excessive speed is sufficient to support his conviction of illegal transportation of intoxicating liquor. State v. Vanhoy, 230 N. C. 162, 52 S. E. (2d) 278.

Same—To Deny Nonsuit.—

The state's evidence tending to show that officers found in defendant's car, which defendant was driving, four fifth-gallon bottles of intoxicating liquor intact and four broken bottles from which some of the contents had leaked out, all of which contained or had contained sloe gin, is sufficient to overrule defendant's motion to nonsuit in a prosecution under this section for transportation and possession of intoxicating liquor in a county which has not elected to come under article 3 of this chapter. State v. Holbrook, 228 N. C. 582, 46 S. E. (2d) 842.

The charge in a prosecution for the unlawful transportation of intoxicating liquor was held to be in substantial compliance with the requirements of § 1-180. State v. Vanhoy, 230 N. C. 162, 52 S. E. (2d) 278.

Cited in State v. Suddreth, 223 N. C. 610, 27 S. E. (2d) 623.

§ 18-4. Advertising, etc., of utensils, etc., for use in manufacturing liquor.

Cited in State v. Beasley, 226 N. C. 577, 39 S. E. (2d) 605.

§ 18-6. Seizure of liquor or conveyance; arrests; sale of property.—When any officer of the law shall discover any person in the act of transporting, in violation of the law, intoxicating

liquor in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquor found therein being transported contrary to law. Whenever intoxicating liquor transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this article in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. All liquor seized under this section shall be held and shall upon the acquittal of the person so charged be returned to the established owner, and shall within ten days from conviction or default of appearance of such person be destroyed: Provided that any taxpaid liquor so seized shall within ten days be turned over to the board of county commissioners, which shall within ninety days from the receipt thereof turn it over to hospitals for medicinal purposes, or sell it to legalized alcoholic beverage control stores within the state of North Carolina, the proceeds of such sale being placed in the school fund of the county in which such seizure was made, or destroy it. Unless the claimant can show that the property seized is his property, and that the same was used in transporting liquor without his knowledge and consent, with the right on the part of the claimant to have a jury pass upon his claim, the court shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used for illegal transportation of liquor, and shall pay the balance of the proceeds to the treasurer or the proper officer in the county who receives fines and forfeitures, to be used for the school fund of the county. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken, or, if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold, and the proceeds, after deducting the expenses and costs, shall be paid to the treasurer or proper officer in the county who receives fines and forfeitures, to be used for the school fund of the county: Provided, that nothing in this section shall be construed to authorize any officer to search any automobile or other vehicle or baggage of any person without a search warrant duly issued, except where the officer sees or has absolute personal knowledge that there is intoxicating liquor in such vehicle or baggage (1923, c. 1, s. 6; 1945, c. 635; C. S. 3411(f).)

Editor's Note.—

The 1945 amendment inserted the provisions as to returning seized liquor to the owner, turning it over to hospitals or selling it.

This section does not provide for seizure of all intoxicating liquor found in vehicle, but for seizure of any and all intoxicating liquor found therein being transported contrary to law. State v. Gordon, 225 N. C. 241, 34 S. E. (2d) 414.

Confiscation and Forfeiture Are Mandatory.—Where one, who was in possession of seized liquor at the time he was arrested for unlawful acts with respect thereto, pleads guilty to charges of unlawful possession and unlawful transportation of this liquor and thereupon personal judgment is rendered against him, the provisions of this section are mandatory that the judgment also order the confiscation and forfeiture of the liquor so unlawfully possessed and transported. State v. Hall, 224 N. C. 314, 30 S. E. (2d) 158.

Jurisdiction to declare forfeiture of a vehicle used in the transportation of intoxicating liquor is in the court which has jurisdiction of the offense charged against the person operating the vehicle. State v. Reavis, 228 N. C. 18, 44 S. E. (2d) 354.

Order Confiscating Car. — Defendant admitted ownership of the car in which two bottles of nontax-paid whiskey were being transported at the time of his arrest, and he was found guilty of unlawful transportation of intoxicating liquor. This was held sufficient to sustain the court's order confiscating his car and ordering it sold in conformity with the statute. State v. Vanhoy, 230 N. C. 162, 52 S. E. (2d) 278.

Order for Forfeiture Nunc Pro Tunc.—Where defendant has been convicted of illegal transportation of nontax-paid liquor, the court may at a subsequent term enter an order nunc pro tunc for the forfeiture and sale of the vehicle used for such transportation. State v. Mayhor, 226 N. C. 645, 39 S. E. (2d) 833.

Where a vehicle is seized by a municipal police officer for illegal transportation of intoxicating liquor, the vehicle is in the custody of the officer or of the law and not the municipality. State v. Law, 227 N. C. 103, 40 S. E. (2d) 699.

Cited in State v. Gordon, 224 N. C. 304, 30 S. E. (2d) 43.

§ 18-6.1. Officers to refer to state courts cases involving vehicles seized and arrests made for unlawful transportation.—All members of the state highway patrol and other state and local law enforcing officers shall, whenever seizing any vehicle on account of the unlawful transportation of intoxicating beverages, or making arrests of persons on account of same, refer the cases to the state court having jurisdiction thereof, to be determined by such state court in accordance with the law of this state. Any such officer who shall, in violation of this section, refer such cases to courts of another jurisdiction, shall be guilty of misfeasance in office and subject to a fine of one hundred dollars ($100.00). (1945, c. 779.)

§ 18-8. Witnesses; self crimination; immunity.

Only a witness required to testify under compulsion is granted immunity from prosecution by this section. Hence an officer, who purchased liquor in order to obtain evidence against a suspect and voluntarily testified for the prosecution, could not claim the immunity afforded by this section, and it was error to instruct the jury to the contrary. State v. Love, 229 N. C. 99, 47 S. E. (2d) 712.

§ 18-11. Possession prima facie evidence of keeping for sale.

Section Does Not Apply in Prosecution under § 18-50.—The statutory presumption from the fact of possession does

not arise in a prosecution under § 18-50 for possessing nontax-paid liquor for the purpose of sale. State v. McNeill, 225 N. C. 560, 35 S. E. (2d) 629.

The possession in one's dwelling of not more than one gallon of liquor upon which the tax has been paid raises no presumption that the possession is unlawful. This applies even though the dwelling is in dry territory. And in order to convict the state must establish by independent evidence, unaided by any presumption, that the possession is unlawful. In such case, in the absence of evidence of possession of nontax-paid liquor or more than one gallon of tax-paid intoxicating beverage, prima facie evidence of the violation of the statute is wanting. State v. Barnhardt, 230 N. C. 223, 52 S. E. (2d) 904.

The presence of four bottles containing less than a gallon of whiskey in a cabin near his filling station which was occupied by defendant would not be sufficient to constitute prima facie evidence that the liquor was being kept for the purpose of sale. State v. Watts, 224 N. C. 771, 32 S. E. (2d) 348.

Where a person has in his possession tax-paid intoxicating liquors in quantity not in excess of one gallon, in his private dwelling in a county in which the sale of such intoxicating liquors is not authorized by § 18-36 et seq., nothing else appearing, such possession is not now prima facie evidence that such intoxicants are so possessed for the purpose of sale under this section. State v. Suddreth, 223 N. C. 610, 27 S. E. (2d) 623.

Proof of the possession of more than one gallon of intoxicating liquor, even though it is found in the private dwelling of defendant and the tax thereon has been paid, is prima facie evidence that such liquor is unlawfully possessed and is being kept for the purpose of sale. Defendant is protected against the presumption of illegality or the rule of evidence created by this section only so long as he does not possess more than one gallon. Where he possesses more than one gallon he has the burden to rebut the prima facie evidence by showing that such possession not only comes within the exceptive provisions of this section, but also that it was legally acquired and transported to his dwelling and kept there for family uses only. State v. Barnhardt, 230 N. C. 223, 52 S. E. (2d) 904. See §§ 18-49, 18-58.

Evidence tending to show that more than one gallon of intoxicating liquor upon which the tax had not been paid was found in a house owned by defendant in dry territory justifies an instruction to the effect that it is unlawful to possess at any one time more than one gallon of intoxicating liquor even in the possessor's home when defendant offers no evidence tending to show that the liquor was acquired from an A. B. C. store in this state or was purchased in another state and legally transported to his residence in quantities of not more than one gallon at any one time. State v. Barnhardt, 230 N. C. 223, 52 S. E. (2d) 904.

Burden of Proving Proper Purposes.—

The provision of this section making it lawful to possess liquor in a private dwelling for family purposes is an exception to the general rule, and the burden of proof in respect thereto is on defendant. State v. Wilson, 227 N. C. 43, 40 S. E. (2d) 449.

Testimony that defendant frequently sleeps in a house is insufficient to show that it is his private dwelling within the meaning of this section. State v. Barnhardt, 230 N. C. 223, 52 S. E. (2d) 904.

Instruction Using Language of This Section Proper.—In a prosecution for unlawful possession of intoxicating liquor for the purpose of sale in a county which has not elected to come under the Alcoholic Beverage Control Act, the court may properly charge the law in the language of this section and § 18-13, since the law therein stated constitutes a material part of the law of the case. State v. Wilson, 227 N. C. 43, 40 S. E. (2d) 449.

Prima Facie Case for Jury.—In a prosecution for the unlawful possession of intoxicating liquor for the purpose of sale, evidence that defendant, who resided four miles from the still, came to the still and got one-half gallon of nontax-paid whiskey and left with it, is sufficient to make out a prima facie case for the jury. State v. Graham, 224 N. C. 347, 30 S. E. (2d) 151.

Where, in a prosecution under § 18-2 for unlawful possession of intoxicating liquor for the purpose of sale in a county which has not elected to come under the Alcoholic Beverage Control Act, the state offers evidence that defendant had in his possession approximately 17½ gallons of liquor, and there is no evidence that defendant's possession was for the use of himself, his family and bona fide guests, defendant's motion to nonsuit is properly denied, since this section applies. State v. Wilson, 227 N. C. 43, 40 S. E. (2d) 449.

Stated in State v. Peterson, 226 N. C. 255, 37 S. E. (2d) 591.

§ 18-13. Search warrants; disposal of liquor seized.

Legislative Intent.—Our statutes seem to indicate the legislative intent to be that liquor itself, when the subject of unlawful traffic and capable of harmful effects, offends the law and should be regarded as a nuisance and contraband, to be summarily destroyed or otherwise disposed of. Only in case of failure to establish a violation of the law is the restoration of the liquor permitted. However, the processes of our courts are available to anyone legally interested to present his claim for seized liquor, and his plea will be heard. State v. Hall, 224 N. C. 314, 30 S. E. (2d) 158.

Hearing Contemplated.—While § 18-6 provides only for a hearing in respect of the seized vehicle used in transporting intoxicating liquor contrary to law, because thereunder the liquor itself is to be destroyed, this section clearly contemplates a hearing in the criminal case to determine the "established owner" or rightful claimant. This remedy appears adequate and is approved. State v. Gordon, 225 N. C. 241, 34 S. E. (2d) 414.

Cited in State v. Gordon, 224 N. C. 304, 30 S. E. (2d) 43.

§ 18-25. Rewards for seizure of still.

Local Modification.—Montgomery: 1949, c. 68, s. 1.

§ 18-26. Same—In certain counties.

This section shall apply to the following counties only: Alleghany, Ashe, Avery, Bladen, Buncombe, Caswell, Catawba, Chowan, Craven, Duplin, Forsyth, Beaufort, Hyde, Hoke, Lee, Lenoir, Lincoln, Mecklenburg, New Hanover, Onslow, Pamlico, Pender, Perquimans, Richmond, Rockingham, Sampson, Scotland, Vance, Wake, Washington, Watauga, Wilkes, Wilson and Yancey. (1927, c. 42; Pub. Loc. 1933, c. 160; 1947, c. 207.)

The 1947 amendment inserted "Scotland" in the list of counties in the second paragraph. As the first paragraph was not affected by the amendment it is not set out.

§ 18-28. Distilling or manufacturing liquor; first offense misdemeanor.

Cited in State v. Graham, 224 N. C. 351, 30 S. E. (2d) 154.

Art. 2. Miscellaneous Regulations.

§ 18-32. Keeping liquor for sale; evidence.

3. The possession of more than one gallon of wine at any one time, whether in one or more places; or

(1949, c. 1251, s. 2.)

Editor's Note.—The 1949 amendment substituted in subsection 3 the words "one gallon of wine" for the words "three gallons of vinous liquors." As the rest of the section was not affected by the amendment it is not set out. Section 1 of the amendatory act provides that the types of wine included under the provisions of this act shall include all types of wine as defined in subsection (b) of § 18-64 and article 5 of this chapter. And section 4½ of the amendatory act provides that it shall apply only to the counties and cities that have or may establish alcoholic beverage control stores.

Section Harmonizes with § 18-11.—The provisions of § 18-11 are subjective in character, and harmonize with the prima facie rule of evidence as to possession of more than one gallon of spirituous liquors as contained in this section. State v. Suddreth, 223 N. C. 610, 615, 27 S. E. (2d) 623.

Instructions.—Where an instruction, that "the possession of more than one gallon of liquor constitutes prima facie evidence of unlawful possession for the purpose of sale in violation of G. S., 18-32," is directed to a count charging unlawful possession for the purpose of sale, and defendant is convicted on that count and on two other counts of unlawful possession, and sentences imposed run concurrently, conceding the charge to be erroneous, it cannot avail defendant, who must show error affecting the whole case. State v. Gordon, 224 N. C. 304, 30 S. E. (2d) 43.

Evidence.—

In a criminal prosecution, charging defendant with the possession of whiskey for purpose of sale, where the state's evidence showed the presence of four tax-paid, unbroken

bottles, containing less than a gallon of whiskey, in the cabin of defendant near his filling station, and four other tax-paid, unbroken bottles, containing four-fifths of a gallon in another cabin near-by on defendant's premises, occupied by a woman who claimed these four bottles as her own purchase for her own use, the evidence was insufficient to make out a prima facie case. State v. Watts, 224 N. C. 771, 32 S. E. (2d) 348.

Evidence Sufficient to Support Adverse Verdict.—Evidence in State v. Gordon, 224 N. C. 304, 307, 30 S. E. (2d) 43, held amply sufficient to support an adverse verdict without resort to any statutory presumption, as provided in this section.

Stated in State v. Peterson, 226 N. C. 255, 37 S. E. (2d) 591.

Art. 3. Alcoholic Beverage Control Act of 1937.

§ 18-36. Purposes of article.

The Alcoholic Beverage Control Act is of statewide operation but does not repeal the Turlington Act, which remains in full force except as modified by the A. B. C. Act. State v. Barnhardt, 230 N. C. 223, 52 S. E. (2d) 904. See note to § 18-1.

Prima Facie Evidence of Possession for Purpose of Sale. Where a person has in his possession so-called tax-paid intoxicating liquors in quantity not in excess of one gallon in his private dwelling in a county in which the sale of such intoxicating liquors is not authorized under and by virtue of the Alcoholic Beverage Control Act, nothing else appearing, such possession is not now prima facie evidence that such intoxicating liquors are possessed by such person for the purpose of being sold, and such prima facie rule of evidence, prescribed by § 18-11, is in irreconcilable conflict with the provisions of this article, and to such extent is repealed thereby. State v. Suddreth, 223 N. C. 610, 613, 27 S. E. (2d) 623.

Cited in Hunter v. Board of Trustees, 224 N. C. 359, 30 S. E. (2d) 384; State v. Holbrook, 228 N. C. 582, 46 S. E. (2d) 842.

§ 18-39. Powers and authority of board.

(n) To permit the establishment of warehouses for the storage of alcoholic beverages within the state, the storage of alcoholic beverages in warehouses already established, and to prescribe rules and regulations for the storage of such beverages and the withdrawal of the same therefrom. Such warehousing or bailment of alcoholic beverages as may be made hereunder shall be for the convenience of delivery to alcoholic boards of control and others authorized to purchase the same and shall be under the strict supervision and subject to all of the rules and regulations of the state board of control relating thereto. (1937, c. 49, s. 4, cc. 237, 411; 1945, c. 954.)

Editor's Note.—
The 1945 amendment inserted the words "and others" after the word "control" in line nine of subsection (n). As the rest of the section was not affected by the amendment it is not set out.

Cited in Hunter v. Board of Trustees, 224 N. C. 359, 30 S. E. (2d) 384.

§ 18-45. Powers and duties of county boards.

Stated in Jordan v. Harris, 225 N. C. 763, 36 S. E. (2d) 270.

Cited in Hunter v. Board of Trustees, 224 N. C. 359, 30 S. E. (2d) 384.

§ 18-48. Possession illegal if taxes not paid; punishment and forfeiture for violations; possession in container without proper stamp, prima facie evidence.

Possession Unlawful without Exception.—The possession of nontax-paid liquor in any quantity anywhere in the state is, without exception, unlawful. State v. Barnhardt, 230 N. C. 223, 52 S. E. (2d) 904.

This section and § 18-50 are on an equal footing, and neither prescribes nor includes a lesser offense or an offense of lesser degree. State v. McNeill, 225 N. C. 560, 35 S. E. (2d) 629.

Sufficiency of Warrant.—A warrant which, stripped of nonessential words, charges defendant with unlawful possession of a quantity of nontax-paid whiskey, is sufficient to survive a motion to quash. State v. Camel, 230 N. C. 426, 53 S. E. (2d) 313.

Sufficiency of Evidence.—In a prosecution under this section on a warrant charging possession of nontax-paid liquor, evidence by the state that six gallons of liquor and a jar of "white liquor" were found on defendant's premises, without evidence that the containers did not bear a revenue stamp of the federal government or a stamp of any of the county A. B. C. boards, is insufficient to sustain conviction. The court will not take judicial notice that "white liquor" means nontax-paid liquor. State v. Wolf, 230 N. C. 267, 52 S. E. (2d) 920.

Evidence of defendant's illegal possession of a considerable quantity of nontax-paid whiskey was held sufficient to carry the case to the jury and his motion to nonsuit was properly denied. State v. Camel, 230 N. C. 426, 53 S. E. (2d) 313.

Confiscation of Car.—Defendant admitted ownership of the car in which two bottles of nontax-paid whiskey were being transported at the time of his arrest, and he was found guilty of unlawful transportation of intoxicating liquor. This was held sufficient to sustain the court's order confiscating his car and ordering it sold in conformity with statute. State v. Vanhoy, 230 N. C. 162, 52 S. E. (2d) 278.

Cited in State v. Gordon, 224 N. C. 304, 30 S. E. (2d) 43; State v. Gordon, 225 N. C. 241, 244, 34 S. E. (2d) 414; State v. Peterson, 226 N. C. 255, 37 S. E. (2d) 591; State v. Maynor, 226 N. C. 645, 39 S. E. (2d) 833.

§ 18-49. Transportation, not in excess of one gallon, authorized; transportation in course of delivery to stores.

Exemption Is Matter of Defense.—This section, permitting the transportation of alcoholic beverages not in excess of one gallon from a county which has elected to come under this article to another county not coming under the provisions of the article, is a matter of defense, and it is incumbent upon the defendant to bring his case within the exemption either from the state's evidence or from his own. State v. Holbrook, 228 N. C. 582, 46 S. E. (2d) 842.

Stated in State v. Peterson, 226 N. C. 255, 37 S. E. (2d) 591.

Cited in State v. Suddreth, 223 N. C. 610, 27 S. E. (2d) 623; State v. Barnhardt, 230 N. C. 223, 52 S. E. (2d) 904.

§ 18-49.1. Regulating transportation in excess of one gallon for delivery to federal reservation or to another state; conditions to be complied with.—

Before any person shall transport over the roads and highways of this state any alcoholic beverages in excess of one gallon within, into or through the state of North Carolina for delivery to a federal reservation exercising exclusive jurisdiction, or in transit through this state to another state, such person shall post with the state board of alcoholic beverage control a bond with surety approved by the said board, payable to the state of North Carolina in the penal sum of one thousand dollars ($1,000.00), running in the name of the state of North Carolina, conditioned that such person will not unlawfully transport or deliver any alcoholic beverages within, into or through the state of North Carolina, the forfeiture to be in case of conviction paid to the school fund of the county in which the seizure is made and any such county shall have the right to sue for the same. When such alcoholic beverages are desired to be transported within, into or through the state of North Carolina, such transportation shall be engaged in only under the following conditions:

(1) Statement as to Bond and Bill of Lading Required.—There shall accompany such alcoholic beverages a statement signed by the chairman or secretary of the state board of alcoholic beverage control showing that the bond hereinbefore required has been furnished and approve There shall accompany such alcoholic beverages at all times during transportation a bill of lading or

other memorandum of shipment signed by the consignor showing an exact description of the alcoholic beverages being transported, the name and address of the consignor, the name and address of the consignee, the route to be traveled by such vehicle while in the state of North Carolina, and such route must be substantially the most direct route, from the consignor's place of business to the place of business of the consignee.

(2) Route Stated in Bill of Lading to Be Followed.—Vehicles transporting alcoholic beverages shall not substantially vary from the route specified in the bill of lading or other memorandum of shipment.

(3) Names of True Consignor and Consignee Must Appear.—The name of the consignor on any such bill of lading or other memorandum of shipment shall be the name of the true consignor of the alcoholic beverages being transported and such consignor shall be only a person who has a legal right to make such shipment. The name of the consignee on any such bill of lading or memorandum of shipment shall be the name of the true consignee of the alcoholic beverages being transported and who had previously authorized in writing the shipment of the alcoholic beverages being transported and who has a legal right to receive such alcoholic beverages at the point of destination shown on the bill of lading or other memorandum of shipment.

(4) Officers May Require Driver to Exhibit Papers.—The driver or any person in charge of any vehicle so transporting such alcoholic beverages shall, when required by any sheriff, deputy sheriff or other police officer having the power to make arrests, exhibit to such officer such papers or documents required by this law to accompany such shipment. (1945, c. 457, s. 1.)

Editor's Note.—The act inserting this and the following three sections became effective July 1, 1945.

For comment on the act inserting this and the following three sections, see 23 N. C. Law Rev. 352.

§ 18-49.2. Transportation in excess of one gallon prohibited, exceptions; regulations of A. B. C. board.—The wilful transportation of alcoholic beverages within, into or through the state of North Carolina in quantities in excess of one gallon is prohibited except for delivery to federal reservations to which has been ceded exclusive jurisdiction by the state of North Carolina, or in transporting it through this state to another state in accordance with the provisions of § 18-49.1 and such regulations as may be adopted by the state board of alcoholic beverage control pursuant to this section. The state board of alcoholic beverage control may adopt further regulations governing the transportation of alcoholic beverages within, into and through the state of North Carolina in quantities in excess of one gallon, for delivery to federal reservations or in transit through this state to another state, as it may deem necessary to confine such transportation to legitimate purposes and may issue transportation permits in accordance with such regulations. (1945, c. 457, s. 2.)

§ 18-49.3. Violation of section 18-49.1 or 18-49.2 a misdemeanor; seizure and disposition of vehicle and alcoholic beverages.—Any person who shall wilfully transport alcoholic beverages in excess of one gallon within, into or through the state of North Carolina in violation of the provisions of § 18-49.1, or such regulations as may be adopted by the state board of alcoholic beverage control as authorized by § 18-49.2, shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, in the discretion of the court. Any vehicle so illegally transporting such alcoholic beverages and the alcoholic beverages being so illegally transported shall be taken in possession by the officer upon arrest of the person engaged in such illegal transportation and, upon conviction of such person or upon forfeiture of bond and failure of such person to appear for trial, such vehicle shall be disposed of as is provided in § 18-6 and any alcoholic beverages so seized shall be disposed of as is provided in § 18-13. (1945, c. 457, s. 3.)

§ 18-49.4. Exceptions to the application of sections 18-49.1 to 18-49.3.—The provisions of §§ 18-49.1 to 18-49.3 shall not apply to those beverages defined in § 18-64 purchased from a person licensed to sell the same in this state, and those light wines which may be transported as authorized by article six of this chapter, and the wines defined in article five of this chapter. Nothing in said §§ 18-49.1 to 18-49.3 shall be construed to prevent the transportation of alcoholic beverages to be sold under the Alcoholic Beverage Control Act of one thousand nine hundred and thirty-seven, and amendments thereto, or to prevent the transportation of alcoholic beverages not in excess of one gallon, as authorized by law prior to the passage of said sections; nothing contained in the said sections shall be construed to prohibit the transportation in this state of alcoholic beverages legally acquired for one's own personal use and transported as now authorized by the laws of this state; and nothing contained in the said sections shall affect sleeping car companies or railroads in the lawful operations of their business. (1945, c. 457, ss. 3, 4.)

§ 18-50. Possession for sale and sales of illicit liquors; sales of liquors purchased from stores.

No Presumption of Intent to Sell Arises from Possession.—In a prosecution under this section no presumption of intent to sell arises from the unlawful possession of illicit liquor, and the state must prove not only unlawful possession of illicit liquor but also the intent to sell, unaided by any presumption or rule of evidence. State v. Peterson, 226 N. C. 255, 37 S. E. (2d) 591; State v. Wilson, 227 N. C. 43, 40 S. E. (2d) 449.

One Charged with Violation of This Section Cannot Be Convicted under § 18-48.—Where defendant was charged with violation of this section and there was no other count or charge in the warrant she could not be convicted under § 18-48, as these two statutes defining misdemeanors are on equal footing and neither prescribes nor includes a lesser offense or offense of lesser degree. State v. McNeill, 225 N. C. 560, 35 S. E. (2d) 629.

A conviction on insufficient evidence on a warrant charging unlawful possession of illicit liquor for the purpose of sale under this section, cannot be sustained on the ground that the evidence might be sufficient to sustain a conviction of possession of a quantity of nontax-paid liquor under § 18-48. State v. Peterson, 226 N. C. 255, 37 S. E. (2d) 591.

Evidence Insufficient to Carry Case to Jury.—In prosecution under this section evidence tending to show that officers of the law were reluctantly admitted in defendant's house, that the officers heard whispering within the house before they were admitted, that in the kitchen there were defendant, his wife, and a man with whiskey on his breath, and in the front room a man and a woman, that they found in the kitchen a half-gallon jar, with a few drops of whiskey in it, and two glasses and a five-gallon bucket of slops, nearly full, smelling of liquor, and that there was fifty cents in change on the stove, was insuffi-

cient to overrule motion for judgment as of nonsuit. State v. Peterson, 226 N. C. 255, 37 S. E. (2d) 591.

In prosecution under this section where only evidence offered by the state was through its officers, including police officer's uncontradicted testimony that defendant said nontax-paid liquor found in the room was for sick child, such evidence negatived possession for the purpose of sale, and was insufficient to carry case to jury. State v. McNeill, 225 N. C. 560, 35 S. E. (2d) 629.

§ 18-58. Transportation into state; and purchases, other than from stores, prohibited.

One-Gallon Exemption Is Matter of Defense.—The exemption from criminal liability for bringing into the state not more than one gallon of liquor is a matter of defense, and the defendant must bring his case within the exemption, either from the state's evidence or from his own. State v. Holbrook, 228 N. C. 582, 46 S. E. (2d) 842.

Cited in State v. Suddreth, 223 N. C. 610, 27 S. E. (2d) 623; State v. Barnhardt, 230 N. C. 223, 52 S. E. (2d) 904.

§ 18-61. County elections as to liquor control stores; application of Turlington Act; time of elections.

In a county which has not elected to come under the Alcoholic Beverage Control Act, the Turlington Act, as modified by the later statute, is in full force and effect. State v. Wilson, 227 N. C. 43, 40 S. E. (2d) 449.

Art. 4. Beverage Control Act of 1939.

§ 18-63. Title.

Provisions in Pari Materia.—The different provisions of Public Laws of 1939, ch. 158, relative to granting license for the sale of beer and wine, are pari materia and must be read together as one connected whole. McCotter v. Reel, 223 N. C. 486, 27 S. E. (2d) 149.

Sale of Beer.—Generally speaking, it is unlawful to sell beer in North Carolina. But the sale thereof is not unlawful, provided the seller is duly licensed under, and makes sale in accord with the provisions of this article. State v. Cochran, 230 N. C. 523, 53 S. E. (2d) 663. And see §§ 18-126, 18-129 et seq.

§ 18-64. Definitions.

(b) Unfortified wines, as used in this article, shall mean wine of an alcoholic content produced only by natural fermentation or by the addition of pure cane, beet, or dextrose sugar and having an alcoholic content of not less than five per centum (5%) and not more than fourteen per centum (14%) of absolute alcohol, the per centum of alcohol to be reckoned by volume, which wine has been approved as to identity, quality and purity by the state board of alcoholic control as provided in this chapter.

(1945, c. 903, s. 3.)

Editor's Note.—
The 1945 amendment, effective May 1, 1945, added that part of paragraph (b) appearing after the word "volume" in line eight. As the rest of the section was not affected by the amendment it is not set out.

For subsequent law exempting from its application beverages defined in this section, see § 18-49.4.

§ 18-67. Manufacture.

The license specified in this section shall not be issued for the manufacture of the beverages described in § 18-64 (b) unless the applicant for license exhibits a valid permit from the state board of alcoholic control to engage in the business of selling such beverages for resale, as provided in this chapter.

(1945, c. 903, s. 4.)

Editor's Note.—The 1945 amendment, effective May 1, 1945, directed that the above sentence be inserted as the second sentence of this section. As the rest of the section was not affected by the amendment it is not set out.

§ 18-68. Bottler's license.—Any person who shall engage in the business of receiving shipments of the beverages enumerated in § 18-64, subsection (a) in barrels or other containers, and bottling the same for sale to others for resale, shall pay an annual license tax of two hundred fifty dollars ($250.00); and any person who shall engage in the business of bottling the beverages described in § 18-64, subsection (b), shall pay an annual license tax of two hundred fifty dollars ($250.00): Provided, however, that any person engaged in the business of bottling the beverages described in § 18-64, subsection (a) and also the beverages described in § 18-64, subsection (b), or either, shall pay an annual license tax of four hundred dollars ($400.00); provided further, the license provided by this section for the bottling of the beverages described in § 18-64 (b) shall not be issued to any person who does not have a permit to engage in the business of bottling the beverages described in § 18-64 (b) from the board of alcoholic control as provided in this chapter. No other license tax shall be levied upon the businesses taxed in this section, but licenses under this section shall be liable for the payment of the taxes imposed by § 18-81 in the manner therein set forth. (1939, c. 158, s. 505; 1941, c. 339, s. 4; 1945, c. 903, s. 5.)

Editor's Note.—The 1945 amendment, effective May 1, 1945, inserted the second proviso.

§ 18-69. Wholesaler's license.

Licenses to sell at wholesale the beverages described in section 18-64, subsection (b) shall pay an annual license tax of one hundred fifty dollars ($150.00): Provided, that a licensee to sell at wholesale the beverages described in § 18-64, subsection (a) and the beverages described in § 18-64, subsection (b) shall pay an annual license tax of two hundred fifty dollars ($250.00); provided further, the license provided by this paragraph shall not be issued to any person who does not have a permit to engage in the business of selling at wholesale the beverages described in § 18-64 (b) from the board of alcoholic control as provided in this chapter.

(1945, c. 903, s. 6.)

Editor's Note.—
The 1945 amendment, effective May 1, 1945, added the proviso at the end of the second paragraph. As the rest of the section was not affected by the amendment it is not set out.

§ 18-69.1. Prohibition against exclusive outlets.—It shall be unlawful for any person, firm or corporation engaged in business under this article as a manufacturer, or wholesaler, or bottler of wine or malt beverages directly or indirectly or through an affiliate:

1. To require, by agreement or otherwise, that any retailer engaged in the sale of wine or malt beverages, purchase any such products from such person, firm or corporation to the exclusion in whole or in part of wine or malt beverages sold or offered for sale by other persons, firms or corporations in North Carolina, if the direct effect of such requirement as to prevent, deter, hinder, or restrict other persons, firms or corporations in North Carolina from selling or offering for sale any such products to such retailer; or

2. To induce through any of the following means any retailer, engaged in the sale of wine or malt beverages, to purchase any such products from such person, firm or corporation to the exclusion in whole or in part of wine or malt bever-

ages sold or offered for sale by other persons, firms, or corporations in North Carolina, if the direct effect of such inducement is to prevent, deter, hinder or restrict other persons, firms or corporations in North Carolina from selling or offering for sale any such products to such retailer: (1) by acquiring any interest in real or personal property owned, occupied, or used by the retailer in the conduct of his business; (2) by furnishing, giving free goods or deals, renting, lending, or selling to the retailer, any equipment, fixtures, signs, supplies, money, services, or other things of value, subject to such exceptions as the commissioner of revenue shall by regulation prescribe, having due regard for public health, the quantity and value of articles involved, established trade customs not contrary to the public interest and the purposes of this subsection. (1945, c. 708, s. 6.)

§ 18-71. Salesman's license.

The license provided by this section shall not be issued to any person for offering for sale or soliciting orders for the beverages described in § 18-64 (b) who does not have a permit to engage in the business of offering for sale or soliciting orders for beverages described in § 18-64 (b) from the board of alcoholic control as provided in this chapter. (1939, c. 158, s. 508; 1945, c. 903, s. 7.)

Editor's Note.—The 1945 amendment, effective May 1, 1945, added the above sentence at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

§ 18-72. Character of license.

Local Modification.—Swain: 1945, c. 961.

Compulsory Issuance.—An "on premises" license to sell beer is not available, as a matter of right, to any citizen who may qualify under the provisions of § 18-75. Compulsory issuance thereof is in any event limited to the businesses enumerated in this section. McCotter v. Reel, 223 N. C. 486, 27 S. E. (2d) 149.

Cited in State v. Alverson, 225 N. C. 29, 33 S. E. (2d) 135.

§ 18-73. Retail license issued for sale of wines.

1. "On premises" licenses shall be issued only to bona fide hotels, cafeterias, cafes and restaurants which shall have a Grade A rating from the state department of health, and shall authorize the licensees to sell at retail for consumption on the premises designated in the license; provided, no such license shall be issued except to such hotels, cafeterias, cafes and restaurants where prepared food is customarily sold and only to such as are licensed under the provisions of § 105-62; provided further, no such license shall be issued to persons or places which are licensed only under subsection (a) of § 105-62.

(1945, c. 903, s. 8.)

Editor's Note.—

The 1945 amendment, effective May 1, 1945, rewrote subdivision 1 of this section. As the rest of the section was not affected by the amendment it is not set out.

Cited in McCotter v. Reel, 223 N. C. 486, 27 S. E. (2d) 149.

§ 18-74. Amount of retail license tax.—The license tax to sell at retail under § 18-64, subsection (a) for municipalities shall be:

(1) For "on premises" license, fifteen dollars ($15.00).

(2) For "off premises" license, five dollars ($5.00).

The license tax to sell at retail under section 18-64, subsection (b), shall be:

(1) For "on premises" license, fifteen dollars ($15.00).

(2) For "off premises" license, ten dollars ($10.00).

The rate of license tax levied in this section shall be for the first license issued to one person and for each additional license issued to one person an additional tax of ten per cent (10%) of the base tax, such increase to apply progressively for each additional license issued to one person. (1939, c. 158, s. 510; 1943, c. 400, s. 6; 1945, c. 708, s. 6.)

Editor's Note.—

The 1945 amendment, effective May 1, 1945, struck out the words "or both" formerly appearing after (b) in line nine.

§ 18-75. Who may sell at retail.—Every person making application for license to sell at retail or wholesale the beverages enumerated in § 18-64, if the place where such sale is to be made is within a municipality, shall make application first to the governing board of such municipality, and the application shall contain:

Neither the state nor any county or city shall issue a license under this article to any person, or firm, or corporation who has not been a bona fide resident of North Carolina and a citizen of the United States for one year. No resident of the state shall obtain a license under this article and employ or receive aid from a non-resident for the purpose of defeating this requirement. No license shall be issued to a pool room or billiard parlor or any person, firm or corporation operating same for the sale of wine as defined in G. S. § 18-64, subsection (b). Any person violating this paragraph shall be guilty of a misdemeanor, and upon conviction shall be imprisoned not more than thirty days or fined not more than two hundred dollars ($200.00). (1939, c. 158, s. 511; 1945, c. 708, s. 6; 1947, c. 1098, s. 1.)

Editor's Note.—The 1945 amendment inserted in lines two and three of the introductory paragraph the words "or wholesale the." It also inserted in lines four and five of the last paragraph the words "and a citizen of the United States." The 1947 amendment inserted the third sentence of the last paragraph. As only the paragraphs mentioned were affected by the amendments the rest of the section is not set out.

See § 18-72 and note thereto.

Cited in Martin v. Holly Springs, 230 N. C. 388, 53 S. E. (2d) 161.

§ 18-76. County license to sell at retail.

Local Modification.—Avery: 1945, c. 794; Guilford: 1949, c. 1140; Madison: 1945, c. 794; Swain: 1945, c. 961.

§ 18-77. Issuance of license mandatory; sales during religious services.—Except as herein provided it shall be mandatory that the governing body of a municipality or county issue license to any person applying for the same when such person shall have complied with requirements of this article: Provided, the governing board of any county or city which has reason to believe that any applicant for license has, during the preceding license year, committed any act or permitted any condition for which his license was, or might have been revoked under § 18-78 or 18-78.1, said governing board shall be authorized to hold a hearing concerning the issuance of license to said applicant at a designated time and place, of which the applicant shall be given ten days notice; at said hearing the applicant may appear, offer evi-

dence, and be heard, and said governing body shall make findings of fact based on the evidence at said hearing and shall enter said findings in its minutes; if from said evidence the governing body shall find as a fact that during the preceding license year the applicant committed any act or permitted any condition for which his license was, or might have been, revoked under §§ 18-78 and 18-78.1, the governing body may refuse to issue license to said applicant. Provided further, that the applicant may and shall have the right to appeal from an adverse decision to the superior court of said county where and when the matter shall be heard, as by law now provided for the trial of civil actions; that said notice of appeal may be given at the time of the hearing or within ten days thereafter, and said cause upon appeal shall be docketed at the next ensuing term of civil superior court in said county. Provided, further, no person shall dispense beverages herein authorized to be sold, within fifty feet of a church building in an incorporated city or town, or in a city or town having police protection whether incorporated or not, while religious services are being held in such church, or within three hundred feet of a church building outside the incorporate limits of a city or town while church services are in progress: And provided further that this section shall not apply in any territory where the sale of wine and/or beer prohibited by special legislative act. And provided further, that such governing bodies in the counties of Watauga, Ashe, Jackson, Haywood, Duplin, Alexander, Robeson, McDowell, Yadkin, Wilkes, Sampson, Greene, Montgomery, Transylvania, Randolph, Chatham, Alamance, Clay, Madison, Pender, Avery, Nash, City of Greensboro in Guilford County, Granville, Vance, Macon and the Town of Aulander, or any municipality therein shall be authorized in their discretion to decline to issue the "on premises" licenses provided for in subsection one of § 18-73. The governing bodies in the counties of Watauga, Ashe, Jackson, Haywood, Duplin, Alexander, Robeson, McDowell, Yadkin, Wilkes, Sampson, Greene, Montgomery, Transylvania, Randolph, Chatham, Alamance, Clay, Madison, Pender, Avery, Nash, Granville, Bertie and the town of Aulander or municipalities therein, shall be authorized to prohibit the sale of beer and/or wine between the hours of 12:01 A. M. on Sundays and midnight Sunday night. (1939, c. 158, s. 513; 1939, c. 405; 1945, c. 708, s. 6; cc. 934, 935, 1037; 1947, c. 932.)

Local Modification.—Avery: 1945, c. 794; Bertie: 1949, c. 1059; Madison: 1945, c. 794.

Cross Reference.—For other restrictions on the sale of wine and beer, see §§ 18-105 to 18-107.

Editor's Note.—The first 1945 amendment, effective May 1, 1945, inserted at the beginning of this section the words "Except as herein provided." It also inserted the first two provisos. The second 1945 amendment made a portion of the section applicable to the city of Greensboro. The third and fourth 1945 amendments inserted "Vance" and "Macon" respectively, in the first list of counties appearing in this section.

The 1947 amendment inserted "Bertie" in the list of counties in the last sentence.

For act purporting to extend the provisions of this section to Burke county, see Session Laws 1945, c. 1031.

Cited in McCotter v. Reel, 223 N. C. 486, 27 S. E. (2d) 149.

§ 18-78. Revocation or suspension of license; rule making power of state board of alcoholic control.—If any licensee violates any of the provisions of this article or any rules and regulations under authority of this article or fails to superintend in person or through a manager, the business for which the license was issued, or allows the premises with respect to which the license was issued to be used for any unlawful, disorderly, or immoral purposes, or knowingly employs in the sale or distribution of beverages any person who has been convicted of a felony involving moral turpitude or adjudged guilty of violating the prohibition laws within two years or otherwise fails to carry out in good faith the purposes of this article, the license of any such person may be revoked by the governing board of the municipality or by the board of county commissioners after the licensee has been given an opportunity to be heard in his defense. Whenever any person, being duly licensed under this article, shall be convicted of the violation of any of the prohibition laws or of any of the provisions of this article or of any rule or regulation of the state board of alcoholic control on the premises herein licensed, it shall be the duty of the court to revoke said license. Whenever any license which has been issued by any municipality, any board of county commissioners, or by the commissioner of revenue has been revoked, it shall be unlawful to reissue said license for said premises to any person for a term of six months after the revocation of said license.

The state board of alcoholic control shall have the power to adopt, repeal and amend rules and regulations to carry out the provisions of this article and to revoke or suspend the state permit of any licensee for a violation of the provisions of this article or of any rule or regulation adopted by said board. Whenever there shall be filed with the state board of alcoholic control a certified copy of a judgment of a court convicting a licensee of a violation of the prohibition laws, of any provision of this article or of any rule or regulation issued by said board, said board shall forthwith revoke the permit of such licensee. The revocation or suspension of a permit issued by the state board of alcoholic control shall automatically revoke or suspend any and all state, county and municipal licenses issued to such licensee under the authority of this article, and the revocation or suspension of either a state, county or municipal license shall automatically revoke or suspend any other licenses issued to the licensee under the authority of this article. (1939, c. 158, s. 514; 1943, c. 400, s. 6; 1949, c. 974, s. 14.)

Editor's Note.—The 1949 amendment substituted "state board of alcoholic control" for "commissioner of revenue," and rewrote the second paragraph. Section 17 of the amendatory act provides that it shall apply to all licenses issued for the license year 1949-1950 and thereafter. For brief comment on amendment, see 27 N. C. Law Rev. 463.

As to dismissal of certiorari to review revocation of license by town authorities for violation of this section, see Harney v. Mayor and Board of Com'rs, 229 N. C. 71, 47 S. E. (2d) 535.

§ 18-78.1. Prohibited acts under license for sale for consumption on premises.—No holder of a license authorizing the sale at retail of beverages, as defined in § 18-64, for consumption on the premises where sold, or any servant, agent, or employee of the licensee, shall do any of the following upon the licensed premises:

(1) Knowingly sell such beverages to any person under eighteen (18) years of age.

(2) Knowingly sell such beverages to any person while such person is in an intoxicated condition.

(3) Sell such beverages upon the licensed premises or permit such beverages to be consumed thereon, on any day or at any time when such sale or consumption is prohibited by law.

(4) Permit on the licensed premises any disorderly conduct, breach of peace, or any lewd, immoral, or improper entertainment, conduct, or practices.

(5) Sell, offer for sale, possess, or permit the consumption on the licensed premises of any kind of alcoholic liquors the sale or possession of which is not authorized under his license. (1943, c. 400, s. 6; 1945, c. 708, s. 6; 1949, c. 974, s. 15.)

Editor's Note.—The 1949 amendment struck out provisions as to revocation and suspension of licenses. Section 17 of the amendatory act provides that it shall apply to all licenses issued for the license year 1949-1950 and thereafter. See 27 N. C. Law Rev. 463.

§ 18-81. Additional tax.—(a) In addition to the license taxes herein levied, a tax is hereby levied upon the sale of beverages enumerated in § 18-64, subsection (a) of seven dollars and fifty cents ($7.50) per barrel of thirty-one gallons, or the equivalent of such tax in containers of more or less than thirty-one gallons, and in bottles or other containers of not more than twelve ounces, a tax of two and one-half cents per bottle or container, and in bottles or containers of the capacity of one quart, or its equivalent, a tax of six and two-thirds cents per bottle or container: Provided fruit cider of alcoholic content not exceeding that provided in this article may be sold in bottles or other containers of not more than six ounces at a tax of five-eighths of a cent per bottle or container.

(b) The payment of the tax imposed by the preceding subsection shall be evidenced as to containers of one quart, or its equivalent, or less, by the affixing of crowns or lids to such containers in which beverages are placed, received, stored, shipped, or handled, and upon which the tax has been paid at the rate prescribed in the preceding subsection.

(r) In addition to the license taxes herein levied, a tax is hereby levied upon the sale of beverages described in section 18-64, subsection (b) of sixty cents (60 cts.) per gallon. The foregoing tax to apply to naturally fermented wines. The tax on imitation, sub-standard or synthetic wines (as defined in the United States Treasury Regulations) shall be two dollars and forty cents ($2.40) per gallon.

These additional taxes levied under this subsection shall be paid to the commissioner of revenue by the wholesale distributor or bottler of such beverages.

Reports shall be made to the commissioner of revenue in such form as he may prescribe on or before the tenth day of each month, for all beverages sold by such wholesale distributor or bottler within the preceding month, and such reports when filed shall be accompanied by a remittance of the amount of tax shown to be due. Failure to file the reports herein prescribed and pay the tax as shown to be due thereon shall subject such wholesale distributor or bottler to a penalty of five per centum of the amount of the tax due, per month from the date the tax is due.

If the wholesale distributor or bottler shall refuse to make the reports required under this section, then such reports shall be made by the commissioner or his duly authorized agents from the best information available, and such reports shall be prima facie correct for the purposes of this section, and the amount of tax due thereby shall be a lien against all the property of the taxpayer until discharged by payments, and if payment is not made within thirty days after demand therefor by the commissioner or his duly authorized agents, there shall be added not more than one hundred per centum as damages, together with interest at the rate of one per centum per month from the time such tax was due. If such tax be paid within thirty days after notice by the commissioner, then there shall be added not more than ten per centum as damages, per month from the time such tax was due until paid.

The commissioner for good cause may extend the time for making any report required under the provisions of this section, and may grant such additional time within which to make such report as he may deem proper, but the time for filing any such report shall not be extended beyond the fifteenth day of the month next succeeding the regular due date of such report. If the time for filing a report be extended, interest at the rate of one-half of one per centum per month from the time the report was required to be filed to the time of payment shall be added and paid.

(s) If any dealer, either at wholesale or retail shall expose for sale or have in his possession either in storage or on display any nontax-paid beverages enumerated under § 18-64 (a) and (b), the commissioner of revenue shall have the authority to revoke any privilege license issued under this article to said dealer and said license shall not be renewed for the balance of the tax year; in addition, the commissioner may refuse to issue new license to such dealer unless the dealer can satisfactorily show to the commissioner of revenue that he will in the future comply with the provisions of this article and the rules and regulations of the commissioner issued under authority hereof.

The taxes levied in this section are in addition to the taxes levied in Schedule E of the Revenue Act.

(t) From the taxes collected annually under subsection (a) and subsection (r) of this section amounts equivalent to one-half thereof shall be allocated and distributed, upon the basis herein provided, to counties and municipalities wherein such beverages may be licensed to be sold under the provisions of this article. The amounts distributable to each county and municipality entitled to the same under the provisions of this subsection shall be determined upon the basis of population therein as shown by the latest federal decennial census. Where such beverages may be licensed to be sold in both the county and municipality, allocation of such amounts shall be made to both the county and the municipality on the basis of population. Where such beverages may be licensed to be sold in a municipality in a county wherein the sale of such beverages is otherwise prohibited, allocation of such amounts shall be

made to the municipality on the basis of population; provided, however, that where the sale of such beverages is prohibited within defined areas within a county or municipality, the amounts otherwise distributable to such county or municipality on the basis of population shall be reduced in the same ratio that such areas bear to the total area of the county or municipality, and the amount of such reduction shall be retained by the state: Provided, further, that if said area within a county is a municipality for which the population is shown by the latest federal decennial census, reduction of such amounts shall be based on such population rather than on area. The commissioner of revenue shall determine the amounts distributable to each county and municipality, for the period July 1st, 1947, to September 30th, 1947, inclusive, and shall distribute such amounts within sixty (60) days thereafter; and the commissioner of revenue annually thereafter shall determine the amounts distributable to each county and municipality for each twelve-month period ending September 30th and shall distribute such amounts within sixty (60) days thereafter. (1939, c. 158, s. 517; c. 370, s. 1; 1941, c. 50, s. 7; c. 339, s. 4; 1943, c. 400, s. 6; 1943, cc. 564, 565; 1945, c. 708, s. 6; 1947, c. 1084, ss. 7-9.)

Editor's Note.—

The 1945 amendment, effective May 1, 1945, made changes in subsections (a) and (b). It also made changes in the first paragraph of subsection (r) and inserted subsection (s) immediately before the last paragraph. The 1947 amendment made changes in subsections (a) and (r) and added subsection (t). As subsections (c) through (q) were not affected by the amendments they are not set out.

Section 10 of the 1947 amendatory act provides: "The new tax rates herein provided shall become effective July 1st, 1947, and said rates shall apply to all beverages enumerated in G. S. § 18-64 which are sold or offered for sale after that date, whether shipped into the state prior to that date or not. Prior to the sale after that date of beverages on which has been paid the tax at the rate applicable prior to that date, report shall be made to the commissioner of revenue as to such beverages and the increased tax thereon shall be paid."

§ 18-81.1. Use of funds allocated to counties and municipalities.—The funds allocated to counties and/or municipalities under subsection (t) of § 18-81 may be used by said counties or municipalities as any other general or surplus funds of said unit may be used. (1947, c. 1084, s. 11.)

§ 18-83. Nonresident manufacturers and wholesale dealers to be licensed. — From and after April thirtieth, one thousand nine hundred thirty-nine, every nonresident desiring to engage in the business of making sales of the beverages described in § 18-64, to wholesale dealers licensed under the provisions of this article, shall first apply to the commissioner of revenue for a permit so to do. The commissioner of revenue may require of every such applicant that a bond in a sum not to exceed two thousand dollars ($2,000.00) be executed by such applicant and deposited with the commissioner, conditioned upon the faithful compliance by such applicant with the provisions of this article, and particularly that such applicant shall not make sales of any of the beverages described in section 18-64 to any person in this state except a duly licensed wholesale dealer. Upon the payment of a license tax of one hundred fifty dollars ($150.00), if the commissioner is satisfied that said applicant is a bona fide manufacturer or distributor of the beverages defined in § 18-64, he shall then issue a permit to such applicant which shall bear a serial number. The license issued under this section to any person who does not have a permit from the board of alcoholic control as provided in this chapter for the sale for resale of beverages described in § 18-64 (b) shall only permit said licensee to engage in the business of selling for resale the beverages described in § 18-64(a). Every holder of such nonresident permit and license shall thereafter put the number of such permit on every invoice for any quantity of beverages sold by such licensee to any wholesale dealer in North Carolina. Upon the failure of any such licensee to comply with all the provisions of this article, the commissioner of revenue may revoke such permit or license.

Any resident manufacturer licensed under § 18-67 shall not be required to post the bond required by this section. (1939, c. 158, s. 518½; 1945, c. 903, s. 9.)

Editor's Note.—The 1945 amendment, effective May 1, 1945, inserted the fourth sentence.

§ 18-83.1. Resident wholesalers shall not purchase beverages for resale from unlicensed nonresidents.—It shall be unlawful for any resident wholesale distributor or bottler to purchase any of the beverages described in § 18-64 for resale within this state from any nonresident who has not procured the permit or license required in the preceding section. (1945, c. 708, s. 6.)

§ 18-88.1. Wine for sacramental purposes exempt from tax.—The tax levied in this article upon the sale of beverages described in § 18-64 (b) shall not apply to sacramental wines received by ordained ministers of the gospel under the provisions of § 18-21. (1945, c. 708, s. 6.)

§ 18-89. Administrative provisions. — The commissioner of revenue and the authorized agents of the state department of revenue shall have and exercise all the rights, duties, powers, and responsibilities in enforcing this article that are enumerated in the Revenue Act in administering taxes levied in Schedule B of that act. Any person, firm or corporation engaging in any activity for which a state, county, or municipal license is required under this article without obtaining said license, or continuing any such activity after the expiration of any state, county, or municipal license, granted under this article, shall be subject to the same liability for criminal prosecution, and for penalties, as is prescribed in § 105-109. (1939, c. 158, s. 523; 1945, c. 708, s. 6.)

Editor's Note.—The 1945 amendment, effective May 1, 1945, added the second sentence.

§ 18-90.2. Revocation of license upon revocation of permit.—Whenever the state board of alcoholic control shall certify to the commissioner of revenue that any permit issued by said board under the provisions of this chapter has been cancelled or revoked, the commissioner of revenue shall thereupon immediately revoke any license which has been issued under this article to the person whose permit has been revoked by said board, and such revocation by the commissioner shall not entitle the person whose license was revoked to any refund of taxes or license fees paid for or under said license. (1945, c. 903, s. 12.)

§ 18-91.1. Persons, firms, or corporations engaged in more than one business to pay on each.— When any person, firm or corporation is engaged in more than one business or trade which is made under the provisions of this article subject to state license taxes, such person, firm, or corporation shall pay the license taxes prescribed in this article for each separate business or trade. (1945, c. 708, s. 6.)

Art. 5. Fortified Wine Control Act of 1941.

§ 18-94. Title of article.

For subsequent law exempting from its application wines defined in this article, see § 18-49.4.

§ 18-96. Definition of "fortified wines."—Fortified wines shall mean any wine or alcoholic beverage made by fermentation of grapes, fruit and berries and fortified by the addition of brandy or alcohol or having an alcoholic content of more than fourteen per cent of absolute alcohol, reckoned by volume, and which has been approved as to identity, quality and purity by the state board of alcoholic control as provided in this chapter. (1941, c. 339, s. 1; 1945, c. 903, s. 10.)

Editor's Note.—The 1945 amendment, effective May 1, 1945, added that part of the section appearing after the word "volume" in line seven.

§ 18-97. Certain sales, etc., prohibited; names of persons ordering wines furnished police or sheriff.—It shall be unlawful for any person, firm or corporation, except alcoholic beverage control stores operated in North Carolina, to sell, or possess for sale, any fortified wines as defined herein. It shall be unlawful for any person to purchase on order and receive by mail or express from any such alcoholic beverage control store fortified wines in quantities in excess of one gallon at any one time. Upon the request of any chief of police or sheriff any alcoholic beverage control system shall furnish the names of any persons ordering such wines, and the dates and amounts of such orders. Nothing herein contained shall be construed to permit any person to order and receive by mail or express any spirituous liquors. (1941, c. 339, s. 2; 1945, c. 635; c. 708, s. 6.)

Editor's Note.—The 1945 amendments struck out the word "not" formerly appearing after the word "quantities" in line eight.

§ 18-99. Application of other laws; sale of sweet wines; licensing of wholesale distributors. — The provisions of article 3 of this chapter shall apply to fortified wines: Provided, in any county in which the operation of alcoholic beverage control stores is authorized by law, it shall be legal to sell sweet wines for consumption on the premises in hotels and restaurants which have a Grade A rating from the state board of health, and it shall be legal to sell said wines in drug stores and grocery stores for off premises consumption; such sales however shall be subject to the rules and regulations of the state alcoholic beverage control board. For the purpose of this section, sweet wines shall be any wine made by fermentation from grapes, fruits or berries, to which nothing but pure brandy has been added, which brandy is made from the same type of grape, fruit or berry, which is contained in the base wine to which it is added, and having an alcoholic content of not less than fourteen per centum (14%) and not more than twenty per centum (20%) of absolute alcohol, reckoned by volume, and approved by the state board of alcoholic control as to identity, quality and purity as provided in this chapter: Provided further that the state alcoholic control board shall approve and authorize the licensing of wholesale wine distributors in such counties where alcoholic board control stores are operated. (1941, c. 339, s. 6; 1945, c. 903, s. 11.)

Editor's Note.—The 1945 amendment, effective May 1, 1945, rewrote the first proviso.

Art. 6. Light Domestic Wines; Manufacture and Regulation.

§ 18-100. Manufacture of domestic wines permitted.

For subsequent law exempting from its application light wines authorized by this article, see § 18-49.4.

Art. 7. Beer and Wine; Hours of Sale.

§ 18-105. Sale between certain hours unlawful.

Editor's Note.—This section is implicitly repealed as to the sale of beer by § 18-141, providing that beer may not be sold after 11:00 P. M. 27 N. C. Law Rev. 463.

For comment on this and the three following sections, see 21 N. C. Law Rev. 356.

§ 18-106. Permitting consumption on premises during certain hours unlawful.

Editor's Note.—Nothing in article 12 of this chapter purports to change the hours permissible on premises consumption of beer. 27 N. C. Law Rev. 463.

§ 18-107. Regulation by counties and municipalities.

Local Modification.—Town of Hamlet in Richmond county: 1945, c. 931; Town of Rockingham in Richmond county: 1945, c. 930.

§ 18-108.1. "Beer" defined. — Wherever used in this article, the word "beer" is defined to include beer, lager beer, ale, porter, and other brewed or fermented beverages containing one half (½) of one per cent (1%) of alcohol by volume but not more than five per cent (5%) of alcohol by weight as authorized by the laws of the United States of America. (1945, c. 780.)

Art. 8. Establishment of Standards for Lawful Wine; Permits, etc.

§ 18-109. Powers of state board of alcoholic control.—The state board of alcoholic control shall be referred to herein as "the board". The board is authorized and empowered:

(1) To adopt rules and regulations establishing standards of identity, quality and purity for the wines described in § 18-64 (b) and in article five of this chapter. These standards shall be such as are deemed by said board to best protect the public against wine containing deleterious, harmful or impure substances or elements, or an improper balance of elements, and against spurious or imitation wines and wines unfit for beverage purposes. Provided, nothing in this or in any other section of this article or act shall authorize said board to increase the alcoholic content of the wines described in § 18-64 (b) and in article five of this chapter, or to permit the sale or possession of any wines in any county of the state where the same are now or shall hereafter be prohibited by law.

(2) To issue permits to resident or non-resident manufacturers, wineries, bottlers, and wholesalers, or any other persons selling wine for the purpose

of resale, or offering wine for sale for the purpose of resale, whether on their own account or for or on behalf of other persons, which permit shall only authorize the possession or sale in this state of wines meeting the standards adopted by the board; and to revoke any such permit on violation of any of the provisions of this article or of any of the rules and regulations promulgated under the authority of this article.

(3) To test wines possessed or offered for sale, or sold in this state and to make chemical or laboratory analyses of said wines or to determine in any other manner whether said wines meet the standards established by said board; to confiscate and destroy any wines not meeting said standards; to enter and inspect any premises upon which said wines are possessed or offered for sale; and to examine any and all books, records, accounts, invoices, or other papers or data which in any way relate to the possession or sale of said wines.

(4) To take all proper steps for the prosecution of persons violating the provisions of this article, and for carrying out the provisions and intent thereof.

(5) To employ such personnel as may be necessary for the efficient administration and enforcement of this article, subject to the provisions of the Executive Budget Act.

(6) To exercise all other powers which may be reasonably implied from the granting of express powers herein, together with such other powers as may be incidental to, or convenient for, the carrying out and performance of the powers and duties herein given to said board; and to exercise any and all of the powers granted said board under § 18-39 which are needed for the proper administration and enforcement of this article.

(7) The advertisement and sale of wine in this state shall be subject to all existing laws and the following additional authority and powers hereby expressly granted to the board:

(a) The board, in its discretion, may approve or disapprove all forms of advertising of wine, including the type and amount of display material which may be used in the place of business of a retail permit holder;

(b) The board shall have the sole power, in its discretion, to determine the fitness and qualification of an applicant for a permit to sell wine at retail. The board shall inquire into the character of the applicant, the location, general appearance and type of place of business of the applicant;

(c) The board shall have authority, in its discretion, to determine the number of retail permits to be granted in any locality. In addition to the powers herein granted to the state board of alcoholic control, said board is authorized and empowered to adopt rules and regulations regulating and fixing the hours of sale in the several counties and municipalities therein in which wine is authorized to be sold. The board shall not issue a permit hereunder for the sale of wine in any pool room or billiard parlor or in any other place of business, of whatsoever kind and character, if in the discretion of the board, it is not a proper place for the sale of wine;

(d) The board shall require that all retail permit holders keep their places of business clean, well lighted and in an orderly manner;

(e) Every person intending to apply for any permit to sell wine at retail hereunder shall, not more than thirty (30) days and not less than ten (10) days before applying to the board for such permit, make application to the county and municipal authority, as provided for in chapter 18, article IV, of the General Statutes of North Carolina, and shall post a notice of such intention on the front door of the building, place or room where he proposes to engage in such business, or publish such notice at least once in a newspaper published in or having a general circulation in the county, city or town wherein such person proposes to engage in such business;

(f) Every person desiring a permit under the provisions of this subsection shall, after publishing notice of his intention as provided in subsection (e) above, file with the board an application therefor on forms provided by the board and a statement in writing and under oath setting forth such information as the board shall require;

(g) Any objections to the issuance of the permit to an applicant shall be filed in writing with the board and the board shall not refuse to grant any such permit except upon a hearing held after ten (10) days' notice to the applicant of the time and place of such hearing, which notice shall contain a statement of the objections to granting such permit and shall be served on the applicant by sending same to the applicant by registered mail to his last known post office address. The applicant shall have the right to produce evidence in his behalf at the hearing and be represented in person or by council;

(h) All persons holding a license to sell wine at retail at the time of the enactment of this law shall be deemed to have complied with all requirements of the board in filing application for a permit to sell wine at retail, except operators of pool rooms and billiard parlors, but shall be subject to the action of the board in suspension or revocation of licenses, as provided for herein. All permits shall be for a period of one year unless sooner revoked or suspended and shall be renewable May first of each calendar year;

(i) The board shall certify to the department of revenue the names and addresses of all persons to whom the board has issued permits and no license issued to an applicant shall be valid until the applicant has obtained the permit, as provided by this subsection;

(j) The board may suspend or revoke any permit issued by it if in the discretion of the board it is of the opinion that the permittee is not a suitable person to hold such permit or that the place occupied by the permittee is not a suitable place, or that the number of permits issued should be reduced;

(k) Before the board may suspend or revoke any permit issued under the provisions of this subsection, at least ten (10) days' notice of such proposed or contemplated action by the board shall be given to the affected permittee. Such notice shall be in writing, shall contain a statement in detail of the grounds or reasons for such proposed or contemplated action of the board, and shall be served on the permittee by sending the same to such permittee by registered mail to his last known post office address. The board

shall in such notice appoint a time and place when and at which the said permittee shall be heard as to why the said permit shall not be suspended or revoked. The permittee shall at such time and place have the right to produce evidence in his behalf and to be represented by counsel;

(l) The action of the board in refusing to issue a permit or in suspending or revoking same pursuant to the provisions of this subsection shall not be subject to review by any court nor shall any mandamus lie in such case;

(m) In case where the board suspends or revokes a permit, the board shall grant the permittee a reasonable length of time in which to dispose of his stock.

(8) All licenses shall be issued under the provisions of article IV of chapter 18 of the General Statutes. The granting of a permit hereunder to sell wine shall be required in addition to the requirements of article IV of chapter 18 of the General Statutes as to securing a license to sell wine at retail. (1945, c. 903, s. 1; 1947, c. 1098, ss. 2, 3.)

Editor's Note.—The 1947 amendment rewrote the preliminary paragraph and added subsections (7) and (8). Section 3 of the amendatory act provides that the act shall not repeal any special, public-local or private act prohibiting the sale of wine in any county in this state, or any act authorizing the board of commissioners of any county of this state, or the governing board of any municipality, in its discretion, to prohibit the sale of wine; and shall not repeal any act prohibiting the sale of wine by vote of the people of any county or municipality and any county or municipality in which wine is permitted to be sold hereafter under the provisions of article 11 of this chapter.

For discussion of this act, see 23 N. C. Law Rev. 350.

§ 18-110. Duties of persons possessing wine or offering the same for sale.—All persons possessing or offering for sale or reselling any of the wines described in § 18-64 (b) and in article five of this chapter, shall keep clear, complete and accurate records which will reveal the sources from which said wines were acquired, the date of acquisition, and any other information which may be required to be preserved by rules and regulations of the board. All such persons shall freely permit representatives of the board to enter and inspect the premises upon which such wines are possessed or offered for sale, to test and analyze any of such wines, and to examine all books, records, accounts, invoices, or other papers or data relating to such wines. (1945, c. 903, s. 1.)

§ 18-111. Statement of analysis to be furnished.—Manufacturers, wineries, bottlers, and wholesalers, or any other persons selling wine for the purpose of resale, whether on their own account or for or on behalf of other persons, shall, upon the request of the board, furnish a verified statement of a laboratory analysis of any wine sold or offered for sale by such persons. (1945, c. 903, s. 1.)

§ 18-112. Manufacturers, bottlers, wholesalers, et cetera, to obtain permit for sale from board.—All manufacturers of wine, wineries, bottlers of wine, wholesalers of wine, or any other persons selling wine for the purpose of resale, whether on their account or for or on behalf of other persons, whether any of such manufacturers, wineries, bottlers, wholesalers or other persons are residents or nonresidents of this state, shall, as a condition precedent to the sale or the offering for sale of any wine described in § 18-64 (b) and in article five of this chapter, apply for and obtain from the state board of alcoholic control a permit for the sale of wines approved by said board. The sale of wines without such a permit, or the sale with such a permit of wines not approved by the board, shall be unlawful. (1945, c. 903, s. 1.)

§ 18-113. Violation misdemeanor; permit revoked.—Any person who violates any of the provisions of this article, or any of the rules and regulations promulgated under the authority of this article, shall be guilty of a misdemeanor and shall, upon conviction, be fined or imprisoned, or both, in the discretion of the court. Any permit issued under authority hereof shall be subject to suspension or revocation by the board when it appears that the permit holder has violated any of the provisions of this article. Provided, however, that when the board shall determine that any person has violated any of the provisions hereof, before his permit shall be either suspended or revoked, he shall be given five (5) days written notice, by registered mail, advising the permit holder of the charges against him and fixing a day, hour and place for a hearing, which hearing shall be conducted by the board. The permit holder shall be entitled to appear in person or be represented by counsel at such hearing. (1945, c. 903, s. 1.)

§ 18-113.1. Misdemeanor for retailer to sell unapproved wines.—It shall be unlawful for any person selling at retail any of the wines described in § 18-64 (b) and in article five of this chapter, to sell wines, the brands of which are not on the approved list of wines prepared by the state board of alcoholic control, unless specific authority for the sale of said wines has been obtained from said board. It shall be the duty of all retailers to secure from the state board of alcoholic control an approved list of wines and it shall be unlawful for retailers to purchase from manufacturers, wholesalers or distributors any wines not on said approved list, unless specific authority for such purchase is obtained from the state board of alcoholic control.

It shall be unlawful for any person other than a manufacturer, distributor or bottler to buy, or to sell at retail to any one person, more than one gallon of wine at any one time, whether in one or more places.

Any person violating the provisions of this section shall be guilty of a misdemeanor and shall, upon conviction, be fined or imprisoned, or both, in the discretion of the court. (1945, c. 903, s. 1; 1949, c. 1251, s. 3.)

Editor's Note.—The 1949 amendment inserted the second paragraph. Section 4½ of the amendatory act provides that its provisions shall apply only to the counties and cities that have established or may establish alcoholic beverage control stores.

§ 18-113.2. Types of wine included under provisions of article.—The types of wine included under the provisions of this article shall include all types of wine as defined in G. S. § 18-64 (b) and article 5 of this chapter. (1949, c. 1251, s. 1.)

Editor's Note.—Section 4½ of the act from which this section was codified provides: "The provisions of this act shall apply only to the counties and cities that have or may establish alcoholic beverage control stores."

§ 18-114. Funds for administration of article.—The governor and the council of state are authorized to allocate from the contingency and emer-

gency fund such funds for the administration of this article as may be found to be necessary. (1945, c. 903, s. 1.)

§ 18-115. Definition of "person." — As used in this article, the word "person" shall include natural persons, partnerships, associations, joint stock companies, corporations, and any other form of organization for the transaction of business. (1945, c. 903, s. 1.)

§ 18-116. Effective date; disposition of wines on hand. — This article shall be effective from and after the ratification of this article. Provided, no standards adopted by the state board of alcoholic control shall be effective until thirty days after the adoption of the regulation establishing said standards; and provided further, that any person affected by the adoption of any standard by the board shall be granted sixty days after the effective date of the standard within which to dispose of any wines on hand at the effective date of said standard which do not comply with said standard. (1945, c. 903, s. 1.)

Editor's Note.—The act inserting this article was ratified on March 19, 1945.

§ 18-116.1. Additional power of local governing body to suspend or revoke retail wine license.— In addition to the other grounds provided by law for refusing to grant, or for revoking or suspending wine licenses, the governing body of any county or city may revoke or suspend the license of any retail licensee within its jurisdiction for violating any existing law or regulation of the board concerning the sale of wine. In any proceeding before such governing body for the revocation or suspension of a retailer's license, the licensee shall be given due notice of the charges against him, and be given an opportunity to appear personally and by counsel in his defense. (1949, c. 1251, s. 4.)

Editor's Note.—Section 4½ of the act adding §§ 18-116.1 to 18-116.5 provides: "The provisions of this act shall apply only to the counties and cities that have or may establish alcoholic beverage control stores."

For comment on this and the four following sections, see 27 N. C. Law Rev. 463.

§ 18-116.2. Authority of local A. B. C. boards to revoke or suspend permit or limit sales to A. B. C. stores.—In addition to the authority of the state board, the local A. B. C. boards may, within their respective counties, suspend or revoke any permit for the sale of wine if in the discretion of the local A. B. C. board it is of the opinion that the permittee is not a suitable person to hold such permit, or that the place occupied by the permittee is not a suitable place, or that the number of permits issued should be reduced; provided, further, that the local A. B. C. boards shall have and retain at all times the discretionary right to limit, within the territory over which they have jurisdiction, the sale of wine to A. B. C. stores exclusively, if in the opinion of a local A. B. C. board conditions warrant such restriction. (1949, c. 1251, s. 4.)

See note under § 18-116.1.

§ 18-116.3. Effect of revocation of license or permit by local authority.—In the event any county or municipality, through its governing body, shall for cause revoke any license, such revocation shall automatically revoke any other wine license or permit held by the licensee; and in all cases where a permit is revoked by the board or a local A. B. C. board, such revocation shall render void any state, county, or municipal license issued hereunder. (1949, c. 1251, s. 4.)

See note under § 18-116.1.

§ 18-116.4. Authority of local boards to restrict days and hours of sale of wine.—In addition to the authority of the state board to regulate and fix the days and hours of the sale of wine, the local A. B. C. boards shall have authority, in their discretion, to further restrict the days and hours of the sale of wine within their respective territories. (1949, c. 1251, s. 4.)

See note under § 18-116.1.

§ 18-116.5. Investigation of licensed premises; examination of books, etc., refusal to admit inspector; powers and authority of inspectors; use of A. B. C. officers as inspectors.—All officers, inspectors and investigators appointed by either the state board or local A. B. C. boards shall have authority to investigate the operation of the licensed premises of all persons licensed under this article, to examine the books and records of such licensee, to procure evidence with respect to the violation of this article, or any rules and regulations adopted thereunder, and to perform such other duties as the board may direct. Such inspectors shall have the right to enter any such licensed premises in the state in the performance of their duty, at any hour of the day or night when wine is being sold or consumed on such licensed premises. Refusal by such permittee or by any employee of a permittee to permit such inspectors to enter the premises shall be cause for revocation or suspension of the permit of such permittee. The officers, inspectors and investigators so appointed shall, after taking the oath prescribed for peace officers, have the same powers and authority, including the right to serve all criminal process and to make arrests, as other peace officers.

All alcoholic beverage control officers now employed, or who may hereafter be employed, may be used by the board, or the local A. B. C. boards, as inspectors in counties and cities having alcoholic beverage control stores, and shall be vested with all powers and authority as herein vested in inspectors. (1949, c. 1251, s. 4.)

See note under § 18-116.1.

Art. 9. Substandard, Imitation and Synthetic Wines.

§ 18-117. Possession or sale prohibited.—It shall be unlawful for any retail wine licensee in the state of North Carolina to have in his possession, to sell, or offer for sale any imitation, substandard, or synthetic wine. (1945, c. 974, s. 1.)

§ 18-118. Violation a misdemeanor. — Violation of the provisions of this article shall constitute a misdemeanor and be punishable by a fine or imprisonment in the discretion of the court. (1945, c. 974, s. 2.)

Art. 10. Regulation or Prohibition of Sale of Wine.

§ 18-119. Certain counties authorized to regulate or prohibit sale of wine.—From and after the effective date of this article, the board of county

commissioners of Rutherford, Montgomery, Chatham, Gates, Hertford, Moore, Buncombe, Caswell, Duplin, Rockingham, Cleveland and Richmond counties shall have full power and authority, by resolution duly adopted, to regulate or prohibit the sale of wine within said respective counties, except that it may not prohibit the sale of wine in any municipality of said counties unless the governing body adopts a resolution prohibiting the sale of wine within the corporate limits of said municipality. (1945, c. 1076, s. 1; 1947, c. 886, s. 1; c. 918, s. 1.)

Editor's Note.—By Session Laws 1945, c. 961, the commissioners of Swain county, and the governing authority of any municipality therein, may decline to issue any licenses authorized under this chapter for the sale of wine. And by Session Laws 1945, cc. 927, 1092, the commissioners of Bladen county may do the same.

The 1947 amendments inserted "Cleveland" and "Rockingham" in the list of counties.

§ 18-120. Municipalities in certain counties authorized to regulate or prohibit sale of wine.—The governing body of any municipality in Rutherford, Montgomery, Chatham, Gates, Hertford, Moore, Buncombe, Caswell, Duplin, Rockingham, Cleveland and Richmond counties, from and after the effective date of this article shall have full power and authority, by resolution adopted, to regulate or prohibit the sale of wine within the corporate limits of its municipality. (1945, c. 1076, s. 2; 1947, c. 886, s. 2; c. 918, s. 2.)

The 1947 amendments inserted "Cleveland" and "Rockingham" in the list of counties.

§ 18-121. Rules and regulations.—The board of county commissioners of Rutherford, Montgomery, Chatham, Gates, Hertford, Moore, Buncombe, Caswell, Duplin, Rockingham, Cleveland and Richmond counties and/or the governing body of any municipality of said counties may adopt rules and regulations regulating the sale of wine within the territory specified in §§ 18-119 and 18-120, fixing the hours of sale, the places of business to which license may be issued, the location of places of business which may engage in the sale of wine, and pass upon the qualifications of applicants for license and may in its discretion prescribe the terms and conditions upon which a licensee may engage in the sale of wine. (1945, c. 1076, s. 3; 1947, c. 886, s. 3; c. 918, s. 3.)

The 1947 amendments inserted "Cleveland" and "Rockingham" in the list of counties.

§ 18-122. Effective date of resolution prohibiting sale.—Upon the passage or adoption of any resolution as provided in this article, prohibiting the sale of wine, any person, firm, or corporation theretofore licensed to sell wine and having on hand stocks of wine, shall have thirty (30) days from the date of the passage of such resolution in which to dispose of such stock of wine. (1945, c. 1076, s. 4.)

§ 18-123. Violation a misdemeanor. — Any person, firm, or corporation violating the provisions of this article or any resolution adopted by the board of commissioners of either Rutherford, Montgomery, Chatham, Gates, Hertford, Moore, Buncombe, Caswell, Duplin, Rockingham, Cleveland and Richmond counties or the governing body of any municipality therein, pursuant to the authority prescribed herein, shall be guilty of a misdemeanor, and upon conviction or confession of guilt, shall be punished in the discretion of the courts. (1945, c. 1076, s. 5; 1947, c. 886, s. 4; c. 918, s. 4.)

The 1947 amendments inserted "Cleveland" and "Rockingham" in the list of counties.

Art. 11. Elections on Question of Sale of Wine and Beer.

§ 18-124. Provision for elections in counties or municipalities.—(a) Compliance with article required.—For the purpose of determining whether or not wine or beer or both shall be sold in any municipality having a population of one thousand (1,000) or more according to the last federal census or within the area of any county outside the corporate limits of such a municipality, an election shall be called within any such municipality or within the county as a whole when, and only when, the conditions of this article are complied with.

(b) Petition requesting election. — Upon the presentation to it of a petition signed by fifteen per cent (15%) of the registered voters of the county that voted for governor in the last election requesting that an election be held for the purpose of submitting to the voters of the county the question of whether or not wine or beer or both shall legally be sold therein, the county board of elections shall call an election for the purpose of submitting said question or questions to the voters of the county.

(c) Requirements concerning petition.—No petition filed pursuant to the provisions of this article shall be considered by the county board of elections unless said petition shall state upon its face that at the election requested by those signing the petition there shall be submitted to the voters (1) the question of the legal sale of wine or (2) the question of the legal sale of beer or (3) the question of the legal sale of both wine and beer. Nor shall any petition be considered unless it states that the signers thereof are registered voters of the county in which the election is requested.

(d) Time of calling election.—Whenever a petition for an election is presented to the county board of elections pursuant to the provisions of this article, said board shall within thirty (30) days call the election petitioned for.

(e) Notice and conduct of election. — Thirty days' public notice shall be given of any election called pursuant to the provisions of this article prior to the opening of the registration books for the same, and such election shall be held under the same law and regulations as are provided for the election of members of the general assembly, except that no absentee ballots shall be voted in said election.

(f) Restrictions as to time of election.—No election shall be held pursuant to the provisions of this article in any county within sixty (60) days of the holding of any general election, special election, or primary election in said county or any municipality thereof.

(g) Time between elections. — Whenever an election is held pursuant to the provisions of this article in any county, no other election pursuant to the provisions of this article shall be held in

such county within three (3) years of the holding of the preceding election pursuant to the provisions of this article: Provided, that this subsection shall not prevent the holding of a municipal election in such county as hereinafter provided within three (3) years of the holding of said county election. (1947, c. 1084, s. 1.)

Editor's Note.—Section 5 of the act from which this article was codified provided that no election shall be called pursuant to its provisions within 160 days after its effective date of July 1, 1947.

For brief discussion of act from which this article was codified, see 25 N. C. Law Rev. 382.

Cited in State v. Cochran, 230 N. C. 523, 53 S. E. (2d) 663.

§ 18-125. Form of ballots.—If such election is called to determine whether or not wine shall be sold within the county, the ballot shall contain the following:

☐ For the legal sale of wine
☐ Against the legal sale of wine

If such election is called to determine whether or not beer shall be sold within the county, the ballot shall contain the following:

☐ For the legal sale of beer
☐ Against the legal sale of beer

If such an election is called to determine whether or not wine and/or beer shall be sold within the county, the ballot shall contain the following:

☐ For the legal sale of wine
☐ Against the legal sale of wine
☐ For the legal sale of beer
☐ Against the legal sale of beer

(1947, c. 1084, s. 2.)

§ 18-126. Effect of vote for or against sale of beer or wine.—(a) Vote on sale of beer.—If a majority of the votes cast in such election shall be for the legal sale of beer, then the governing board of the county and the governing board of each municipality in said county shall issue licenses to sell beer as defined in G. S. § 18-64 as provided in chapter 18 of the General Statutes notwithstanding any public, special, local or private act to the contrary, whether passed before or after the ratification of this article.

If a majority of the votes cast in such election shall be against the legal sale of beer, then after the expiration of sixty (60) days from the day on which the election is held it shall be unlawful to sell or possess for the purpose of sale in the county, either within or without the corporate limits of municipalities therein, any beer of more than one-half of one per cent of alcohol by volume, and such sale or possession for the purpose of sale shall constitute a misdemeanor, the punishment for which shall be in the discretion of the court. This paragraph shall not apply to any municipality in which an election is held as hereinafter provided after the holding of a county election, and at which a majority of the votes cast shall be for the sale of beer.

(b) Vote on sale of wine.—If a majority of the votes cast in such election shall be for the legal sale of wine, then the governing board of the county and the governing board of each municipality in said county shall issue to applicants entitled to same licenses to sell wine as defined in G. S. §§ 18-64 and 18-99 as provided in chapter 18 of the General Statutes notwithstanding any public, special, local or private act to the contrary, whether passed before or after the ratification of this article.

If a majority of the votes cast in such election shall be against the legal sale of wine, then after the expiration of sixty (60) days from the day on which the election is held it shall be unlawful to sell or possess for the purpose of sale in the county, either within or without the corporate limits of municipalities therein, any wine of more than three per cent (3%) of alcohol by volume, and such sale or possession for the purpose of sale shall constitute a misdemeanor, the punishment for which shall be in the discretion of the court. This paragraph shall not apply to any municipality in which an election is held as hereinafter provided after the holding of a county election, and at which a majority of the votes cast shall be for the sale of wine. (1947, c. 1084, s. 3.)

Where defendant was convicted of the unlawful sale of tax-paid beer in a trial free from error, the solicitor formally admitted that at the time of the sale, defendant possessed and displayed licenses for the sale of beer from the city, county and state, which "were then in full force and effect." The supreme court stayed the judgment, since the judicial admission of the solicitor brought the sale within the protective provisions of the statute and disclosed that no criminal offense had been committed. State v. Cochran, 230 N. C. 523, 53 S. E. (2d) 663.

§ 18-127. Elections in certain municipalities after majority vote in county against sale of wine or beer.—After the holding of a county election pursuant to the provisions of this article in which a majority of the votes cast is against the legal sale of wine or beer or both, the governing board of any municipality in said county having a population of one thousand (1,000) or more according to the last federal census shall call an election to determine whether or not the beverage or beverages, the legal sale of which has been prohibited as a result of said county election, shall legally be sold within the corporate limits of said municipality notwithstanding the results of the county election. An election authorized by this section shall be called by the governing board of the municipality only upon being presented with a petition signed by fifteen per cent (15%) of the registered voters of said municipality that voted for the governing body of such municipality in the last primary or election in whichever voted the greatest number of votes requesting that such election be held.

The petition shall state whether the election is to be held to determine whether or not wine or beer or both is legally to be sold within said municipality, but no election shall be held in said municipality to determine whether or not any beverage is legally to be sold therein unless the sale of such beverage has been prohibited in the county in which said municipality is located. No petition shall be considered unless it complies with this paragraph nor unless it states that the signers thereof are registered voters of the municipality in which the election is requested.

The provisions of this article, including the laws and regulations adopted by reference, relating to county elections, including the provisions relating to the calling of elections, notice of elections,

holding of elections, ballots, and results of elections, are hereby in all respects made applicable to any municipal election held pursuant to the provisions of this section except that the county board of elections shall not conduct any such election.

If a majority of the votes cast in any election held pursuant to the provisions of this section shall be against the sale of the beverage or beverages voted on, then the sale or possession for the purpose of sale of such beverage or beverages shall constitute a misdemeanor, the punishment for which shall be in the discretion of the court as hereinbefore provided.

If a majority of the votes cast in any election held pursuant to the provisions of this section shall be for the sale of the beverage or beverages voted on, then the governing board of said municipality shall issue to applicants entitled to same licenses to sell such beverage or beverages as defined in G. S. §§ 18-64 and 18-99 as provided in chapter 18 of the General Statutes, notwithstanding the result of the county election or any public, special, local or private act to the contrary, whether passed before or after the ratification of this article. (1947, c. 1084, s. 4.)

§ 18-128. Wine for sacramental purposes not prohibited.—Nothing in this article shall prevent the purchase or possession of wine for sacramental purposes by any organized church or ordained minister of the gospel. (1947, c. 1084, s. 6.)

Art. 12. Additional Powers of State Board over Malt Beverages.

§ 18-129. Power of state board of alcoholic control to regulate distribution and sale of malt beverages; determination of qualifications of applicant for permit, etc.—The state board of alcoholic control shall be referred to herein as "the board", and said board in addition to all powers now conferred upon it by law is hereby vested with additional powers to regulate the distribution and sale of malt beverages as follows:

The distribution and sale of beer in this state shall be subject to all existing laws and the following additional authority and powers are hereby expressly granted to the board.

The board shall have the sole power, in its discretion, to determine the fitness and qualifications of an applicant for a permit to sell, manufacture or bottle beer. The board shall inquire into the character of the applicant, the location, general appearance and type of place of business of the applicant. (1949, c. 974, s. 1.)

Editor's Note.—Section 19 of the act from which this article was codified made it effective from and after April 14, 1949.

For comment on this article, see 27 N. C. Law Rev. 463.

§ 18-130. Application for permit; contents.—All resident bottlers or manufacturers of beer and all resident wholesalers and retailers of beer shall file a written application for a permit with the state board of alcoholic control, and in the application shall state under oath therein:

(1) The name and residence of the applicant and the length of his residence within the state of North Carolina;

(2) The particular place for which the license is desired, designating the same by a street and number if practicable; if not, by such other apt description as definitely locates it; and if said place is outside a municipality within the county, the distance to the nearest church or public or private school from said place;

(3) The name of the owner of the premises upon which the business licensed is to be carried on, and, if the owner is not the applicant, that such applicant is the actual and bona fide lessee of the premises;

(4) That the place or building in which it is proposed to do business conforms to all laws of health and fire regulations applicable thereto, and is a safe and proper place or building;

(5) That the applicant intends to carry on the business authorized by the permit for himself or under his immediate supervision and direction;

(6) That the applicant has been a bona fide resident of this state for a period of at least one year immediately preceding the date of filing his application and that he is not less than twenty-one years of age;

(7) The place of birth of applicant and that he is a citizen of the United States, and, if a naturalized citizen, when and where naturalized;

(8) That the applicant has never been convicted of a felony or other crime involving moral turpitude; and that he has not, within the two years next preceding the filing of the application, been adjudged guilty of violating the prohibition or liquor laws, either state or federal;

(9) That the applicant has not during five years next preceding the date of said application had any permit or license issuable hereunder or any license issued to him pursuant to the laws of this state, or any other state, to sell alcoholic beverages of any kind revoked;

(10) That the applicant is not the holder of a federal special tax liquor stamp;

(11) If the applicant is a firm, association or partnership, the application shall state the matters required in subsections (6), (7), (8) and (9), with respect to each of the members thereof, and each of said members must meet all of the requirements in said subsections provided;

(12) If the applicant is a corporation, organized or authorized to do business in this state, the application shall state the matters required in subsections (7), (8) and (9), with respect to each of the officers and directors thereof, and any stockholder owning more than twenty-five per cent (25%) of the stock of such corporation, and the person or persons who shall conduct and manage the licensed premises for the corporation, and each of said persons must meet all the requirements in said subsections provided; provided, however, that the requirement as to residence shall not apply to said officers, directors and stockholders of such corporation, but such requirement shall apply to any such officer, director or stockholder, agent or employee who is also the manager and in charge of the premises for which permit is applied for. (1949, c. 974, s. 1.)

§ 18-131. Application to be verified; refusal or revocation of permit; penalty for false statement; independent investigation of applicant.—The application must be verified by the affidavit of the applicant before a notary public or other person duly authorized by law to administer oaths. The

foregoing provisions and requirements are mandatory prerequisites for the issuance of a permit and in the event any applicant fails to qualify under the same, or if any false statement is knowingly made in any application, permit shall be refused. If a permit is granted on any application, containing a false statement knowingly made, said permit shall be revoked and the applicant upon conviction shall be guilty of a misdemeanor and subject to the penalty provided by law for misdemeanors. In addition to the information furnished in any application, the chief of malt beverage division shall make such additional and independent investigation of each applicant, and of the place to be occupied, as deemed necessary or advisable. (1949, c. 974, s. 2.)

§ 18-132. Permit revoked if federal special tax liquor stamp procured.—If an applicant, after obtaining a permit, shall procure a federal special tax liquor stamp, the board shall revoke his permit forthwith. (1949, c. 974, s. 3.)

§ 18-133. Notice of intent to apply for permit; posting or publication of notice; objections to issuance of permit and hearing thereon.—Every person intending to apply for any permit to sell beer at retail hereunder shall, not more than thirty days and not less than ten days before applying to the board for such permit, give written notice of such intention to the county and municipal authorities in which applicant proposes to maintain his business, and shall post a notice of such intention on the front door of the building, place or room where he proposes to engage in such business, or publish such notice at least once in a newspaper published in or having a general circulation in the county, city or town wherein such persons propose to engage in such business.

Any objections to the issuance of the permit to an applicant shall be filed in writing with the board and the board shall not refuse to grant any such permit except upon a hearing, if requested in writing by applicant, held after ten days notice to the applicant of the time and place of such hearing, which notice shall contain a statement of the objections to granting such permit and shall be served on the applicant by sending same to the applicant by registered mail to the address given in his application. The applicant shall have the right to produce evidence in his behalf at the hearing and be represented in person or by counsel. (1949, c. 974, s. 4.)

§ 18-134. Status of persons holding license at time of ratification of article.—All persons holding a license to sell beer at retail at the time of the ratification of this article shall be deemed to have complied with all the requirements of the board in filing application for a permit to sell beer at retail; provided, however, that such licensee shall make application for a permit in the manner prescribed in this article on or before June 30, 1949, and upon failure to make such application, such license held by such retailer shall be void. (1949, c. 974, s. 5.)

§ 18-135. Certification to department of revenue of permits issued; issuance of license; revocation of permit or license.—The board shall certify to the department of revenue the names, locations and addresses of all persons to whom the board has issued permits, and no license issued to an applicant (subject, however, to the provisions of § 18-134) shall be valid until the applicant has obtained the permit as provided by this article.

Provided, however, that when a permit has been issued by the board the permittee, upon payment of fees now provided by law, shall have license issued to him by the commissioner of revenue and by the governing body of any county or municipality wherein said permittee shall conduct his business. In all cases where a permit is revoked by the board, such revocation shall render void any state, county or municipal license issued hereunder and in the event any county or municipality through its governing body shall for cause revoke any license such revocation shall automatically revoke any other malt beverage license or permit held by the licensee.

Provided, further, however, that the jurisdiction herein conferred upon the board to revoke or suspend permits shall not preclude the governing body of any county or municipality from revoking or suspending the license of any retail licensee within its jurisdiction for violating any existing law regulating the sale of malt beverages or of the provisions of this article. In any proceeding before such governing body for the revocation or suspension of a retailer's license, the licensee shall be given due notice of the charges against him and be given an opportunity to appear personally and by counsel in his defense. (1949, c. 974, s. 6.)

§ 18-136. Suspension or revocation of permit upon personal disqualification, etc.—The board may suspend or revoke any permit issued by it if in the discretion of the board it is the opinion that the permittee is not a suitable person to hold such permit or that the place occupied by the permittee is not a suitable place. (1949, c. 974, s. 7.)

§ 18-137. Hearing upon suspension or revocation of permit.—Before the board may suspend or revoke any permit issued under the provisions of this article, at least ten days notice of such proposed or contemplated action by the board shall be given to the affected permittee. Such notice shall be in writing, shall contain a statement in detail of the grounds or reasons for such proposed or contemplated action of the board, and shall be served on the permittee by sending the same to such permittee by registered mail to his last known post office address. The board shall in such notice appoint a time and place when and at which the said permittee shall be heard as to why the said permit shall not be suspended or revoked. The permittee shall at such time and place have the right to produce evidence in his behalf and to be represented by counsel. (1949, c. 974, s. 8.)

§ 18-138. Rules and regulations for enforcement of article.—The board is hereby vested with power to adopt rules and regulations for carrying out the provisions of this article, but not inconsistent herewith, and to amend or repeal such regulation. Every regulation or amendment thereto adopted by the board shall become effective on the tenth day after the date of its adoption and the filing of a certified copy thereof in the office of the secretary of state. (1949, c. 974, s. 9.)

§ 18-139. Effect of article on existing local regulations as to sale of beer.—Nothing in this article shall require any county or municipality to issue licenses for any territory where the sale of beer is prohibited by special legislative act or for any area where the sale or possession for the purpose of sale of beer is unlawful as a result of local option election, and this article shall not repeal any special, public-local or private act prohibiting the sale of beer in any county in this state, or any act authorizing the board of commissioners of any county of this state, or the governing body of any municipality, in its discretion, to prohibit the sale of beer. (1949, c. 974, s. 10.)

§ 18-140. Chief of malt beverage division and assistants; inspectors.—(a) To more adequately insure the strict enforcement of the regulations of the board and of the provisions of this article, the board shall appoint a person to be known and designated as "chief of malt beverage division", who shall be in charge of the administration of such division and who shall be paid such compensation as the board with the approval of the governor shall fix. Said board in addition to said chief of malt beverage division may appoint one or more assistants to the chief of the malt beverage division, all of whom shall have full authority to make investigations, hold hearings and to make findings of fact. Upon the approval of the said board of the findings and orders of suspension or revocation of the permit of any licensee, such findings of said chief, assistant or assistants shall be deemed to be the findings and the order of the board. The board shall employ an adequate number of field men to be designated as "inspectors", not less than fifteen in number who shall devote their full time to the enforcement of the provisions of this article and such rules and regulations as may be promulgated thereunder by the board.

(b) Such inspectors shall investigate the operation of the licensed premises of all persons licensed under this article, examine the books and records of such licensee, procure evidence with respect to the violation of this article or any rules and regulations adopted thereunder and perform such other duties as the board may direct Such inspectors shall have the right to enter any such licensed premises in the state in the performance of their duty at any hour of the day or night when beer is being sold or consumed on such licensed premises. Refusal by such permittee or by any other employee of a permittee to permit such inspectors to enter the premises shall be cause for revocation or suspension of the permit of such permittee. The inspectors so appointed shall, after taking the oath prescribed for peace officers, have the same power and authority in the enforcement of this article as other peace officers. Such inspectors shall be paid such compensation as may be fixed by the board with the approval of the governor.

(c) All alcoholic beverage control officers now employed or who may hereafter be employed may be used by the board as inspectors in counties and cities having alcoholic beverage control stores in addition to the other inspectors provided for under this article, and shall be vested with all powers and authority as herein vested in inspectors. (1949, c. 974, s. 11.)

§ 18-141. Sale of beer during certain hours prohibited.—No beer shall be sold between the hours of 11:00 P. M. and 7:30 A. M. and no permit shall authorize sale thereof during said hours. (1949, c. 974, s. 12.)

Effect on § 18-105.—Section 18-105, which prohibits the sale of beer and/or wine after 11:30 P. M., is implicitly repealed as to the sale of beer by the provision in this section that beer may not be sold after 11:00 P. M. Nothing in this article, however, purports to change the hours of permissible on premises consumption of beer, which are set by § 18-106 at 7:00 A. M. to 12:00 midnight. 27 N. C. Law Rev. 463.

§ 18-142. Keeping places of business clean, etc.—The board shall require that all retail permit holders keep their places of business clean, well lighted and in an orderly manner. (1949, c. 974, s. 13.)

§ 18-143. Appropriation for malt beverage division.—For the efficient administration and enforcement of this article, an appropriation is hereby made for the use of the state board of alcoholic control, which appropriation shall be in addition to the appropriation to the state board of alcoholic control in the biennial appropriation acts, of a sum in an amount not less than three per cent (3%) and not more than five per cent (5%) of the total malt beverage taxes collected by the commissioner of revenue, the percentage within the limitations herein provided to be determined by the state board of alcoholic control and certified to the director of the budget. The appropriation herein provided shall be deducted before the distribution as provided under subsection (t) of § 18-81, G. S., is made. The director of the budget shall estimate the amount of the appropriation to be provided by the percentage of collections requested by state board of alcoholic control and shall make advance allocation based upon such estimate, and the enforcement fund provided by such appropriation shall be set up in a special fund to be designated as "the malt beverage control and enforcement fund". (1949, c. 974, s. 16.)

§ 18-144. Application of article.—This article shall apply to all licenses to be issued for the license tax year 1949-1950 and thereafter. (1949, c. 974, s. 17.)

Chapter 19. Offenses against Public Morals.

§ 19-1. What are nuisances under this chapter.—Whoever shall erect, establish, continue, maintain, use, own, or lease any building, erection, or place used for the purpose of lewdness, assignation, prostitution, gambling, or illegal sale of whiskey, or illegal sale of narcotic drugs as defined in the Uniform Narcotic Drug Act is guilty of nuisance, and the building, erection, or place, or the ground itself, in or upon which such lewdness, assignation, prostitution, gambling, or illegal sale of liquor is conducted, permitted, or carried on, continued, or exists, and the furniture, fixtures, musical instruments and contents, are also declared a nuisance, and shall be enjoined and abated as hereinafter provided. (1919, c. 288; Pub. Loc. 1913, c. 761, s. 25; 1949, c. 1164; C. S. 3180.)

Editor's Note.—The 1949 amendment inserted in lines five and six the words "or illegal sale of narcotic drugs as defined in the Uniform Narcotic Drug Act."

Applied in State v. Lancaster, 228 N. C. 157, 44 S. E. (2d) 733.

Cited in State v. Alverson, 225 N. C. 29, 33 S. E. (2d) 135; State v. Gordon, 225 N. C. 241, 249, 34 S. E. (2d) 414 (con. op.).

§ 19-2. Action for abatement; injunction.

Public Nuisances.—This and the following sections are not applicable to proceedings brought to abate a public nuisance as defined by § 90-103. State v. Townsend, 227 N. C. 642, 44 S. E. (2d) 36.

Procedure Cannot Be Invoked against Alcoholic Control Board.—It was never intended that the procedure here invoked to abate a nuisance should be applied against an alcoholic control board set up under color of legislative authority, or against one who rents a building to such a board for the purpose of operating a liquor control store. State v. Lancaster, 228 N. C. 157, 158, 44 S. E. (2d) 733.

The proceeding by a citizen in the name of the state for injunction, the closing of a place of business and the seizure and sale of the personal property used therewith, must be based upon allegation and proof of one or more of the specific acts denounced by § 19-1. State v. Alverson, 225 N. C. 29, 33 S. E. (2d) 135.

Chapter 20. Motor Vehicles.

Art. 1. Department of Motor Vehicles.

§ 20-1. Department of motor vehicles created; powers and duties.—A department of the government of this state, to be known as the department of motor vehicles, is hereby created. It is the intent and purpose of this article, and it shall be liberally construed to accomplish that purpose, to transfer and consolidate under one administrative head in the department of motor vehicles agencies now operated under the department of revenue and dealing with the subject of the regulation of motor vehicular traffic, whether such activities are at present handled directly by the commissioner of revenue or by the motor vehicle bureau, the auto theft bureau, the division of highway safety, the major of the state highway patrol, the officials handling the Uniform Driver's License Act; and the department of motor vehicles shall succeed to and is hereby vested with all the powers, duties and jurisdiction now vested by law in any of said agencies; provided, however, all

powers, duties and functions relating to the collection of motor fuel taxes, and the collection of the gasoline and oil inspection taxes, shall continue to be vested in and exercised by the commissioner of revenue, and wherever it is now provided by law that reports shall be filed with the commissioner or department of revenue as a basis for collecting the motor fuel or gasoline and oil inspection taxes, or enforcing any of the laws regarding the motor fuel or gasoline and oil inspection taxes, such reports shall continue to be made to the department of revenue and the commissioner of motor vehicles shall make available to the commissioner of revenue all information from the files of the department of motor vehicles which the commissioner of revenue may request to enable him to better enforce the law with respect to the collection of such taxes: Provided, further, nothing in this article shall deprive the utilities commissioner of any of the duties or powers now vested in him with regard to the regulation of motor vehicle carriers. (1941, c. 36, s. 1; 1949, c. 1167.)

Editor's Note.—The 1949 amendment made changes rendered necessary by reason of the transfer of the administration of the gasoline and oil inspection law to the department of agriculture.

For acts relating to parking meters not affected by this chapter, see Session Laws 1947, c. 54 (city of Shelby); c. 66 (town of Laurinburg); c. 675 (city of Statesville); c. 735 (town of Mooresville); c. 1035 (Cabarrus county). And see Session Laws 1949, relating to city of Statesville.

§ 20-2. Commissioner of motor vehicles.—The department of motor vehicles shall be under control of an executive officer to be designated as the commissioner of motor vehicles, who shall be appointed by the governor and be responsible directly to the governor and subject to removal by the governor at his discretion and without requirement of the assignment of any cause. The commissioner shall be paid an annual salary to be fixed by the governor, with the approval of the advisory budget commission, payable in monthly installments, and shall likewise be allowed his traveling expenses when away from Raleigh on official business.

In any action, proceeding, or matter of any kind, to which the commissioner of motor vehicles is a party or in which he may have an interest, all pleadings, legal notices, proofs of claim, warrants for collection, certificates of tax liability, executions, and other legal documents may be signed and verified by the assistant commissioner on behalf of the commissioner. (1941, c. 36, s. 2; 1945, c. 527.)

Editor's Note.—The 1945 amendment added the second paragraph.

Art. 2. Uniform Driver's License Act.

§ 20-7. Operators' and chauffeurs' licenses; expiration; examinations; fees.—(a) No person except those expressly exempted under § 20-8 shall operate a motor vehicle upon any highway in this state unless such person upon application has been licensed as an operator or chauffeur by the department under the provisions of this article.

(b) Every application for an operator's or chauffeur's license shall be made upon the approved form furnished by the department.

(c) No person shall hereafter be issued an operator's license until it is determined that such person is physically and mentally capable of safely operating motor vehicles over the highways of the state. In determining whether or not a person is physically and mentally capable of safely operating motor vehicles over the highways of the state, the department shall require such person to demonstrate his capability by passing an examination, which may include road tests, oral and in the case of literate applicants written tests, and tests of vision, as the department may require.

(d) The department shall cause each person who has heretofore been issued an operator's license to be examined or re-examined, as the case may be, to determine whether or not such person is physically and mentally capable of safely operating motor vehicles over the highways of the state. Those persons found, as a result of such examination or re-examination, to be capable of safely operating motor vehicles over the highways of the state shall be reissued operators' licenses; and those persons found to be incapable of safely operating motor vehicles over the highways of the state shall not be reissued operators' licenses. The examination required by this subsection may include such road tests, oral and in the case of literate applicants written tests, and tests of vision, as the department may require. The department may once reissue operators' licenses without examination to licensed operators who have passed an operator's examination given by the department subsequent to July 1st, 1945, and prior to July 1st, 1947.

(e) The department is hereby authorized to grant unlimited licenses or licenses containing such limitations as it may deem advisable. If any applicant shall suffer from any physical defect or disease which affects his or her operation of a motor vehicle, the department may require to be filed with it a certificate of such applicant's condition signed by some medical authority of the applicant's community designated by the department. This certificate shall in all cases be treated as confidential. Nothing in this subsection shall be construed to prevent the department from refusing to issue a license, either limited or unlimited, to any person deemed to be incapable of operating a motor vehicle with safety to himself and to the public: Provided, that nothing herein shall prohibit deaf persons from operating motor vehicles who in every other way meet the requirements of this section.

(f) The operators' licenses issued under this section shall automatically expire on the birthday of the licensee in the fourth year following the year of issuance; and no new license shall be issued to any operator after the expiration of his license until such operator has again passed the examination specified in this section.

(g) Every chauffeur's license shall expire June 30th of each year and shall be renewed annually, after an examination, which may include road tests, oral and in the case of literate applicants written tests, and tests of vision, as the department may require: Provided, that the commissioner of motor vehicles may, in proper cases, waive the examination required by this subsection.

(h) Upon receipt of information that the physical or mental condition of any person has changed

since his or her examination for an operator's or chauffeur's license and before a new examination is required by this section, the department may, after ten (10) days' written notice, require such person to take another examination to determine his or her capability to operate safely motor vehicles over the highways of the state. If such person is found to be capable of safely operating vehicles over the highways of the state, license shall be reissued to him or her and no fee shall be collected by the department for such examination and reissuance of license. If such person is found to be incapable of safely operating vehicles over the highways of the state, no license shall be issued or reissued to him or her unless such person shall subsequently pass an examination given by the department.

(i) For the examination and issuance or reissuance of an operator's or chauffeur's license or the reissuance of an operator's or chauffeur's license without an examination, the licensee shall pay to the department a fee of two dollars ($2.00).

(j) The fees collected under this section and § 20-14 shall be placed in a special fund to be designated the "Operators' and Chauffeurs' License Fund" and shall be used under the direction and supervision of the assistant director of the budget for the administration of this section.

(k) Any person operating a motor vehicle in violation of this section shall be guilty of a misdemeanor and upon conviction shall be punished as provided in this section.

(l) Any person who, except for lack of instruction in operating a motor vehicle would be qualified to obtain an operator's license under this article, may apply for a temporary learner's permit, and the department shall issue such permit, entitling the applicant, while having such permit in his immediate possession, to drive a motor vehicle upon the highways for a period of thirty (30) days, during daylight hours. Any such learner's permit may be renewed, or a new permit issued for an additional period of thirty (30) days. Such person must, while operating a motor vehicle over the highways, be accompanied by a licensed operator or chauffeur who is actually occupying a seat beside the driver.

(m) Every operator's or chauffeur's license issued by the department shall bear thereon the distinguishing number assigned to the licensee and shall contain the name, age, residence address and a brief description of the licensee, who, for the purpose of identification and as a condition precedent to the validity of the license, immediately upon receipt thereof, shall endorse his or her regular signature in ink upon the same in the space provided for that purpose unless a facsimile of his or her signature appears thereon. Such license shall be carried by the licensee at all times while engaged in the operation of a motor vehicle. However, no person charged with failing to so carry such license shall be convicted, if he produces in court an operator's or chauffeur's license theretofore issued to him and valid at the time of his arrest.

(n) All operators' licenses issued by the department of motor vehicles prior to July 1, 1947 shall expire as follows and the holders thereof shall not be permitted to operate motor vehicles over the highways of North Carolina unless they secure new operators' licenses as required by law:

(1) A license issued to a person whose last or surname begins with the letter "A" or the letter "B" shall expire April 6, 1949;

(2) A license issued to a person whose last or surname begins with the letter "C" or the letter "D" shall expire April 6, 1949;

(3) A license issued to a person whose last or surname begins with the letters "E", "F" or "G" shall expire April 6, 1949;

(4) A license issued to a person whose last or surname begins with the letters "H", "I", "J" or "K" shall expire at midnight, June 30, 1949;

(5) A license issued to a person whose last or surname begins with the letter "L" or the letter "M" shall expire at midnight, December 31, 1949;

(6) A license issued to a person whose last or surname begins with the letters "N", "O", "P" or "Q" shall expire at midnight, June 30, 1950;

(7) A license issued to a person whose last or surname begins with the letters "R", "S" or "T" shall expire at midnight, December 31, 1950;

(8) A license issued to a person whose last or surname begins with the letters "U", "V", "W", "X", "Y" or "Z" shall expire at midnight, June 30, 1951.

(o) The punishment for a violation of this section shall be a fine of not less than twenty-five dollars ($25.00) or imprisonment for not less than thirty (30) days, or both such fine and imprisonment, in the discretion of the court. (1935, c. 52, s. 2; 1943, c. 649, s. 1; c. 787, s. 1; 1947, c. 1067, s. 10; 1949, c. 583, ss. 9, 10; c. 826, ss. 1, 2.)

Editor's Note.—The 1947 amendment rewrote this section. The 1949 amendments inserted present subsections (m) and (n), renumbered former subsection (m) as (o) and deleted the former provision of subsection (a) relating to the operation of a motor vehicle while under instruction of and accompanied by a licensed operator.

Driving without a License Is Negligence Per Se.—Under this section it is negligence per se for one to drive a motor vehicle without a license, but such negligence must be the proximate cause of injury in order to be actionable. Hoke v. Atlantic Greyhound Corp., 226 N. C. 692, 40 S. E. (2d) 345.

§ 20-9. What persons shall not be licensed.

Cited in Hoke v. Atlantic Greyhound Corp., 226 N. C. 692, 40 S. E. (2d) 345.

§ **20-13:** Repealed by Session Laws 1947, c. 1067, s. 11.

§ 20-16. Authority of department to suspend license.—(a) The department shall have authority to suspend the license of any operator or chauffeur without preliminary hearing upon a showing by its records or other satisfactory evidence that the licensee:

1. Has committed an offense for which mandatory revocation of license is required upon conviction;

2. Has been involved as a driver in any accident resulting in the death or personal injury of another or serious property damage, which accident is obviously the result of the negligence of such driver, and where such property damage has not been compensated for;

3. Is an habitually reckless or negligent driver of a motor vehicle;

4. Is incompetent to drive a motor vehicle;

5. Is an habitual violator of the traffic laws;

6. Has permitted an unlawful or fraudulent use of such license;

7. Has committed an offense in another state, which if committed in this state would be grounds for suspension or revocation;

8. Has been convicted of illegal transportation of intoxicating liquors;

9. Has, within one (1) year, been convicted of two or more charges of speeding in excess of fifty-five (55) and not more than seventy-five (75) miles per hour, or of one or more charges of reckless driving and one or more charges of speeding in excess of fifty-five (55) and not more than seventy-five (75) miles per hour; or

10. Has been convicted of operating a motor vehicle at a speed in excess of seventy-five (75) miles per hour.

(b) Pending an appeal from a conviction of any violation of the motor vehicle laws of this state, no driver's or chauffeur's license shall be suspended by the department of motor vehicles because of such conviction or because of evidence of the commission of the offense for which the conviction has been had.

(c) Upon suspending the license of any person as hereinbefore in this section authorized, the department shall immediately notify the licensee in writing and upon his request shall afford him an opportunity for a hearing as early as practical within not to exceed twenty (20) days after receipt of such request in the county wherein the licensee resides unless the department and the licensee agree that such hearing may be held in some other county, and such notice shall contain the provisions of this section printed thereon. Upon such hearing the duly authorized agents of the department may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers and may, except as provided in section 20-231, require a re-examination of the licensee. Upon such hearing the department shall either rescind its order of suspension, or good cause appearing therefor, may extend the suspension of such license. (1935, c. 52, s. 11; 1947, c. 893, ss. 1, 2; c. 1067, s. 13; 1949, c. 373, ss. 1, 2; c. 1032, s. 2.)

Editor's Note.—The first 1947 amendment added the last clause of paragraph 2 of subsection (a) and made changes in former subsection (b). The second 1947 amendment added paragraphs 9 and 10 to subsection (a).

The first 1949 amendment inserted the present subsection (b) and redesignated former subsection (b) as subsection (c). The second 1949 amendment inserted in line sixteen of subsection (c) the words "except as provided in section 20-231." For brief discussion of these amendments, see 27 N. C. Law Rev. 371, 372.

Judgment in Excess of Jurisdiction of Superior Court.—A judgment of the Superior Court requiring a defendant to surrender his license to drive a motor vehicle and prohibiting him from operating such vehicles for a specified period, is in excess of the jurisdiction of such court and is void. State v. Cooper, 224 N. C. 100, 29 S. E. (2d) 18.

Power to suspend or revoke a driver's license is exclusively in the department of motor vehicles subject to review by the superior court. State v. Warren, 230 N. C. 299, 52 S. E. (2d) 879.

Discretionary suspensions and revocations of licenses by the department of motor vehicles are reviewable under § 20-25, but mandatory revocations under § 20-17 are not so reviewable. In re Wright, 228 N. C. 584, 46 S. E. (2d) 696. See State v. Cooper, 224 N. C. 100, 29 S. E. (2d) 18.

Construed with § 20-23.—This section and § 20-23 are parts of the same statute relating to the same subject matter and must be construed in pari materia. In re Wright, 228 N. C. 584, 46 S. E. (2d) 696.

The language of subsection (7) of this section and § 20-23 is almost identical. This section is the real source of authority. The latter section prescribes a rule of evidence and adds the power of revocation, when this section is the basis of action. Id.

Conviction of Drunken Driving in Another State.—Upon a receipt of notification from the highway department of another state that a resident of this state had there been convicted of drunken driving, the department of motor vehicles has the right to suspend the driving license of such person. In re Wright, 228 N. C. 301, 45 S. E. (2d) 370.

A provision in a judgment in a prosecution for violation of a statutory provision regulating the operation of motor vehicles, that defendant's license be surrendered and that defendant not operate a motor vehicle on the public highways for a stipulated period, is void and will be stricken on appeal. State v. Warren, 230 N. C. 299, 52 S. E. (2d) 879.

§ 20-17. Mandatory revocation of license by department.—The department shall forthwith revoke the license of any operator or chauffeur upon receiving a record of such operator's or chauffeur's conviction for any of the following offenses when such conviction has become final:

1. Manslaughter (or negligent homicide) resulting from the operation of a motor vehicle.

2. Driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug.

3. Any felony in the commission of which a motor vehicle is used.

4. Failure to stop and render aid as required under the laws of this state in the event of a motor vehicle accident.

5. Perjury or the making of a false affidavit or statement under oath to the department under this article or under any other law relating to the ownership of motor vehicles.

6. Conviction, or forfeiture of bail not vacated, upon two charges of reckless driving committed within a period of twelve months.

7. Conviction, or forfeiture of bail not vacated, upon one charge of reckless driving while engaged in the illegal transportation of intoxicants for the purpose of sale. (1935, c. 52, s. 12; 1947, c. 1067, s. 14.)

Cross Reference.—As to power to suspend or revoke license generally, see § 20-16 and note.

Editor's Note.—Prior to the 1947 amendment this section was divided into subsections (a) and (b). The amendment struck out subsection (b) relating to extension of period of suspension or revocation.

Review of Revocation.—Mandatory revocations under this section are not reviewable under § 20-25. In re Wright, 228 N. C. 584, 46 S. E. (2d) 696.

Evidence that defendant had been convicted for operating an automobile while under the influence of intoxicants, was competent on the question as to whether a driver's license issued to defendant had been legally revoked. State v. Stewart, 224 N. C. 528, 31 S. E. (2d) 534.

§ 20-19. Period of suspension or revocation.—(a) When a license is suspended under paragraph 9 of § 20-16, the period of suspension shall be not less than sixty (60) days nor more than six (6) months, as may seem just and proper to the department.

(b) When a license is suspended under paragraph 10 of § 20-16, the period of suspension shall be not less than six months and not more than one year.

(c) When a license is suspended under any other provision of law, the period of suspension shall be not more than one year.

(d) When a license is revoked because of a second conviction for driving under the influence of intoxicating liquor or a narcotic drug, the department shall not grant application for a new license until the expiration of three years.

(e) When a license is revoked because of a

third or subsequent conviction for driving under the influence of intoxicating liquor or a narcotic drug the department shall never grant application for a new license: Provided, that the department may, after the expiration of five years, grant an application for a new license upon satisfactory proof that the former licensee has been of good behavior for the past five years, and that his conduct and attitude is such as to entitle him to favorable consideration.

(f) When a license is revoked for any other reason, the department shall not grant application for a new license until the expiration of one year. (1935, c. 52, s. 13; 1947, c. 1067, s. 15.)

Editor's Note.—The 1947 amendment rewrote this section.

§ 20-23. Suspending resident's license upon conviction in another state.

Construed with § 20-16.—See note to § 20-16.

And § 20-25.—This section and § 20-25 must be construed in pari materia. In re Wright, 228 N. C. 584, 46 S. E. (2d) 696.

Conviction of Drunken Driving.—Upon a receipt of notification from the highway department of another state that a resident of this state had there been convicted of drunken driving, the department of motor vehicles has the right to suspend the driving license of such person. In re Wright, 228 N. C. 301, 45 S. E. (2d) 370.

Notice May Be from Any Source.—This section does not limit the notice of conviction in another state, upon which the department may act, to notice from a judicial tribunal or other official agency. Under the wording of the statute, from whatever source the notice may come, the department may act. In re Wright, 228 N. C. 584, 46 S. E. (2d) 696.

§ 20-24. When court to forward license to department and report convictions.—(a) Whenever any person is convicted of any violation of the motor vehicle laws of this State, a notation of such conviction shall be entered by the court upon the license of the person so convicted. Whenever any person is convicted of any offense for which this article makes mandatory the revocation of the operator's or chauffeur's license of such person by the department, the court in which such conviction is had shall require the surrender to it of all operators' and chauffeurs' licenses then held by the person so convicted and the court shall thereupon forward the same, together with a record of such conviction, to the department.

(b) Every court having jurisdiction over offenses committed under this article, or any other law of this State regulating the operation of motor vehicles on highways, shall forward to the department a record of the conviction of any person in said court for a violation of any said laws, and may recommend the suspension of the operator's or chauffeur's license of the person so convicted.

(c) For the purpose of this article the term "conviction" shall mean a final conviction. Also, for the purposes of this article a forfeiture of bail or collateral deposited to secure a defendant's appearance in court, which forfeiture has not been vacated, shall be equivalent to a conviction.

(d) After November 1, 1935, no operator's or chauffeur's license shall be suspended or revoked except in accordance with the provisions of this article. (1935, c. 52, s. 18; 1949, c. 373, ss. 3, 4.)

Editor's Note.—The 1949 amendment repealed former subsection (d) and redesignated former subsection (e) as subsection (d).

Meaning of Forfeiture of Bail or Collateral.—"Bail" as here used means security for a defendant's appearance in court to answer a criminal charge there pending. Ordinarily it is evidenced by a bond or recognizance which becomes a record of the court. The forfeiture thereof is a judicial act. In re Wright, 228 N. C. 584, 46 S. E. (2d) 696.

The mere deposit of security with an arresting officer or magistrate pending issuance and service of warrant, which deposit is retained without the semblance of judicial or legal forfeiture is not a forfeiture of "bail" within the meaning of subsection (c) of this section. Id.

§ 20-25. Right of appeal to court.

By the 1941 Act, chapter 36, the power to suspend or revoke drivers' licenses after July 1, 1941, vested exclusively in the newly created Department of Motor Vehicles, subject to the same right of review by the Superior Court as existed prior to that date. State v. Cooper, 224 N. C. 100, 101, 29 S. E. (2d) 18.

Construed with § 20-23.—This section and § 20-23 must be construed in pari materia. In re Wright, 288 N. C. 584, 46 S. E. (2d) 696.

The jurisdiction vested by this section is not a delegation of legislative and administrative authority. The review is judicial and is governed by the standards and guides which are applicable to other judicial proceedings. In re Wright, 228 N. C. 584, 46 S. E. (2d) 696.

And failure of the section to provide standards for the guidance of the courts does not invalidate it or negate the jurisdiction. In re Wright, 228 N. C. 584, 46 S. E. (2d) 696.

Such jurisdiction is not the limited, inherent power of courts to review the discretionary acts of an administrative officer. The power is conferred by statute, and the statute must be looked to in order to ascertain the nature and extent of the review contemplated by the legislature. In re Wright, 228 N. C. 301, 45 S. E. (2d) 370.

The Section Imposes Additional Jurisdiction.—The court has inherent authority to review the discretionary action of an administrative agency, whenever such action affects personal or property rights, upon a prima facie showing, by petition for a writ of certiorari, that such agency has acted arbitrarily, capriciously, or in disregard of law. This section dispenses with the necessity of an application for writ of certiorari, provides for direct approach to the courts and enlarges the scope of the hearing. That the legislature had full authority to impose this additional jurisdiction upon the courts is beyond question. In re Wright, 228 N. C. 584, 46 S. E. (2d) 696.

But no discretionary power is conferred upon the court in reviewing the suspension or revocation of driving licenses, and the court may determine only if, upon the facts, petitioner's license is subject to suspension or revocation under the provisions of the statute. In re Wright, 228 N. C. 584, 46 S. E. (2d) 696.

Discretionary suspensions and revocations of driving licenses by the department of motor vehicles are reviewable under this section. In re Wright, 228 N. C. 584, 46 S. E. (2d) 696; State v. Cooper, 224 N. C. 100, 29 S. E. (2d) 18.

By Trial De Novo.—All suspensions, cancellations and revocations of driving licenses made in the discretion of the department of motor vehicles, whether under §§ 20-16, 20-23 or any other provision of this chapter, are reviewable by trial de novo. In re Wright, 228 N. C. 584, 46 S. E. (2d) 696.

The hearing in the superior court is de novo, and the court is not bound by the findings of fact or the conclusion of law made by the department. In re Wright, 228 N. C. 301, 45 S. E. (2d) 370.

But mandatory revocations under § 20-17 are not reviewable. And no right accrues to a licensee who petitions for a review of the order of the department when it acts under the terms of § 20-17, for then its action is mandatory. In re Wright, 228 N. C. 584, 46 S. E. (2d) 696.

Hearing by Department Is Prerequisite to Court Review.—Section 20-16(b) provides for a rehearing by the department of motor vehicles upon application of a licensee whose license has been suspended, and this procedure should be followed and should be made to appear in the petition before review by the superior court. In re Wright, 228 N. C. 301, 45 S. E. (2d) 370.

Cancellation of Suspension.—Petitioner was arrested in South Carolina charged with operating a motor vehicle while under the influence of intoxicants. He gave bond for appearance, but no warrant was served on him and no trial had, and his bond was forfeited. His license was suspended by the department of motor vehicles upon information of the highway department of South Carolina that he had been found guilty of driving while intoxicated. Upon review the superior court found, in addition, that the suspension was based upon misinformation and further that petitioner in fact was not guilty. It was held that the findings supported the court's order directing the re-

spondent to cancel the suspension and to restore license to petitioner. In re Wright, 228 N. C. 301, 45 S. E. (2d) 370.

§ 20-28. Unlawful to drive while license suspended or revoked. — (a) Any person whose operator's or chauffeur's license has been suspended or revoked other than permanently, as provided in this article, who shall drive any motor vehicle upon the highways of the state while such license is suspended or revoked, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than two hundred dollars ($200.00) or imprisonment in the discretion of the court, or both such fine and imprisonment. In addition, the defendant's license shall be suspended or revoked, as the case may be, for an additional period of double the period of the suspension or revocation in effect at the time of his or her apprehension for a violation of this section.

(b) Any person whose license has been permanently revoked, as provided in this article, who shall drive any motor vehicle upon the highways of the state while such license is permanently revoked shall be guilty of a misdemeanor and shall be imprisoned for not less than one year. (1935, c. 52, s. 22; 1945, c. 635; 1947, c. 1067, s. 16.)

Editor's Note.—The 1945 amendment substituted "shall" for "may" in line six. The 1947 amendment rewrote this section.

§ 20-29. Surrender of license.—Any person operating or in charge of a motor vehicle, when requested by an officer in uniform, or, in the event of accident in which the vehicle which he is operating or in charge of shall be involved, when requested by any other person, who shall refuse to write his name for the purpose of identification or to give his name and address and the name and address of the owner of such vehicle, or who shall give a false name or address, or who shall refuse, on demand of such officer or such other person, to produce his license and exhibit same to such officer or such other person for the purpose of examination, or who shall refuse to surrender his license on demand of the department, or fail to produce same when requested by a court of this State, shall be guilty of a misdemeanor and upon conviction shall be punished as provided in this article. Pickup notices for operators' or chauffeurs' licenses or revocation or suspension of license notices and orders or demands issued by the department for the surrender of such licenses may be served and executed by patrolmen or other peace officers, and such patrolmen and peace officers, while serving and executing such notices, orders and demands, shall have all the power and authority possessed by peace officers when serving and executing warrants charging violations of the criminal laws of the State. (1935, c. 52, s. 23; 1949, c. 583, s. 7.)

Editor's Note.—The 1949 amendment added the second sentence.

§ 20-29.1. Commissioner may require reexamination; issuance of limited or restricted licenses.—The commissioner of motor vehicles, having good and sufficient cause to believe that a licensed operator or chauffeur is incompetent or otherwise not qualified to be licensed, may, upon written notice of at least five days to such licensee, require him to submit to a reexamination to determine his competency to operate a motor vehicle. Upon the conclusion of such examination, the commissioner shall take such action as may be appropriate, and may suspend or revoke the license of such person or permit him to retain such license, or may issue a license subject to restrictions. Refusal or neglect of the licensee to submit to such reexamination shall be grounds for the suspension or revocation of his license. The commissioner may, in his discretion and upon the written application of any persons qualified to receive an operator's or chauffeur's license, issue to such person an operator's or chauffeur's license restricting or limiting the licensee to the operation of a single prescribed motor vehicle or to the operation of a particular class or type of motor vehicle. Such a limitation or restriction shall be noted on the face of the license, and it shall be unlawful for the holder of such limited or restricted license to operate any motor vehicle or class of motor vehicle not specified by such restricted or limited license, and the operation by such licensee of motor vehicles not specified by such license shall be deemed the equivalent of operating a motor vehicle without any chauffeur's or operator's license. Any such restricted or limited licensee may at any time surrender such restricted or limited license and apply for and receive an unrestricted operator's or chauffeur's license upon meeting the requirements therefor. (1943, c. 787, s. 2; 1949, c. 1121.)

Editor's Note.—The 1949 amendment added the provisions pertaining to the issuance of limited or restricted licenses.

§ 20-32. Unlawful to permit unlicensed minor to drive motor vehicle.

Instruction.—An instruction to the effect that it would be negligence per se for defendant to permit his child under the legal driving age to operate his automobile but that defendant could not be held liable unless the jury found from the preponderance of the evidence that such negligence was the proximate or one of the proximate causes of the injury, was held sufficient to cover this aspect of the case. Hoke v. Atlantic Greyhound Corp., 227 N. C. 412, 414, 42 S. E. (2d) 593.

§ 20-34. Unlawful to permit violations of this article.

Permitting Violation Is Negligence Per Se.—Under this section it is negligence per se for the owner of a car or one having it under his control to permit a person under legal age to operate same, but such negligence must be proximate cause of injury in order to be actionable. Hoke v. Atlantic Greyhound Corp., 226 N. C. 692, 40 S. E. (2d) 345.

§ 20-35. Penalties for misdemeanor.

Cited in Hoke v. Atlantic Greyhound Corp., 226 N. C. 692, 40 S. E. (2d) 345.

§ 20-36: Repealed by Session Laws 1947, c. 1067, s. 11.

§ 20-37. Limitations on issuance of licenses.

Editor's Note.—For comment on the 1943 amendment, see 21 N. C. Law Rev. 358.

Authority to License and Regulate Taxicabs.—In adopting this section the General Assembly delegated the authority to license taxicabs and regulate their use on public streets to the several municipalities. Suddreth v. Charlotte, 223 N. C. 629, 27 S. E. (2d) 650.

In the exercise of this delegated power, it is the duty of the municipal authorities in their sound discretion, to determine what ordinances or regulations are reasonably necessary for the protection of the public or the better government of the town; and when in the exercise of such discretion an ordinance is adopted, it is presumed to be valid; and, the courts will not declare it invalid unless it

is clearly shown to be so. State v. Stallings, 230 N. C. 252, 52 S. E. (2d) 901.

Under such delegated power a city may require, as a condition incident to the privilege of operating a taxicab on its streets, that the driver of such taxicab shall wear a distinctive cap or other insignia while operating a taxicab, to show that he is a duly licensed taxicab driver. Id.

Art. 2A. Operators' Licenses and Registration Plates for Afflicted or Disabled Persons.

§ 20-37.1. Motorized wheel chairs or similar vehicles.—Any afflicted or disabled person who is qualified to operate a motorized wheel chair or other similar vehicle not exceeding one thousand pounds gross weight, may apply to the department of motor vehicles for a special operator's license and permanent registration plates. When it is made to appear to the satisfaction of the department of motor vehicles that the applicant is qualified to operate such vehicle, and is dependent upon such vehicle as a means of conveyance or as a means of earning a livelihood, said department shall, upon the payment of a license fee of $1.00 for each such motor vehicle, issue to such applicant for his exclusive personal use a special vehicle operator's license, which shall be renewed annually upon the payment of a fee of 50c, and permanent registration plates for such vehicle. The initial $1.00 fee required by this section shall be in full payment of the permanent registration plates issued for such vehicle and such plates need not thereafter be renewed and such plates shall be valid only on the vehicle for which issued and then only while such vehicle is owned by the person to whom the plates were originally issued.

Any person other than the licensee who shall operate any motor vehicle equipped with any such special license plate as is authorized by this section shall be guilty of a misdemeanor and upon conviction subject to punishment in the discretion of the court. (1949, c. 143.)

Art. 3. Motor Vehicle Act of 1937.

Part 1. General Provisions.

§ 20-38. Definition of words and phrases.

(f) Established Place of Business.—Means the place actually occupied by a dealer or manufacturer and at which a permanent business of bargaining, trading and selling motor vehicles is or will be carried on as such in good faith, and at which place of business shall be kept and maintained the books, records and files necessary and incident to the conduct of the business of automobile dealers or manufacturers.

(q) Passenger Vehicles. — (1) Excursion passenger vehicles.

Passenger vehicles kept in use for the purpose of transporting persons on sight-seeing or travel tours.

(2) For hire passenger vehicles.

Passenger motor vehicles engaged in the business of transporting passengers for compensation; but this classification shall not include motor vehicles of seven-passenger capacity or less operated by the owner where the cost of operation is shared by neighbor fellow workmen between their homes and the place of regular daily employment, when operated for not more than two trips each way per day, nor shall this classification include automobiles operated by the owner where the cost of operation is shared by the passengers on a "share the expense" plan.

(3) Franchise bus carriers.

Passenger motor vehicles operated under a franchise certificate issued by the utilities commission under §§ 62-103 to 62-121, for operation on the public highways of this state between fixed termini or over a regular route for the transportation of persons or property for compensation.

(4) Motorcycle.

Every motor vehicle having a saddle for the use of the rider and designed to travel on not more than three wheels in contact with the ground, but excluding a tractor.

(5) U-Drive-It passenger vehicles.

Passenger motor vehicles used for the purpose of rent or lease to be operated by the lessee; provided, this shall not include passenger motor vehicles of nine passenger capacity or less which are leased for a term of one year or more to the same person, firm, or corporation.

(6) Private passenger vehicles.

All other passenger vehicles not included in the above definitions.

(r) Property-Hauling Vehicles. — (1) Contract hauler vehicles.

Motor vehicles used for the transportation of property for hire, but not licensed as franchise hauler vehicles under the provisions of §§ 62-103 to 62-121: Provided, it shall not be construed to include the transportation of farm crops or products, including logs, bark, pulp and tannic acid wood delivered from farms and forests to the first or primary market, nor to perishable foods which are still owned by the grower while being delivered to the first or primary market, by an operator of not more than one truck or trailer for hire, nor to merchandise hauled for neighborhood farmers incidentally and not as a regular business in going to and from farms and primary markets. Provided further, that the term "for hire" as used herein shall include every arrangement by which the owner of a motor vehicle uses, or permits such vehicle to be used, for the transportation of the property of another for compensation, subject to the exemptions aforesaid. Provided, however, that the term "for hire" shall not include motor vehicles whose sole operation in carrying the property of others is limited to the transportation of T. V. A. or A. A. A. phosphate, and/or agricultural limestone in bulk which is furnished as a grant of aid under the United States agricultural adjustment administration or fuel for the exclusive use of the public schools of the state.

(2) Franchise hauler vehicles.

Every motor vehicle used for the transportation of property between fixed termini, or over a regular route, with the right to make occasional trips off said route as provided in §§ 62-103 to 62-121: Provided, only such vehicles shall be so classified as the utilities commission shall determine to be reasonably necessary for the proper handling of the business on said route, and the determination so arrived at shall be duly certified by the utilities commissioner to the motor vehicle bureau; provided further, that vehicles operating as interstate common carriers under authority of the interstate commerce commission shall be included herein unless they do contract hauling in North Caro-

lina in which event they shall be licensed as contract haulers.

(3) Private hauler vehicles.

All motor vehicles used for the transportation of property not falling within one of the above defined classifications.

(4) Semi-Trailer.

Every vehicle without motive power designed for carrying property or persons and for being drawn by a motor vehicle, and so constructed that part of its weight and/or its load rests upon or is carried by the pulling vehicle.

(5) Trailers.

Every vehicle without motive power designed for carrying property or persons wholly on its own structure and to be drawn by a motor vehicle. This shall include so-called pole trailers or a pair of wheels used primarily to balance a load, rather than for purposes of transportation.

(t) Owner.—A person who holds the legal title of a vehicle or, in the event a vehicle is subject to an agreement for conditional sale or lease thereof, with the right of purchase upon performance of the conditions stated in the agreement and with the immediate right of possession vested in the original vendee or lessee; or, in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this article; except that in all such instances when the rent paid by the lessee includes charges for services of any nature and/or when the lease does not provide that title shall pass to the lessee upon payment of the rent stipulated, the lessor shall be regarded as the owner of such vehicle, and said vehicle shall be subject to such requirements of this article as are applicable to vehicles operated for compensation.

(1945, c. 414, s. 1; cc. 653, 838; 1947, c. 220, s. 1; 1949, cc. 814, 1287.)

Editor's Note.—

The first 1945 amendment, effective Jan. 1, 1946, added the exception clause to subsection (t). The second 1945 amendment added at the end of paragraph (1) of subsection (r) the words "or fuel for the exclusive use of the public schools of the state." The third 1945 amendment added the second proviso to paragraph (2) of subsection (r).

The 1947 amendment rewrote subsection (f).

The 1949 amendments rewrote subsection (q) (5) and the first proviso of subsection (r) (1).

As only subsections (f), (q), (r) and (t) were affected by the amendments the rest of the section is not set out.

For comment on the 1943 amendment, see 21 N. C. Law Rev. 356.

Portion of Sidewalks as Highways.—The portion of a sidewalk between a street and a filling station, open to the use of the public as a matter of right for the purposes of vehicular traffic, is a "highway" within the meaning of § 20-138 prohibiting drunken driving. State v. Perry, 230 N. C. 361, 53 S. E. (2d) 288.

Handcart Not Vehicle.—A handcart, being moved solely by human power, is excluded from the category of vehicles defined in subsection (ff) of this section. Lewis v. Watson, 229 N. C. 20, 47 S. E. (2d) 484.

Applied in Sparks v. Willis, 228 N. C. 25, 44 S. E. (2d) 343 (as to subsections (a) and (w)).

Part 2. Authority and Duties of Commissioner and Department.

§ 20-43. Records of department.—(a) All records of the department, other than those declared by law to be confidential for the use of the department, shall be open to public inspection during office hours.

(b) The commissioner may destroy any registration records of the department which have been maintained on file for three years which he may deem obsolete and of no further service in carrying out the powers and duties of the department.

(c) The commissioner, upon receipt of notification from another state or foreign country that a certificate of title issued by the department has been surrendered by the owner in conformity with the laws of such other state or foreign country, may cancel and destroy such record of certificate of title. (1937, c. 407, s. 8; 1947, c. 219, s. 1.)

Editor's Note.—The 1947 amendment added subsection (c) to this section.

Part 3. Registration and Certificates of Titles of Motor Vehicles.

§ 20-50. Owner to secure registration and certificate of title.—Every owner of a vehicle intended to be operated upon any highway of this state and required by this article to be registered shall, before the same is so operated, apply to the department for and obtain the registration thereof, the registration plates therefor, and a certificate of title therefor, and attach the registration plates to the vehicle, except when an owner is permitted to operate a vehicle under the registration provisions relating to manufacturers, dealers and nonresidents contained in § 20-79: Provided, that nothing herein contained shall require the application for or the issuance of a certificate of title for a trailer having not more than two wheels with a gross weight of vehicle and load of twenty-five hundred (2500) pounds or less, and towed by a vehicle licensed by the commissioner for not more than four thousand (4,000) pounds gross weight or a passenger car but before operating a trailer as described above upon the highways of the state, the owner thereof must obtain the registration thereof and pay the registration fees as now provided by part seven of this article; provided that the commissioner of motor vehicles or his duly authorized agent is empowered to grant a special one-way trip permit to move a vehicle without license upon good cause being shown. (1937, c. 407, s. 15; 1943, c. 648; 1945, c. 956, s. 3; 1947, c. 219, s. 2.)

Editor's Note.—

The 1945 amendment, effective April 1, 1945, inserted in the proviso the words "a vehicle licensed by the commissioner for not more than four thousand (4,000) pounds gross weight or." The 1947 amendment added the provision at the end of the section relating to special one-way trip permit.

§ 20-51. Exempt from registration.

(f) Farm tractors equipped with rubber tires and trailers or semi-trailers when attached thereto and when used by a farmer, his tenant, agent, or employee in transporting his own farm implements, farm supplies, or farm products from place to place on the same farm, from one farm to another, from farm to market, or from market to farm. This exemption shall extend also to any tractor and trailer or semi-trailer while on any trip within a radius of ten miles from the point of loading. This section shall not be construed as granting any exemption to farm tractors and trailers or semi-trailers which are operated on a for hire basis, whether money or some other thing of value is paid or given for the use of such tractors and trailers or semi-trailers. (1937, c. 407, s. 16; 1943, c. 500; 1949, c. 429.)

Editor's Note.—The 1949 amendment rewrote paragraph (f). As the rest of the section was not affected by the amendment it is not set out.

§ 20-53. Application for specially constructed, reconstructed, or foreign vehicle; inspection of foreign vehicles before registration.—(a) In the event the vehicle to be registered is a specially constructed, reconstructed, or foreign vehicle, such fact shall be stated in the application, and with reference to every foreign vehicle which has been registered outside of this state, the owner shall surrender to the department all registration cards and certificates of title or other evidence of such foreign registration as may be in his possession or under his control, except as provided in sub-division (b) hereof.

(b) Where, in the course of interstate operation of a vehicle registered in another state, it is desirable to retain registration of said vehicle in such other state, such applicant need not surrender, but shall submit for inspection said evidence of such foreign registration, and the department in its discretion, and upon a proper showing, shall register said vehicle in this state but shall not issue a certificate of title for such vehicle.

(c) Before any motor vehicle, which has been registered or licensed for use in any other state or foreign country, can be registered for use upon the highways of this State, as required by the motor vehicle laws, the person applying for said license shall be required to file with the motor vehicle department a certificate signed by a member of the state highway patrol showing that the motor vehicle has been inspected by said official, and that the same is in such mechanical condition as to meet the requirements and laws of this State as to motor vehicles which may be lawfully operated upon the streets and highways of this State. The members of the state highway patrol shall be required to make the necessary inspections of such motor vehicles and when, from such inspections, it is found that such motor vehicles desired to be registered in this State are in such mechanical condition as to meet the requirements of the laws of the State, furnish the certificate herein provided for to the applicant without any charge being made for such services. (1937, c. 407, s. 18; 1949, c. 675.)

Editor's Note.—The 1949 amendment added subsection (c) to this section.

The necessity for subsection (c) of this section arose out of the repeal of the 1947 Motor Vehicle Inspection Law, §§ 20-183.2 to 20-183.8. It is intended to prevent the state from becoming a dumping ground for vehicles that cannot pass the vehicle inspection laws of other states. 27 N. C. Law Rev. 471.

§ 20-56. Registration indexes.—The department shall file each application received, and when satisfied as to the genuineness and regularity thereof, and that the applicant is entitled to register such vehicle and to the issuance of a certificate of title, shall register the vehicle therein described and keep a record thereof in suitable books or on index cards as follows:

(a) Under a distinctive registration number assigned to the vehicle;

(b) Alphabetically, under the name of the owner;

(c) Under the motor number or any other identifying number of the vehicle; and

(d) In the discretion of the department, in any other manner it may deem advisable. (1937, c. 407, s. 20½; 1949, c. 583, s. 5.)

Editor's Note.—The 1949 amendment rewrote subsection (c).

§ 20-61. Owner dismantling or wrecking vehicle to return evidence of registration. — Any owner dismantling or wrecking any vehicle shall forward to the department the certificate of title, registration card and/or other proof of ownership, and the registration plate or plates last issued for such vehicle. No person, firm or corporation shall dismantle or wreck any motor vehicle without first complying with the requirements of this section. The commissioner upon receipt of certificate of title and notice from the owner thereof that a vehicle has been junked or dismantled may cancel and destroy such record of certificate of title. (1937, c. 407, s. 25; 1947, c. 219, s. 3.)

Editor's Note.—The 1947 amendment added the last sentence.

§ 20-64. Transfer of registration plates.

(c) Registration plates issued by the department for vehicles operated for hire may be retained by the owner for transfer to another vehicle belonging to the same owner; or, at the option of the owner to whom issued, by written consent of the owner, may be transferred and assigned with the same vehicle to the new owner upon payment of a fee of one dollar ($1.00) as otherwise provided for a transfer; except that registration plates issued for franchise haulers and franchise bus vehicles may not be transferred and assigned from one owner to another but shall be retained by the owner to whom originally issued; provided, however, if the owner of franchise hauler or franchise bus plates sells out his entire fleet and rights to another who licenses all the vehicles in North Carolina in his name for the same license year, such owner of the franchise hauler or franchise bus plates may secure a refund for the unexpired portion of such plates on a monthly basis beginning the first day of the month following such sale if there is any credit remaining over and above any 6% gross receipts tax due. (1937, c. 407, s. 28; 1945, c. 576, s. 1; 1947, c. 914, s. 1.)

Editor's Note.—The 1945 amendment rewrote subsection (c) and the 1947 amendment added the proviso thereto. As subsections (a) and (b) were not changed by the amendments they are not set out.

Part 4. Transfer of Title or Interest.

§ 20-72. Transfer by owner.—(a) Whenever the owner of a registered vehicle transfers or assigns his title or interest thereto, he shall endorse upon the reverse side of the registration card issued for such vehicle the name and address of the transferee and the date of transfer, and shall immediately deliver such card and registration plates to the transferee if such plates are subject to transfer with the vehicle as set out in § 20-64. If the registration plates are not subject to transfer the registration card and plates may be retained by the transferor of the vehicle and no endorsement would be necessary.

(b) The owner of any vehicle registered under the foregoing provisions of this article, transferring or assigning his title or interest thereto, shall also endorse an assignment and warranty of title in form approved by the department upon the re-

verse side of the certificate of title or execute an assignment and warranty of title of such vehicle and a statement of all liens or encumbrances thereon, which statement shall be verified under oath by the owner, who shall deliver the certificate of title to the purchaser or transferee at the time of delivering the vehicle, except that where a deed of trust, mortgage, conditional sale or title retaining contract is obtained from purchaser or transferee in payment of purchase price or otherwise, the lien holder shall forward such certificate of title papers to the department within twenty days together with necessary fees, or deliver such papers to the purchaser at the time of delivering the vehicle, as he may elect, but in either event the penalty provided in section 20-74 shall apply if application for transfer is not made within twenty days. Any owner selling or transferring his interest to a motor vehicle who willfully fails or refuses to endorse an assignment of title shall be guilty of a misdemeanor. (1937, c. 407, s. 36; 1947, c. 219, ss. 4, 5.)

Editor's Note.—The 1947 amendment rewrote subsection (a) and added the last sentence of subsection (b).

§ 20-73. New owner to secure transfer of registration and new certificate of title.—The transferee within twenty days after the purchase shall apply to the department for a transfer of registration of the vehicle and shall present the certificate of title endorsed and assigned as hereinbefore provided to the department, and make application for and obtain a new certificate of title for such vehicle except as otherwise permitted in sections 20-75 and 20-76. Any transferee willfully failing or refusing to make application for title shall be guilty of a misdemeanor. (1937, c. 407, s. 37; 1939, c. 275; 1947, c. 219, s. 6.)

The 1947 amendment added the second sentence.

§ 20-76. Title lost or unlawfully detained.—Whenever the applicant for the registration of a vehicle or a new certificate of title thereto is unable to present a certificate of title thereto by reason of the same being lost or unlawfully detained by one in possession, or the same is otherwise not available, the department is hereby authorized to receive such application and to examine into the circumstances of the case, and may require the filing of affidavits or other information; and when the department is satisfied that the applicant is entitled thereto and that § 20-72 has been complied with it is hereby authorized to register such vehicle and issue a new registration card, registration plate or plates and certificates of title to the person entitled thereto, upon payment of proper fee for duplicate title and/or replacement. (1937, c. 407, s. 40; 1947, c. 219, s. 7.)

Editor's Note.—The 1947 amendment inserted the reference to § 20-72.

§ 20-77. Transfer by operation of law; liens.—(a) Whenever the title or interest of an owner in or to a vehicle shall pass to another by operation of law, as upon order in bankruptcy, execution sale, repossession upon default in performing the terms of a lease or executory sales contract, or otherwise than by voluntary transfer, the transferee shall secure a transfer of registration to himself and a new certificate of title upon proper application, payment of the fees provided by law, and presentation of the last certificate of title, if available and such instruments or documents of authority or certified copies thereof as may be sufficient or required by law to evidence or effect a transfer of interest in or to chattels in such cases: Provided, however, transfers of registration shall only be made as provided for in § 20-64, sub-sections (a), (b) and (c).

(b) In the event of transfer as upon inheritance, devise or bequest, the department shall, upon receipt of a certified copy of a will, letters of administration and/or a certificate from the clerk of the superior court showing that the motor vehicle registered in the name of the decedent owner has been assigned to his widow as part of her year's support, transfer both title and license as otherwise provided for transfers. However, if no administrator has qualified or the clerk of the superior court refuses to issue a certificate, the department may upon affidavit showing satisfactory reasons therefor effect such transfer; provided, that if a decedent dies intestate leaving surviving a spouse and a minor child or children, or a spouse and a child or children mentally incompetent, whether of age or not, and no guardian has been appointed for said child or children, the surviving spouse shall be authorized to transfer the interest of the child or children in said motor vehicle, as provided in this subsection, to a purchaser thereof, but the new title so issued shall not affect the validity nor be in prejudice of any creditor's lien.

(c) Mechanic's or Storage Lien.—In any case where a vehicle is sold under a mechanic's or storage lien, the department shall be given a twenty-day notice as provided in § 20-114.

(d) The owner of a garage, storage lot or other place of storage shall have a lien for his lawful and reasonable storage charges on any motor vehicle deposited in his place of storage by the owner or any other person having lawful authority to make such storage, and may retain possession of the motor vehicle until such storage charges are paid. If the storage charges are not paid when due, the garage owner or other storage keeper may satisfy said lien as follows:

1. The garage owner or storage keeper shall give written notice to the person who made the storage, to the registered owner, if known, and to any other persons known to claim any lien on or other interest in the motor vehicle. Such notice shall be given by delivery to the person, or by registered letter addressed to the last known place of business or abode of the person to be notified.

2. The notice shall contain a description of the motor vehicle; an itemized statement of the claim for storage charges; a demand that the storage charges be paid on or before a day specified, not less than ten days from the delivery of the notice if it is personally delivered or from the time when the notice should reach its destination according to the due course of post if the notice is sent by mail; and a statement that unless the storage claim is paid on or before the day specified, the motor vehicle will be advertised for sale and sold at auction at a specified time and place.

3. If payment is not made by the day specified in the notice, a sale of the motor vehicle may be had to satisfy the lien. The sale shall be held at the place where the vehicle was stored, or if such place is manifestly unsuitable for the purpose, at

the court house in the county where vehicle was stored. The advertisement of such sale shall contain the name and address of the registered owner of the vehicle, if known or ascertainable; the name and address of the person who made the storage; a description of the motor vehicle, including the make, year of make, model, motor number, serial number and license number, if any; a statement of the amount of storage charges; and the place, date and hour of sale. The advertisement shall be published once a week for two consecutive weeks in a newspaper published in the place where such sale is to be held. The sale shall not be held less than fifteen days from the time of the first publication. If there is no newspaper published in such place, the advertisement shall be posted at least ten days before such sale in not less than three conspicuous public places in such place. A copy of said advertisement shall be sent to the commissioner of motor vehicles at least twenty days prior to the sale. From the proceeds of the sale the garage owner or storage keeper shall satisfy his lien, including the reasonable charges of notice, advertisement and sale. The balance, if any, shall be held by the garage owner or storage keeper and delivered on demand to the person to whom he would have been bound to deliver or justified in delivering the motor vehicle. If no claim is made for said balance within ten days the garage owner or storage keeper shall immediately pay such balance into the office of the clerk of the superior court of the county wherein the sale was held, and the clerk shall hold said money for twelve months for delivery on demand to person entitled thereto, and if no claim is made within said period, said balance shall escheat to the University of North Carolina.

4. At any time before the motor vehicle is so sold any person claiming a right of property or possession therein may pay the garage owner or storage keeper the amount necessary to satisfy his lien and to pay the reasonable expenses and liabilities incurred in serving notices and advertising and preparing for the sale up to the time of such payment, and upon receiving such payment, the garage owner or storage keeper shall deliver the motor vehicle to the person making such payment if he is a person entitled to the possession thereof.

Where no specific agreement is made at the time of storage regarding the time when storage charges shall be due, such charges shall be due ninety days after the storage commenced. (1937, c. 407, s. 41; 1943, c. 726; 1945, cc. 289, 714.)

The first 1945 amendment inserted the proviso in the second sentence of subsection (b). The second 1945 amendment added subsection (d).

§ 20-78. When department to transfer registration and issue new certificate.—(a) The department, upon receipt of a properly endorsed certificate of title and application for transfer of registration, accompanied by the required fee, shall transfer the registration thereof under its registration number to the new owner, and shall issue a new registration card and certificate of title as upon an original registration.

(b) The department shall maintain a record of certificates of title issued and may, after three (3) years from year of issue, at its discretion, destroy such records, maintaining at all times the records of the last two owners.

The commissioner is hereby authorized and empowered to provide for the photographic or photostatic recording of certificate of title records in such manner as he may deem expedient. The photographic or photostatic copies herein authorized shall be sufficient as evidence in tracing of titles of the motor vehicles designated therein, and shall also be admitted in evidence in all actions and proceedings to the same extent that the originals would have been admitted. (1937, c. 407, s. 42; 1943, c. 726; 1947, c. 219, s. 8.)

Editor's Note.—The 1947 amendment rewrote subsection (b).

Part 5. Issuance of Special Plates.

§ 20-79. Registration by manufacturers and dealers.—(a) Every manufacturer of or dealer in motor vehicles, trailers or semi-trailers shall apply to the motor vehicle department for a license as such upon official forms and shall in his application give the name of the manufacturer or dealer and his bona fide address of each partner; if a corporation, the name of the corporation and the state of incorporation; the bona fide address of the place of business; whether a dealer in new vehicles or in used vehicles and shall state how long in business. Upon receipt of said application the department shall upon the payment of fees as required by law issue a license to such applicant, together with number plates, which plates shall bear thereon a distinctive number, the name of this state, which may be abbreviated, the year for which issued, together with the word dealer or a distinguishing symbol indicating that such plate or plates are issued to a dealer. The plates so issued may during the calendar year for which issued be transferred from one vehicle to another owned and operated by such manufacturer or dealer. The license and plates issued under this section shall be in lieu of the registration of such vehicle.

Any person to whom license and number plates are issued under the provisions of this subsection upon discontinuing business as a dealer or manufacturer shall forthwith surrender to the department license and all number plates so issued to him.

No person, firm, or corporation shall engage in the business of buying, selling, distributing or exchanging motor vehicles, trailers or semi-trailers in this State unless he or it qualifies for and obtains the license required by this section.

Any person, firm, or corporation violating any provision of this subsection shall be guilty of a misdemeanor and for each offense shall be fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00).

(1947, c. 220, s. 2; 1949, c. 583, s. 3.)

Editor's Note.—The 1947 amendment rewrote subsection (a). The 1949 amendment inserted the next to last paragraph of subsection (a). It also substituted in the first and second lines of the last paragraph the words "any provision" for the words "the provisions," and made said paragraph applicable to "firm or corporation." As subsections (b) through (e) were not affected by the amendments they are not set out.

§ 20-80. National guard plates.—The commissioner shall cause to be made each year a sufficient number of automobile license plates to furnish each officer of the North Carolina National Guard with a set thereof, said license plates to be in the same form and character as other license plates now or

hereafter authorized by law to be used upon private passenger vehicles registered in this state, except that such license plates shall bear on the face thereof the following words, "National Guard." The said license plates shall be issued only to officers of the North Carolina National Guard, and for which license plates the commissioner shall collect fees in an amount equal to the fees collected for the licensing and registering of private vehicles. The adjutant general of North Carolina shall furnish to the commissioner each year, prior to the date that licenses are issued, a list of the officers of the North Carolina National Guard, which said list shall contain the rank of each officer listed in the order of his seniority in the service, and the said license plates shall be numbered, beginning with the number two hundred and one and in numerical sequence thereafter up to and including the number eleven hundred, according to seniority, the senior officer being issued the license bearing the numerals two hundred and one. Upon transfer of the ownership of a private passenger vehicle upon which there is a license plate bearing the words national guard, said plates shall be removed and the authority to use the same shall thereby be canceled; however, upon application to the commissioner, he shall reissue said plate to the officer of the national guard to whom the same were originally issued, and upon said reissue the commissioner shall collect fees in an amount equal to the fees collected for the original licensing and registering of said private passenger vehicle as is now or may be prescribed by law. (1937, c. 407, s. 44; 1941, c. 36; 1949, c. 1130, s. 7.)

Editor's Note.—The 1949 amendment inserted the word "eleven" in place of the word "five" in line twenty-five of this section.

Part 6. Vehicles of Nonresidents of State, etc.

§ 20-84. Vehicles owned by state, municipalities or orphanages, etc.—The department, upon proper proof being filed with it that any motor vehicle for which registration is herein required is owned by the state or any department thereof, or by any county, township, city or town, or by any board of education, or by any orphanage, shall collect one dollar for the registration of such motor vehicles, but shall not collect any fee for application for certificate of title in the name of the state or any department thereof, or by any county, township, city or town, or by any board of education or orphanage: Provided, that the term "owned" shall be construed to mean that such motor vehicle is the actual property of the state or some department thereof, or of the county, township, city or town, or of the board of education, and no motor vehicle which is the property of any officer or employee of any department named herein shall be construed as being "owned" by such department. Provided, that the above exemptions from registration fees shall also apply to any church owned bus used exclusively for transporting children and parents to Sunday School and church services and for no other purpose.

In lieu of the annual one dollar ($1.00) registration provided for in this section, the department may for the license year 1950 and thereafter provide for a permanent registration of the vehicles described in this section and issue permanent registration plates for such vehicles. The permanent registration plates issued pursuant to this paragraph shall be of a distinctive color and shall bear thereon the word "permanent." Such plates shall not be subject to renewal and shall be valid only on the vehicle for which issued. For the permanent registration and issuance of permanent registration plates provided for in this paragraph, the department shall collect a fee of one dollar ($1.00) for each vehicle so registered and licensed. (1937, c. 407, s. 48; 1939, c. 275; 1949, c. 583, s. 1.)

Editor's Note.—The 1949 amendment added the second paragraph.

§ 20-84.1. Permanent plates for city busses.—The department may for the license year 1950 and thereafter provide for a permanent registration and issue permanent registration plates for city busses and trackless trolleys when such busses and trolleys are operated under franchises authorizing the use of city streets, but no bus or trackless trolley shall be registered or licensed under this section if it is operated under a franchise authorizing an intercity operation. The permanent registration plates issued pursuant to the provisions of this section shall be of a distinctive color and shall bear thereon the word "permanent." Such plates shall not be subject to renewal and shall be valid only on the vehicle for which issued. For the permanent registration and issuance of permanent registration plates as provided for in this section, the department shall collect a fee of one dollar for each vehicle so registered and licensed. (1949, c. 583, s. 6.)

Part 7. Title and Registration Fees.

§ 20-85. Schedule of fees.—There shall be paid to the department for the issuance of certificates of title, transfer of registration and replacement of registration plates fees according to the following schedules:

(a) Each application for certificate of title	$ .50
(b) Each application for duplicate certificate of title	.50
(c) Each application of repossessor for certificate of title	.50
(d) Each transfer of registration	1.00
(e) Each set of replacement registration plates	1.00

(1937, c. 407, s. 49; 1943, c. 648; 1947, c. 219, s. 9.)

Editor's Note.—The 1947 amendment struck out former subsection (f) relating to duplicate registration card.

§ 20-87. Passenger vehicle registration fees.

(b) U-Drive-It Passenger Vehicles.—U-drive-it passenger vehicles shall pay the following tax:

Motorcycles: 1-passenger capacity	$12.00
2-passenger capacity	15.00
3-passenger capacity	18.00

Automobiles: $60.00 per year for each vehicle of nine passenger capacity or less, and vehicles of over nine passenger capacity shall be classified as busses and shall pay $1.90 per hundred pounds empty weight of each vehicle.

(c) For Hire Passenger Vehicles.—For hire passenger vehicles shall be taxed at the rate of $60.00 per year for each vehicle of nine passenger capacity or less and vehicles of over nine passenger capacity shall be classified as busses and shall be taxed at a rate of $1.90 per hundred pounds of empty weight per year for each vehicle; provided,

however, no license shall issue for the operation of any taxicab until the governing body of the city or town in which such taxicab is principally operated, if the principal operation is in a city or town, has issued a certificate showing (1) that the operator of such taxicab has provided liability insurance or other form of indemnity for injury to persons or damage to property resulting from the operation of such taxicab, in such amount as required by the city or town, and (2) that the convenience and necessity of the public requires the operation of such taxicab.

All persons operating taxicabs on January first, one thousand nine hundred and forty-five shall be entitled to a certificate of necessity and convenience for the number of taxicabs operated by them on such date, unless since said date the license of such person or persons to operate a taxicab or taxicabs has been revoked or their right to operate has been withdrawn or revoked; provided that all persons operating taxicabs in Union, Lee, Edgecombe and Nash counties on January first, one thousand nine hundred and forty-five shall be entitled to certificates of necessity and convenience only with the approval of the governing authority of the town or city involved.

A taxicab shall be defined as any motor vehicle, seating nine or fewer passengers, operated upon any street or highway on call or demand, accepting or soliciting passengers indiscriminately for hire between such points along streets or highways as may be directed by the passenger or passengers so being transported, and shall not include motor vehicles or motor vehicle carriers as defined in subsection (k) of § 62-103. Such taxicab shall not be construed to be a common carrier nor its operator a public service corporation.

(e) Private Passenger Vehicles.—There shall be paid to the department annually, as of the first day of January, for the registration and licensing of private passenger vehicles, fees according to the following classifications and schedules:

Vehicles weighing 3500 pounds or less	$10.00
Vehicles weighing 3501 pounds to 4500 pounds	$12.00
Vehicles weighing 4501 pounds and over	$15.00

Provided, where there are models of the same make automobiles that fall within two or more of the above classes, the average weight based on the 1946 and immediate four prior years models shall be ascertained and all models of that make automobile shall be taxed according to the schedule provided above in which the average weight falls. In event there are any make automobiles in operation with models falling into two or more of the above classes that did not manufacture any models in 1946, the average weight based on the last five years in which said make automobile was manufactured, shall be ascertained and all models of that make automobile shall be taxed according to the schedule provided above in which the average falls. Provided further, where new make automobiles are produced after 1946 which has models falling into two or more of the above classes, the average weight shall be ascertained and all models of that make automobile shall be taxed according to the schedule provided above in which the average weight falls. Provided, that a fee of only one dollar shall be charged for any vehicle given by the federal government to any veteran on account of any disability suffered during World War II, so long as such vehicle is owned by the original donee or other veteran entitled to receive such gift under Title 38, section 252, United States Code Annotated.

(f) Private Motorcycles.—The tax on private passenger motorcycles shall be five dollars ($5.00); except that when a motorcycle is equipped with an additional form of device designed to transport persons or property, the tax shall be ten dollars ($10.00).

(g) Manufacturers and Motor Vehicle Dealers.—Manufacturers and dealers in motor vehicles, trailers and semi-trailers for license and for one set of dealer's plates shall pay the sum of twenty-five dollars ($25.00), and for each additional set of dealer's plates the sum of one dollar ($1.00).

(1945, c. 564, s. 1; c. 576, s. 2; 1947, c. 220, s. 3; c. 1019, ss. 1-3; 1949, c. 127.)

Editor's Note.—The 1945 amendments added that part of subsection (c) beginning with the proviso, and rewrote subsection (f). The 1947 amendments made changes in subsections (b), (c), (e) and (g). And the 1949 amendment added the last proviso to subsection (e). Only the subsections affected by the amendments are set out.

§ 20-88. Property hauling vehicles. — (a) Determination of Weight.—For the purpose of licensing, the weight of the several classes of motor vehicles used for transportation of property shall be the gross weight and load, to be determined by the manufacturer's gross weight capacity as shown in an authorized national publication, such as "Commercial Car Journal" or the statistical issue of "Automotive Industries," all such weights subject to verification by the commissioner or his authorized deputy, and if no such gross weight on any vehicle is available in such publication, then the gross weight shall be determined by the commissioner or his authorized agent: Provided, that any determination of weight shall be made only in units of one thousand pounds or major fraction thereof, weights of over five hundred pounds being counted as one thousand and weights of five hundred pounds or less being disregarded. Semi-trailers licensed for use in connection with a truck or truck-tractor shall in no case be licensed for less gross weight capacity than the truck or truck-tractor with which it is to be operated. The gross weight of a single unit equipped with three or more axles may be computed for license fee at a rate not in excess of the rate on trucks and semi-trailers of the same gross weight.

In licensing truck-tractors to be used in connection with a trailer or semi-trailer, the license on the truck-tractor may be limited to twenty thousand pounds gross weight and any weight in excess of twenty thousand pounds may be licensed on the trailer or semi-trailer.

(c) The minimum rate for any vehicle licensed under this section shall be twelve dollars ($12.00), except that the license fee for a trailer having not more than two wheels with a gross weight of vehicle and load not exceeding twenty-five hundred (2500) pounds and towed by a vehicle licensed by the commissioner for not more than four thousand (4000) pounds gross weight or a passenger car shall be three dollars ($3.00) for any

part of the license year for which said license is issued: Provided, however, that any such trailers operated for hire shall be taxed at the same rate as contract hauler vehicles: Provided, further, that in addition to the motor vehicle licenses authorized to be issued pursuant to the provisions of this chapter, the department shall issue, upon application therefor, a license plate for trucks marked "farmer," which shall be issued upon evidence satisfactory to the department that the applicant is a farmer and is actually engaged in the growing, raising and producing of farm products as an occupation. License plates issued under authority of this section shall be placed upon motor trucks engaged exclusively in the carrying or transportation of applicant's farm products, raised or produced on his farm, and farm supplies, and not engaged in hauling for hire: Provided further that the department shall issue necessary rules and regulations providing for the recall, transfer, exchange or cancellation of "farmer" license plates issued hereunder when trucks bearing such shall be sold and/or transferred. Applicants for license plates herein authorized shall pay therefor at a rate equal to one-half the present registration fee provided for trucks by this chapter; provided that the minimum rate for any vehicle licensed under this proviso shall be ten dollars ($10.00); and provided, further, persons applying for "farmer" license under the provisions of this section shall not be entitled to the benefits of § 20-95. The term "farmer" as used in this section means any person engaged in the raising, growing and producing of farm products on a farm not less than ten acres in area, and who does not engage in the business of buying farm products for resale; and the term "farm products" means any food crop, cattle, hogs, poultry, dairy products and other agricultural products designed and to be used for food purposes. Provided, such "farmer" license may be transferred if the new owner executes a statement on a form prescribed by the motor vehicle department showing that he is entitled to a "farmer" license; otherwise the same shall be surrendered and the new owner must pay the difference in the fee for a "farmer" license and the type of license required for the new operation as of the date of such transfer.

(e) Franchise Haulers.—Franchise haulers shall pay an annual license tax as per the above schedule of rates for each vehicle unit, and in addition thereto six per cent of the gross revenue derived from such operations: Provided, said additional six per cent shall not be collectible unless and until and only to the extent that such amount exceeds the license tax or deposit per the above schedule: Provided, further, franchise haulers operating from a point or points in this state to another point or points in this state shall be liable for a tax of six per cent on the gross revenue earned in such intrastate hauls. Franchise haulers operating between a point or points within this state and a point or points without this state shall be liable for a six per cent tax only on that proportion of the gross revenue earned between terminals in this state and terminals outside this state that the mileage in North Carolina bears to the total mileage between the respective terminals. Franchise haulers operating through this state from a point or points outside this state to a point or points outside this state shall be liable for a six per cent tax on that proportion of the gross revenue earned between such terminals as the mileage in North Carolina bears to the total mileage between the respective terminals. In no event shall the tax paid by such franchise haulers be less than the license tax or deposit shown on the above schedule, except where a franchise is hereafter issued by the utilities commission for service over a route within the state which is not now served by any franchise hauler the six per cent gross revenue tax may be reduced to four per cent for the first two years only. The tax prescribed in this subsection is levied as compensation for the use of the highways of this state and for the special privileges extended such franchise haulers by this state.

In lieu of the six per cent gross revenue tax levied by this subsection and the deposit required by subsection (b) of this section, franchise haulers may elect to pay a flat rate according to the highest rate provided by subsection (b) of this section for vehicles and loads of the same gross weight operated by contract haulers. The election to so pay must be made at the time license plates are applied for and may not thereafter be changed during the license year except that for the license year 1949 such election, if one is made, must be made on or before July 1, 1949. Vehicles registered and licensed during the license year and after the election herein provided for has been made, must be registered and licensed and the operator shall pay taxes on the operation thereof according to the election made. A failure by a franchise hauler to make an election under this paragraph shall render such franchise hauler liable for the deposit required by subsection (b) of this section and the six per cent gross revenue tax levied by this subsection.

(1945, c. 569, s. 1; c. 575, s. 1; c. 576, s. 3; c. 956, ss. 1, 2; 1949, cc. 355, 361.)

Editor's Note.—

The first 1945 amendment added the second paragraph of subsection (a). The second 1945 amendment, effective Jan. 1, 1946, struck out a former exception provision in subsection (e). The third 1945 amendment, effective Jan. 1, 1945, added the proviso at the end of subsection (c) and the fourth 1945 amendment, effective April 1, 1945, inserted in the first sentence of subsection (c) the words "a vehicle licensed by the commissioner for not more than four thousand (4,000) pounds gross weight or."

The first 1949 amendment rewrote the first sentence of subsection (c). The second 1949 amendment added the second paragraph of subsection (e).

Only the subsections affected by the amendments are set out.

§ 20-89. Method of computing gross revenue of franchise bus carriers and haulers.—In computing the gross revenue of franchise bus carriers and franchise haulers, revenue derived from the transportation of United States mail or other United States government services shall not be included. All revenue earned both within and without this state from the transportation of persons or property, except as herein provided by franchise bus carriers and franchise haulers whether on fixed schedule routes or by special trips or by auxiliary vehicles not licensed as franchise haulers, whether owned by the franchise hauler or hired from another for the transportation of persons or property within the

limits of the designated franchise route shall be included in the gross revenue upon which said tax is based. Provided, however, that whenever any person licensed as a franchise property hauler transports his own property, other than for his own use, he shall be liable for a tax on such transportation, computed at six percent (6%) of the gross charges authorized by the utilities commission or interstate commerce commission on such operation if it had been for hire; and franchise haulers shall maintain accurate records of all operations involving transportation of their own property, in order that said tax may be correctly computed, paid and audited.

When vehicles are leased from other operators who are licensed as contract haulers or franchise haulers, any amounts paid to such operators under said lease may be deducted by the lessees from gross revenue on which tax is based in the event adequate records and receipts are maintained so as to clearly reflect such payments. Any revenue earned by a franchise hauler under a lease shall be included in the gross revenue upon which said tax is based. (1937, c. 407, s. 53; 1943, c. 726; 1945, c. 414, s. 2; c. 575, s. 2.)

Editor's Note.—
The first 1945 amendment added the second paragraph. The second 1945 amendment, effective Jan. 1, 1946, added the proviso at the end of the first paragraph.

§ 20-91. Records and reports required of franchise carriers.

(d) If any franchise bus carrier or franchise hauler shall fail, neglect, or refuse to keep such records or to make such reports or pay tax due as required, and within the time provided in this article, the commissioner shall immediately inform himself as best as he may as to all matters and things required to be set forth in such records and reports, and from such information as he may be able to obtain, determine and fix the amount of the tax due the state from such delinquent operator for the period covering the delinquency, adding to the tax so determined and as a part thereof an amount equal to five per cent (5%) of the tax, to be collected and paid. The said commissioner shall proceed immediately to collect the tax including the additional five per cent (5%). Any such franchise hauler or franchise bus carrier, having no records on the basis of which the commissioner can determine the amount of the tax due by such carrier, shall be assessed on each vehicle at the rate applicable for contract haulers, and any bonds or deposits theretofore made shall be applied on such assessment and any further amount shall be collected as provided by law.

(1945, c. 575, s. 3; 1947, c. 914, s. 2.)

Editor's Note.—The 1945 amendment added the last sentence of subsection (d), and the 1947 amendment inserted the words "or pay tax due" in line three of subsection (d). As the other subsections were not affected by the amendments they are not set out.

§ 20-92. Revocation of franchise registration. —The failure of any franchise bus carrier or any franchise hauler to pay any tax levied under this article, and/or to make reports as is required, shall constitute cause for revocation of registration and franchise, and the commissioner is hereby authorized to seize the registration plates of any such delinquent carrier and require the cessation of the operation of such vehicles, and the utilities commission may revoke any franchise or permit issued such carrier. (1937, c. 407, s. 56; 1945, c. 575, s. 4.)

Editor's Note.—The 1945 amendment, effective Jan. 1, 1946, added at the end of this section the words "and the utilities commission may revoke any franchise or permit issued such carrier."

§ 20-94. Partial payments.—In the purchase of licenses, where the gross amount of the license to any one owner amounts to more than four hundred dollars ($400.00), half of such payment may, if the commissioner is satisfied of the financial responsibility of such owner, be deferred until June first in any calendar year upon the execution to the commissioner of a draft upon any bank or trust company upon forms to be provided by the commissioner in an amount equivalent to one-half of such tax, plus a carrying charge of one-half of one per cent (½ of 1%): Provided, that any person using any tag so purchased after the first day of June in any such year, without having first provided for the payment of such draft, shall be guilty of a misdemeanor. Any such draft being dishonored and not paid shall be subject to the penalties prescribed in § 20-178 and shall be immediately turned over by the commissioner to his duly authorized agents and/or the state highway patrol, to the end that this provision may be enforced. When the owner of the vehicles for which a draft has been given sells or transfers ownership to all vehicles covered by the draft, such draft shall become payable immediately, and such vehicles shall not be transferred by the department until the draft has been paid. (1937, c. 407, s. 58; 1943, c. 726; 1945, c. 49, ss. 1, 2; 1947, c. 219, s. 10.)

Editor's Note.—
The 1945 amendment substituted "June" for "April" in lines seven and fourteen, and reduced the carrying charge from two per cent to one-half of one per cent.
The 1947 amendment added the last sentence.

§ 20-95. Licenses for less than a year.—Licenses issued on or after April first of each year and before July first for all vehicles, except two-wheel trailers under one thousand five hundred pounds weight pulled by passenger cars, shall be three-fourths of the annual fee. Licenses issued on or after July first and before October first, except two-wheel trailers under one thousand five hundred pounds weight pulled by passenger cars, shall be one-half the annual fee. Licenses issued on or after October first, except on two-wheel trailers under one thousand five hundred pounds weight pulled by passenger cars, shall be one-fourth of the annual fee. (1937, c. 407, s. 59; 1947, c. 914, s. 3.)

Editor's Note.—The 1947 amendment, which struck out the words "franchise haulers and" formerly appearing after the word "except" in line three, is effective as of January 1, 1948.

§ 20-96. Overloading. — The commissioner, or his authorized agent, may allow any owner of a motor vehicle for transportation of property to overload said vehicle by paying the fee at the rate per hundred pounds which would be assessed against such vehicle if its gross weight capacity provided for such load; but such calculation shall be made only in units of one thousand pounds or major fraction thereof, excessive weights of five hundred pounds or less being disregarded and

weights of more than five hundred pounds and not more than one thousand pounds being counted as one thousand. It is the intent of this section that every owner of a motor vehicle shall procure license in advance to cover any overload which may be carried. Any owner failing to do so, and whose vehicle shall be found in operation on the highways carrying an overload in excess of one ton over the weight for which such vehicle is licensed, shall pay in addition to the normal tax levied in this article an additional tax of ten dollars ($10.00) per each thousand pounds in excess of the licensed weight of such vehicle. Nonresidents operating under the provisions of section 20-83 shall be subject to the additional tax provided in this section when their vehicles are operated with more than one ton in excess of the licensed weight or, regardless of the licensed weight, more than one ton in excess of the maximum weight provided for in section 20-118. Any person who shall willfully violate the provisions of this section shall be guilty of a misdemeanor in addition to being liable for the additional tax herein prescribed. (1937, c. 407, s. 60; 1943, c. 726; 1949, c. 583, s. 8; c. 1207, s. 4½; c. 1253.)

Editor's Note.—The 1949 amendments inserted the next to the last sentence and changed the amount of tax from three to ten dollars.

§ 20-97. Taxes compensatory; no additional tax.

Local Modification.—City of Durham: 1949, c. 412.

Editor's Note.—

For comment on the 1943 amendment, see 21 N. C. Law Rev. 358.

§ 20-99. Remedies for the collection of taxes.—1. If any tax imposed by this chapter, or any other tax levied by the state and payable to the commissioner of motor vehicles, or any portion of such tax, be not paid within thirty days after the same becomes due and payable, and after the same has been assessed, the commissioner of motor vehicles shall issue an order under his hand and official seal, directed to the sheriff of any county of the state, commanding him to levy upon and sell the real and personal property of the taxpayer found within his county for the payment of the amount thereof, with the added penalties, additional taxes, interest, and cost of executing the same, and to return to the commissioner of motor vehicles the money collected by virtue thereof within a time to be therein specified, not less than sixty days from the date of the order. The said sheriff shall, thereupon, proceed upon the same in all respects with like effect and in the same manner prescribed by law in respect to executions issued against property upon judgments of a court of record, and shall be entitled to the same fees for his services in executing the order, to be collected in the same manner. Upon the issuance of said order to the sheriff, in the event the delinquent taxpayer shall be the operator of any franchise bus carrier or franchise hauler vehicle, the franchise certificate issued to such operator shall become null and void and shall be cancelled by the utilities commissioner, and it shall be unlawful for any such franchise bus carrier or the operator of any franchise hauler vehicle to continue the operation under said franchise.

2. Bank deposits, rents, salaries, wages, and all other choses in action or property incapable of manual levy or delivery, hereinafter called the intangible, belonging, owing, or to become due to any taxpayer subject to any of the provisions of this chapter, or which has been transferred by such taxpayer under circumstances which would permit it to be levied upon if it were tangible, shall be subject to attachment or garnishment as herein provided, and the person owing said intangible, matured or unmatured, or having same in his possession or control, hereinafter called the garnishee, shall become liable for all sums due by the taxpayer under this chapter to the extent of the amount of the intangible belonging, owing, or to become due to the taxpayer subject to the set off of any matured or unmatured indebtedness of the taxpayer to the garnishee. To effect such attachment or garnishment the commissioner of motor vehicles shall serve or cause to be served upon the taxpayer and the garnishee a notice as hereinafter provided, which notice may be served by any deputy or employee of the commissioner of motor vehicles or by any officer having authority to serve summonses. Said notice shall show:

(1) The name of the taxpayer and his address, if known:

(2) The nature and amount of the tax, and the interest and penalties thereon, and the year or years for which the same were levied or assessed, and

(3) Shall be accompanied by a copy of this subsection, and thereupon the procedure shall be as follows:

If the garnishee has no defense to offer or no set off against the taxpayer, he shall, within ten days after service of said notice, answer the same by sending to the commissioner of motor vehicles by registered mail a statement to that effect, and if the amount due or belonging to the taxpayer is then due or subject to his demand, it shall be remitted to the commissioner with said statement, but if said amount is to mature in the future, the statement shall set forth that fact and the same shall be paid to the commissioner upon maturity, and any payment by the garnishee hereunder shall be a complete extinguishment of any liability therefor on his part to the taxpayer. If the garnishee has any defense or set off, he shall state the same in writing under oath, and, within ten days after service of said notice, shall send two copies of said statement to the commissioner by registered mail; if the commissioner admits such defense or set off, he shall so advise the garnishee in writing within ten days after receipt of such statement and the attachment or garnishment shall thereupon be discharged to the amount required by such defense or set off, and any amount attached or garnished hereunder which is not affected by such defense or set off shall be remitted to the commissioner as above provided in cases where the garnishee has no defense or set off, and with like effect. If the commissioner shall not admit the defense or set off, he shall set forth in writing his objections thereto and shall send a copy thereof to the garnishee within ten days after receipt of the garnishee's statement, or within such further time as may be agreed on by the garnishee, and at the same time he shall file a copy of said notice, a copy of the garnishee's statement, and a copy of his objections thereto in

the superior court of the county where the garnishee resides or does business where the issues made shall be tried as in civil actions.

If judgment is entered in favor of the commissioner of motor vehicles by default or after hearing, the garnishee shall become liable for the taxes, interest and penalties due by the taxpayer to the extent of the amount over and above any defense or set off of the garnishee belonging, owing, or to become due to the taxpayer, but payments shall not be required from amounts which are to become due to the taxpayer until the maturity thereof, nor shall more than ten per cent of any taxpayer's salary or wages be required to be paid hereunder in any one month. The garnishee may satisfy said judgment upon paying said amount, and if he fails to do so, execution may issue as provided by law. From any judgment or order entered upon such hearing either the commissioner of motor vehicles or the garnishee may appeal as provided by law. If, before or after judgment, adequate security is filed for the payment of said taxes, interest, penalties, and costs, the attachment or garnishment may be released or execution stayed pending appeal, but the final judgment shall be paid or enforced as above provided. The taxpayer's sole remedies to question his liability for said taxes, interest, and penalties shall be those provided in § 105-267, as now or hereafter amended or supplemented. If any third person claims any intangible attached or garnished hereunder and his lawful right thereto, or to any part thereof, is shown to the commissioner, he shall discharge the attachment or garnishment to the extent necessary to protect such right, and if such right is asserted after the filing of said copies as aforesaid, it may be established by interpleader as now or hereafter provided by the General Statutes in cases of attachment and garnishment. In case such third party has no notice of proceedings hereunder, he shall have the right to file his petition under oath with the commissioner at any time within twelve months after said intangible is paid to him and if the commissioner finds that such party is lawfully entitled thereto or to any part thereof, he shall pay the same to such party as provided for refunds by § 105-407 and if such payment is denied, said party may appeal from the determination of the commissioner to the superior court of Wake county or to the superior court of the county wherein he resides or does business. The intangibles of a taxpayer shall be paid or collected hereunder only to the extent necessary to satisfy said taxes, interest, penalties, and costs. Except as hereinafter set forth, the remedy provided in this section shall not be resorted to unless a warrant for collection or execution against the taxpayer has been returned unsatisfied: Provided, however, if the commissioner is of opinion that the only effective remedy is that herein provided, it shall not be necessary that a warrant for collection or execution shall be first returned unsatisfied, and in no case shall it be a defense to the remedy herein provided that a warrant for collection or execution has not been first returned unsatisfied: Provided, however, that no salary or wage at the rate of less than two hundred dollars ($200.00) per month, whether paid weekly or monthly, shall be attached or garnished under the provisions of this section.

3. In addition to the remedy herein provided, the commissioner of motor vehicles is authorized and empowered to make a certificate setting forth the essential particulars relating to the said tax, including the amount thereof, the date when the same was due and payable, the person, firm, or corporation chargeable therewith, and the nature of the tax, and under his hand and seal transmit the same to the clerk of the superior court of any county in which the delinquent taxpayer resides or has property; whereupon, it shall be the duty of the clerk of the superior court of the county to docket the said certificate and index the same on the cross index of judgments, and execution may issue thereon with the same force and effect as an execution upon any other judgment of the superior court; said tax shall become a lien on realty only from the date of the docketing of such certificate in the office of the clerk of the superior court and on personalty only from the date of the levy on such personalty and upon execution thereon no homestead or personal property exemption shall be allowed.

4. The remedies herein given are cumulative and in addition to all other remedies provided by law for the collection of said taxes. (1937, c. 407, s. 63; 1945, c. 576, s. 4.)

Editor's Note.—The 1945 amendment rewrote this section.

Part 8. Anti-Theft and Enforcement Provisions.

§ 20-110. When registration shall be rescinded.

(d) The department shall rescind and cancel the certificate of title to any vehicle which has been erroneously issued or fraudulently obtained or is unlawfully detained by anyone not entitled to possession.

(e) The department shall rescind and cancel the license and dealer plates issued to any person when it is found that false or fraudulent statements have been made in the application for the same, and when and if it is found that the applicant does not have a bona fide place of business as provided by this article. (1937, c. 407, s. 74; 1945, c. 576, s. 5; 1947, c. 220, s. 4.)

Editor's Note.—The 1945 amendment added subsection (d), and the 1947 amendment added subsection (e). As the rest of the section was not affected by the amendments it is not set out.

§ 20-111. Violation of registration provisions.

(b) To display or cause or permit to be displayed or to have in possession any registration card, certificate of title or registration number plate knowing the same to be fictitious or to have been canceled, revoked, suspended or altered, or to wilfully display an expired license or registration plate on a vehicle knowing the same to be expired.

(d) To fail or refuse to surrender to the department, upon demand, any title certificate, registration card or registration number plate which has been suspended, canceled or revoked as in this article provided.

(e) To use a false or fictitious name or address in any application for the registration of any vehicle or for a certificate of title or for any renewal or duplicate thereof, or knowingly to make a false statement or knowingly to conceal a material fact or otherwise commit a fraud in any such application. A violation of this subsection shall constitute a misdemeanor punishable in the discretion of the court not to exceed two

years. (1937, c. 407, s. 75; 1943, c. 592, s. 2; 1945, c. 576, s. 6; c. 635; 1949, c. 360.)

The first 1945 amendment added at the end of subsection (b) the words "or to wilfully display an expired license or registration plate on a vehicle knowing the same to be expired." The second 1945 amendment inserted a comma after the words "certificate" in line two of subsection (d). The 1949 amendment rewrote subsection (e). As only these subsections were affected by the amendments the rest of the section is not set out.

Part 9. The Size, Weight, Construction and Equipment of Vehicles.

§ 20-116. Size of vehicles and loads.

(e) No combination of vehicles coupled together shall consist of more than two units and no such combination of vehicles shall exceed a total length of forty-eight feet exclusive of front and rear bumpers, subject to the following exceptions: Said length limitation shall not apply to vehicles operated in the daytime when transporting poles, pipe, machinery or other objects of a structural nature which cannot readily be dismembered, nor to such vehicles transporting such objects operated at nighttime by a public utility when required for emergency repair of public service facilities or properties, but in respect to such night transportation every such vehicle and the load thereon shall be equipped with a sufficient number of clearance lamps on both sides and marker lamps upon the extreme ends of said projecting load to clearly mark the dimensions of such load: Provided, that the state highway and public works commission shall have authority to designate any highways upon the state system as light-traffic roads when, in the opinion of the commission, such roads are inadequate to carry and will be injuriously affected by the maximum load, size, and/or width of trucks or busses using such roads as herein provided for, and all such roads so designated shall be conspicuously posted as light-traffic roads and the maximum load, size and/or width authorized shall be displayed on proper signs erected thereon. The operation of any vehicle whose gross load, size and/or width exceed the maximum shown on such signs over the roads thus posted shall constitute a misdemeanor: Provided further, that no standard concrete highway, or other highway built of material of equivalent durability, and not less than eighteen feet in width, shall be designated as a light-traffic road: Provided further, that the limitations placed on any road shall not be less than eighty per cent (80%) of the standard weight, unless there shall be available an alternate improved route of not more than twenty per cent (20%) increase in the distance; provided, however, that such restriction of limitations shall not apply to any county road, farm-to-market road, or any other road of the secondary system.

(1945, c. 242, s. 1; 1947, c. 844.)

Editor's Note.—

The 1945 amendment substituted "forty-eight" for "forty-five" in line four of subsection (e), and the 1947 amendment added the proviso at the end of the subsection. As the other subsections were not changed they are not set out.

Cited in Hobbs v. Drewer, 226 N. C. 146, 37 S. E. (2d) 121.

§ 20-117.1. Equipment required on all semi-trailers operated by contract or franchise haulers.—(a) On every semi-trailer having a gross weight in excess of 3,000 pounds there shall be at least the following lighting devices and reflectors:

(1) On the front, two amber clearance lamps, one at each side.

(2) On the rear, one red tail lamp; one red or amber stop light; two red clearance lamps, one at each side; two red reflectors, one at each side.

(3) On each side, one amber side-marker lamp, located at or near the front; one red side-marker lamp, located at or near the rear; one amber reflector, located at or near the front; one red reflector, located at or near the rear.

(b) Side-marker lamps may be combined with clearance lamps. Side-marker lamps may be in combination with clearance lamps and may use the same light source.

(c) Clearance, side-marker and tail lamps shall when lighted be capable of being seen at a distance of 500 feet under normal atmospheric conditions during the time when lights are required.

(d) Stop lights shall be actuated by application of the service (foot) brakes and shall be capable of being seen and distinguished from a distance of 100 feet to the rear of the motor vehicle in normal daylight; but shall not project a glaring or dazzling light. The stop light may be incorporated with the tail lamp.

(e) Every reflector mounted on a motor vehicle shall be of such size and characteristics as to be readily visible at night from all distances within 500 feet to 50 feet from the motor vehicle when directly in front of a normal headlight beam. Whether or not the rear reflectors are incorporated in tail lamps, they shall be located on the rear of the motor vehicle at opposite sides and shall also meet the requirements as to visibility as set forth in this paragraph.

(f) Rear-vision mirror. Every tractor shall be equipped with at least one rear-vision mirror, firmly attached to the motor vehicle and so located as to reflect to the driver a view of the highway to the rear.

(g) Fuel container not to project. No part of any fuel tank or container or intake pipe shall project beyond the sides of the motor vehicle.

(h) Flag or light at end of load. Whenever the load on any vehicle shall extend more than four feet beyond the rear of the bed or body thereof, there shall be displayed at the end of such load, in such position as to be clearly visible at all times from the rear of such load, a red flag not less than twelve inches both in length and width, except that between one-half hour after sunset and one-half hour before sunrise there shall be displayed at the end of any such load a red light plainly visible under normal atmospheric conditions at least two hundred feet from the rear of such vehicle. (1949, c. 1207, s. 1.)

§ 20-118. Weight of vehicles and load.—No vehicle or combination of vehicles shall be moved or operated on any highway or bridge when the gross weight thereof exceeds the limits specified below:

(a) When the wheel is equipped with high-pressure pneumatic, solid rubber or cushion tire, eight thousand pounds.

(b) When the wheel is equipped with low-pressure pneumatic tire, nine thousand pounds.

(c) The gross weight on any one axle of the vehicle when the wheels attached to said axle are equipped with high-pressure solid rubber or cushion tires, sixteen thousand pounds.

(d) When the wheels attached to said axle are equipped with low-pressure pneumatic tires, eighteen thousand pounds.

(e) For the purposes of this section an axle load shall be defined as the total load on all wheels whose centers are included within two parallel transverse vertical planes not more than forty-eight inches apart.

(f) For the purposes of this section every pneumatic tire designed for use and used when inflated with air to less than one hundred pounds pressure shall be deemed a low-pressure pneumatic tire, and every pneumatic tire inflated to one hundred pounds pressure or more shall be deemed a high-pressure pneumatic tire.

(g) The gross weight of any vehicle having two axles shall not exceed thirty thousand pounds, unless used in connection with a combination consisting of four axles or more. For the purpose of determining the maximum weight to be allowed for passenger busses to be operated upon the highways of this State, the commissioner of motor vehicles shall require, prior to the issuance of license, a certificate showing the weight of such bus when fully equipped for the road; and no such bus shall be licensed except those heretofore in use in this State if the weight fully equipped shall exceed twenty-two thousand, five hundred (22,500) pounds; and no special permit shall be issued for any bus in excess of the limits herein specified.

(h) The gross weight of any vehicle or combination of vehicles having three axles shall not exceed forty-four thousand pounds. For the purpose of determining gross weight, no axle shall be considered unless the wheels thereof are equipped with adequate brakes.

(i) The gross weight of any vehicle or combination of vehicles having four or more axles shall not exceed fifty-six thousand pounds. For the purpose of determining gross weight, no axle shall be considered unless the wheels thereof are equipped with adequate brakes.

(j) The gross weight with normal load of passengers of any vehicle propelled by electric power obtained from trolley wires, but not operated upon rails, commonly known as an electric trackless trolley coach, which is operated as a part of the general trackless trolley system of passenger transportation of the city of Greensboro and vicinity, shall not exceed thirty thousand pounds.

(k) No vehicle shall be operated on any highway the weight of which, resting on the surface of such highway, exceeds six hundred pounds upon any inch of tire roller or other support.

(l) Provided, however, that no vehicle or combination of vehicles which has an axle load in excess of eighteen thousand (18,000) pounds shall be allowed on any highway or portion of highway that has not been designated by the state highway and public works commission as a heavy duty highway.

Any vehicle or combination of vehicles may exceed the weight limitations hereinbefore set out by not more than five per centum (5%). Vehicles or combinations of vehicles having a gross weight in excess of forty thousand (40,000) pounds shall not be licensed or allowed to use the highways of the State, unless the engine furnishing the motive power of such vehicle or combination of vehicles shall have a piston displacement of three hundred (300) cubic inches, or more. Vehicles or combinations of vehicles having a gross weight in excess of fifty thousand (50,000) pounds shall not be licensed or allowed to use the highways of the State, unless the engine furnishing the motive power of such vehicles or combinations of vehicles shall have a piston displacement of three hundred fifty (350) cubic inches, or more. (1937, c. 407, s. 82; 1943, c. 213, s. 2; 1943, cc. 726, 784; 1945, c. 242, s. 2; c. 569, s. 2; c. 576, s. 7; 1947, c. 1079; 1949, c. 1207, s. 2.)

The 1949 amendment rewrote this section.

§ 20-118.1. Peace officer may weigh vehicle and require removal of excess load.—Any peace officer having reason to believe that the weight of a vehicle and load is unlawful is authorized to weigh the same either by means of portable or stationary scales, and may require that such vehicle be driven to the nearest scales in the event such scales are within two miles. The officer may then require the driver to unload immediately such portion of the load as may be necessary to decrease the gross weight of such vehicle to the maximum therefor specified in this article. All material so unloaded shall be cared for by the owner or operator of such vehicle at the risk of such owner or operator. (1927, c. 148, s. 37; 1949, c. 1207, s. 3.)

The 1949 amendment added the last sentence to this section.

§ 20-120. Operation of flat trucks on state highways regulated; trucks hauling leaf tobacco in barrels or hogsheads.—It shall be unlawful for any person, firm or corporation to operate, or have operated on any public highway in the state any open, flat truck loaded with logs, cotton bales, boxes or other load piled on said truck, without having the said load securely fastened on said truck. Any person violating the provisions of this paragraph shall be guilty of a misdemeanor and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days.

It shall be unlawful for any firm, person or corporation to operate or permit to be operated on any highway of this state a truck or trucks on which leaf tobacco in barrels or hogsheads is carried unless such barrels or hogsheads are reasonably securely fastened to such truck or trucks by metal chains or wire cables or tarpaulin, or manila or hemp ropes of not less than one-half inch in diameter, to hold said barrels or hogsheads in place under any ordinary traffic or road condition. Any person violating the provisions of this paragraph shall be guilty of a misdemeanor and upon conviction shall be fined not more than fifty dollars ($50.00) or imprisoned not more than thirty (30) days: Provided that the provisions of this paragraph shall not apply to any truck or trucks on which the hogsheads or barrels of tobacco are arranged in a single layer, tier, or plane, it being the intent of this paragraph to require the use of metal chains or wire cables only when barrels or hogheads of tobacco are stacked or piled one upon the other on a truck or trucks. Nothing in this paragraph shall apply to trucks engaged in transporting hogsheads or barrels of tobacco between factories and storage houses of the same company unless such hogsheads or bar-

rels are placed upon the truck in tiers. In the event the hogsheads or barrels of tobacco are placed upon the truck in tiers same shall be securely fastened to the said truck as hereinbefore provided in this paragraph. (1939, c. 114; 1947, c. 1094.)

Editor's Note.—The 1947 amendment added the second paragraph.

§ 20-124. Brakes.

Violation of this section is negligence per se, but such violation must be proximate cause of injury to become actionable. Tysinger v. Coble Dairy Products, 225 N. C. 717, 36 S. E. (2d) 246, 250.

A charge as to proper brakes on motor vehicles, in compliance with this section, where the evidence shows no mention of brakes, is a harmless inadvertence. Hopkins v. Colonial Stores, 224 N. C. 137, 29 S. E. (2d) 455.

Cited in Atkins v. White Transp. Co., 224 N. C. 688, 32 S. E. (2d) 209 (dis. op.).

§ 20-129. Required lighting equipment of vehicles.

(d) Rear Lamps: Every motor vehicle and every trailer or semi-trailer which is being drawn at the end of a train of vehicles shall carry at the rear a lamp of a type which has been approved by the commissioner and which exhibits a red light plainly visible under normal atmospheric conditions from a distance of five hundred feet to the rear of such vehicle, and so constructed and placed that the number plate carried on the rear of such vehicle shall under like conditions be so illuminated by a white light as to be read from a distance of fifty feet to the rear of such vehicle, and every trailer or semi-trailer shall carry at the rear, in addition to a rear lamp as above specified, a red reflector of a type which has been approved by the commissioner and which is so designed, located as to a height and maintained as to be visible for at least five hundred feet when opposed by a motor vehicle displaying lawful undimmed headlights at night on an unlighted highway. Such reflector shall be placed at the extreme end of the load.

Notwithstanding the provision of the first paragraph of this subsection, it shall not be necessary for a trailer, licensed for not more than 2500 pounds, to carry or be equipped with a rear lamp, provided such vehicle is equipped with and carries at the rear two red reflectors, each not less than four inches in diameter, and to be of a type approved by the commissioner, and which are so designed, located as to height and maintained as for each reflector to be visible for at least five hundred feet when approached by a motor vehicle displaying lawful undimmed headlights at night on an unlighted highway, such reflectors to be placed at the extreme end of the load.

(1947, c. 526.)

Editor's Note.—

The 1947 amendment added the second paragraph of subsection (d). As the rest of the section was not affected by the amendment it is not set out.

Purpose of Section.—This section was enacted to minimize the hazards incident to the movement of motor vehicles upon the public roads during the nighttime. Thomas v. Thurston Motor Lines, 230 N. C. 122, 52 S. E. (2d) 377.

Violation as Negligence Per Se.—The operation of a tractor-trailer on the highways at night without the rear and clearance lights burning as required by this section is negligence per se. Thomas v. Thurston Motor Lines, 230 N. C. 122, 52 S. E. (2d) 377.

Disabled Vehicle. — A tractor-trailer standing on the paved portion of a highway at nighttime is required to have the rear and clearance lights burning as provided by this section, regardless of whether or not the vehicle is disabled within the meaning of § 20-161(c). Thomas v. Thurston Motor Lines, 230 N. C. 122, 52 S. E. (2d) 377.

Bicycle Being Carried by Pedestrian.—Plaintiff's evidence was to the effect that at nighttime he was carrying a child's bicycle, too small for him to ride, across a street intersection to a repair shop, and that he was hit by a vehicle entering the intersection against the stop light at a high rate of speed. The court held that the refusal to give defendants' requested instruction that the failure to have a light on the bicycle was a violation of subsection (f) of this section was not error, since under the circumstances plaintiff was a pedestrian rather than a cyclist. Holmes v. Blue Bird Cab, 227 N. C. 581, 582, 43 S. E. (2d) 71.

Evidence Requiring Submission to Jury.—Evidence that the car in which plaintiff was riding as a guest struck defendant's trailer which was standing across the highway in the car's lane of traffic, and that the trailer did not have burning the lights required by this section, is sufficient to overrule defendant's motion to nonsuit and motion for a directed verdict in its favor on the issue of negligence, since the question of proximate cause under the evidence is for the jury. Thomas v. Thurston Motor Lines, 230 N. C. 122, 52 S. E. (2d) 377.

Applied in McKinnon v. Howard Motor Lines, 228 N. C. 132, 44 S. E. (2d) 735; Pascal v. Burke Transit Co., 229 N. C. 435, 50 S. E. (2d) 534.

§ 20-130.1. Use of red lights on front of vehicles prohibited; exceptions.

—It shall be unlawful for any person to drive upon the highways of this state any vehicle displaying red lights visible from the front of said vehicle. The provisions of this section shall not apply to police cars, highway patrol cars, ambulances, wreckers, fire fighting vehicles or vehicles of a voluntary lifesaving organization that have been officially approved by the local police authorities and manned or operated by members of such organization while on official call or to such lights as may be prescribed by the Interstate Commerce Commission. (1943, c. 726; 1947, c. 1032.)

Editor's Note.—The 1947 amendment rewrote the second sentence.

§ 20-134. Lights on parked vehicles.

Violation Is Negligence Per Se.—

Parking on a paved highway at night, without flares or other warning, is negligence. Allen v. Dr. Pepper Bottling Co., 223 N. C. 118, 25 S. E. (2d) 388.

Cited in McKinnon v. Howard Motor Lines, 228 N. C. 132, 44 S. E. (2d) 735.

§ 20-136.1. Location of television viewers.

—No person shall drive any motor vehicle equipped with any television viewer, screen, or other means of visually receiving a television broadcast which is located in the motor vehicle at any point forward of the back of the driver's seat, or which is visible to the driver while operating the motor vehicle. (1949, c. 583, s. 4.)

Part 10. Operation of Vehicles and Rules of the Road.

§ 20-138. Persons under the influence of intoxicating liquor or narcotic drugs.

Cross Reference.—For cases construing a similar section now repealed, see note to § 14-387 in original.

Necessity That Causal Connection Be Shown.—The violation of § 20-154 and this section, if conceded, is not sufficient to sustain a prosecution for involuntary manslaughter, unless a causal relation is shown between the breach of the statute and the death. State v. Lowery, 223 N. C. 598, 27 S. E. (2d) 638.

Violation Must Be Shown Beyond a Reasonable Doubt.—Before the state is entitled to a conviction under this section, it must show beyond a reasonable doubt that the defendant was driving a motor vehicle on a public highway of the state while under the influence of intoxicating liquor or narcotic drugs. State v. Carroll, 226 N. C. 237, 37 S. E. (2d) 688.

Permitting Intoxicated Person to Drive.—When an owner

places his motor vehicle in the hands of an intoxicated driver, sits by his side, and permits him, without protest, to operate the vehicle on a public highway while in a state of intoxication, the owner is as guilty as the man at the wheel. State v. Gibbs, 227 N. C. 677, 678, 44 S. E. (2d) 201.

"Under the Influence" Defined.—A person is under the influence of intoxicating liquor or narcotic drugs, within the meaning and intent of this section, when he has drunk a sufficient quantity of intoxicating beverages or taken a sufficient amount of narcotic drugs to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties. State v. Carroll, 226 N. C. 237, 37 S. E. (2d) 688.

In prosecution under this section, an instruction that defendant was under the influence of intoxicants if he had drunk a sufficient amount to make him think or act differently than he would otherwise have done, regardless of the amount, and that he was "under the influence" if his mind and muscles did not normally co-ordinate or if he was abnormal in any degree from intoxicants was held without error. State v. Biggerstaff, 226 N. C. 603, 39 S. E. (2d) 619.

No Distinction between One Who Is Drunk and One under the Influence of Liquor.—The legislature did not intend that any distinction between a person who is drunk and one under the influence of liquor should be made in the interpretation and enforcement of this statute. State v. Carroll, 226 N. C. 237, 37 S. E. (2d) 688, 690.

Instruction on Intoxication Held Erroneous.—An instruction that a person is under the influence of intoxicating liquor when "he has drunk a sufficient quantity of alcoholic liquor or beverage to affect, however slightly, his mind and his muscles, his mental and his physical faculties" is erroneous. State v. Carroll, 226 N. C. 237, 37 S. E. (2d) 688.

Sufficiency of Evidence of Intoxication.—The testimony of two witnesses to the effect that from the detection of some "foreign" odor of an intoxicant from the mouth of a man whom they had not seen before, and who had been knocked unconscious by a blow on the head, they were of opinion he was under the influence of intoxicating liquor, standing alone, was insufficient to constitute substantial evidence that the man, previously, while driving an automobile on the highway, had been under the influence of intoxicants to the extent held necessary in State v. Carroll, 226 N. C. 237, 37 S. E. (2d) 688, to constitute violation of this section. State v. Flinchem, 228 N. C. 149, 150, 44 S. E. (2d) 724.

Portion of Sidewalk as Highway.—The portion of a sidewalk between a street and a filling station, open to the use of the public as a matter of right for the purposes of vehicular traffic, is a "highway" within the meaning of this section. State v. Perry, 230 N. C. 361, 53 S. E. (2d) 288.

When Nonsuit Proper.—Officers who reached the scene of an accident some thirty minutes after it occurred testified that in their opinion defendant driver was intoxicated or under the influence of something, and one of them testified that he smelled something on defendant's breath, but both testified that they did not know whether defendant's condition was due to drink or to injuries sustained by him in the accident. It was held that the evidence raises no more than a suspicion or conjecture as to whether defendant was driving under the influence of liquor or narcotic drugs, and defendant's motion as of nonsuit should have been allowed. State v. Hough, 229 N. C. 532, 50 S. E. (2d) 496.

Evidence held sufficient to be submitted to the jury on a charge of driving a motor vehicle on the highways while under the influence of intoxicants in violation of this section. State v. Blankenship, 229 N. C. 589, 50 S. E. (2d) 724.

In Prosecution for Manslaughter.—Evidence that defendant was driving on the public highways of the state while under the influence of intoxicating liquor in violation of this section, and was driving recklessly in violation of § 20-140, which proximately caused the death of a passenger in his car, is sufficient to be submitted to the jury in a prosecution for manslaughter. State v. Blankenship, 229 N. C. 589, 50 S. E. (2d) 724.

Duty of Judge to Charge as to Good Character of Defendant.—Where defendant was charged with operating a motor vehicle on the public highway while under the influence of intoxicating liquor, in the absence of request it was not incumbent upon the trial judge to charge specifically as to the effect of evidence of the good character of the defendant. This was not an essential feature of the case. State v. Glatly, 230 N. C. 177, 52 S. E. (2d) 277.

§ 20-140. Reckless driving.

Duty to Keep Car under Control and Decrease Speed When Special Hazards Exist.—The driver of an automobile is required at all times to operate his vehicle with due regard to traffic and conditions of the highway, and keep his car under control and decrease speed when special hazards exist by reason of weather or highway conditions or when necessary to avoid colliding with any other vehicle. This requirement, as expressed in this section and § 20-141, constitutes the hub of the motor vehicle law around which other provisions regulating the operation of motor vehicles revolve. Cox v. Lee, 230 N. C. 155, 52 S. E. (2d) 355.

Ability to Stop within Radius of Lights.—And one who operates a motor vehicle during the nighttime must take notice of the existing darkness which limits visibility to the distance his headlights throw their rays, and he must operate his motor vehicle in such manner and at such speed as will enable him to stop within the radius of his lights. Cox v. Lee, 230 N. C. 155, 52 S. E. (2d) 355.

Sufficiency of Evidence for Jury.—

Allegation that defendant violated the provisions of this section, in that truck was operated carelessly and heedlessly in willful and wanton disregard of rights and safety of others, at a speed and in a manner to endanger or be likely to endanger person and property and by operating same to the left, when he could have turned to the right and passed without striking plaintiff's testator, was not supported by evidence. Tysinger v. Coble Dairy Products, 225 N. C. 717, 36 S. E. (2d) 246, 251.

Evidence held sufficient to be submitted to the jury on a charge of reckless driving in violation of this section. State v. Blankenship, 229 N. C. 589, 50 S. E. (2d) 724; State v. Holbrook, 228 N. C. 620, 46 S. E. (2d) 843.

In Prosecution for Manslaughter.—Evidence that defendant was driving on the public highways of the state while under the influence of intoxicating liquor in violation of § 20-138, and was driving recklessly in violation of this section, which proximately caused the death of a passenger in his car, is sufficient to be submitted to the jury in a prosecution for manslaughter. State v. Blankenship, 229 N. C. 589, 50 S. E. (2d) 724.

Evidence held sufficient to justify conviction of reckless driving. State v. Steelman, 228 N. C. 634, 46 S. E. (2d) 845.

The state's evidence tending to show that defendant was driving some eighty to ninety miles per hour over a highway on which several other vehicles were moving at the time, is sufficient to overrule defendant's motion to nonsuit and sustain a conviction of reckless driving. State v. Vanhoy, 230 N. C. 162, 52 S. E. (2d) 278.

The charge in a prosecution for reckless driving was held to be in substantial compliance with the requirements of § 1-180. State v. Vanhoy, 230 N. C. 162, 52 S. E. (2d) 278.

Applied in State v. Flinchem, 228 N. C. 149, 44 S. E. (2d) 724.

Quoted in State v. Wooten, 228 N. C. 628, 46 S. E. (2d) 868.

Cited in Hoke v. Atlantic Greyhound Corp., 226 N. C. 692, 40 S. E. (2d) 345.

§ 20-141. Speed restrictions.—(a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing.

(b) Except as otherwise provided in this chapter, it shall be unlawful to operate a vehicle in excess of the following speeds:

1. Twenty miles per hour in any business district;

2. Thirty-five miles per hour in any residential district;

3. Forty-five miles per hour in places other than those named in paragraphs 1 and 2 of this subsection for vehicles other than passenger cars, regular passenger vehicles, pick-up trucks of less than one ton capacity, and school busses loaded with children;

4. Fifty-five miles per hour in places other than those named in paragraphs 1 and 2 of this subsection for passenger cars, regular passenger carrying vehicles, and pick-up trucks of less than one ton capacity.

(c) The fact that the speed of a vehicle is lower than the foregoing limits shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.

(d) Whenever the state highway and public works commission shall determine upon the basis of an engineering and traffic investigation that any speed hereinbefore set forth is greater than is reasonable or safe under the conditions found to exist at any intersection or other place or upon any part of a highway, said commission shall determine and declare a reasonable and safe speed limit thereat, which shall be effective when appropriate signs giving notice thereof are erected at such intersection or other place or part of the highway.

(e) The foregoing provisions of this section shall not be construed to relieve the plaintiff in any civil action from the burden of proving negligence upon the part of the defendant as the proximate cause of an accident.

(f) Whenever local authorities within their respective jurisdictions determine, upon the basis of an engineering and traffic investigation, that the speed permitted under this article at any intersection is greater than is reasonable or safe under the conditions found to exist at such intersection, such local authority shall determine and declare a reasonable and safe speed limit thereat, which shall be effective when appropriate signs giving notice thereof are erected at such intersection or upon the approaches thereto.

(f1) Local authorities in their respective jurisdictions may in their discretion fix by ordinance such speed limits as they may deem safe and proper on those streets which are not a part of the state highway system and which are not maintained by the state highway and public works commission, but no speed limit so fixed for such streets shall be less than twenty-five miles per hour, and no such ordinance shall become or remain effective unless signs have been conspicuously placed giving notice of the speed limit for such streets. A violation of any ordinance adopted pursuant to the provisions of this subsection shall constitute a misdemeanor punishable by a fine not to exceed fifty dollars ($50.00) or a prison sentence of not more than thirty days.

(g) Local authorities in their respective jurisdictions may, in their discretion, authorize by ordinance higher speeds than those stated in subsection (b) hereof upon through highways or upon highways or portions thereof where there are no intersections or between widely spaced intersections: Provided, that signs are erected giving notice of the authorized speed.

Local authorities shall not have authority to modify or alter the basic rules set forth in subsection (a) herein, nor in any event to authorize by ordinance a speed in excess of fifty miles per hour.

(h) No person shall drive a motor vehicle at such slow speed as to impede or block the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation or in compliance with law. Police officers are hereby authorized to enforce this provision by directions to drivers, and in the event of wilful disobedience to this provision and refusal to comply with the direction of an officer in accordance herewith, the continued slow operation by a driver shall be a misdemeanor.

(i) The state highway and public works commission shall have authority to designate and appropriately mark certain highways of the state as truck routes.

(j) Any person violating any of the provisions of this section shall be guilty of a misdemeanor and shall be punished as provided in § 20-180. (1937, c. 297, s. 2; c. 407, s. 103; 1939, c. 275; 1941, c. 347; 1947, c. 1067, s. 17; 1949, c. 947, s. 1.)

Editor's Note.—The 1947 amendment rewrote this section. The 1949 amendment inserted subsection (f1).

For a brief comment of the 1949 amendment, see 27 N. C. Law Rev. 473.

Regulation of Speed at Night.—

Curves on the road and darkness are conditions a motorist is required to take into consideration in regulating his speed "as may be necessary to avoid colliding with any person, vehicle, or other conveyance." He must operate his automobile at night in such manner and at such speed as will enable him to stop within the radius of his lights. Allen v. Dr. Pepper Bottling Co., 223 N. C. 118, 119, 25 S. E. (2d) 388.

A motorist must operate his automobile at night in such manner and at such speed as will enable him to stop within the radius of his lights. Wilson v. Central Motor Lines, 230 N. C. 551, 54 S. E. (2d) 53; Allen v. Dr. Pepper Bottling Co., 223 N. C. 118, 25 S. E. (2d) 388.

One who operates a motor vehicle during the nighttime must take notice of the existing darkness which limits visibility to the distance his headlights throw their rays, and he must operate his motor vehicle in such manner and at such speed as will enable him to stop within the radius of his lights. Cox v. Lee, 230 N. C. 155, 52 S. E. (2d) 355.

Colliding with Vehicle Parked on Highway at Night without Signals.—The driver of a car is not required to anticipate that vehicles will be parked on the highway at night without the warning signals required by statute, but this does not relieve him of the duty to keep a proper lookout and not to exceed a speed at which he can stop within the radius of his lights, taking into consideration the darkness and atmospheric conditions. Wilson v. Central Motor Lines, 230 N. C. 551, 54 S. E. (2d) 53. See § 20-161(a).

Where plaintiff's own evidence discloses that his lights and brakes were in good condition, that he was driving with his lights full on at thirty-five miles per hour, that he could see 150 feet ahead despite the darkness and heavy fog, and that he failed to see any obstruction and hit the rear of a truck parked on the highway in his lane of traffic without lights or warning flares, the evidence discloses contributory negligence on his part as a matter of law. Wilson v. Central Motor Lines, 230 N. C. 551, 54 S. E. (2d) 53.

Failure to Slacken Speed or Give Signal at Intersection.—Plaintiffs' evidence tending to show that defendant's tractor with trailer was being driven at a speed of 35 miles per hour and entered an intersection with another highway without slackening speed or giving signal or warning, and collided with the truck in which plaintiffs' intestates were riding, which had already entered the intersection, is sufficient to overrule defendant's motions as of nonsuit on the issue of negligence, notwithstanding that defendant's vehicle was being operated upon the dominant highway. Nichols v. Goldston, 228 N. C. 514, 46 S. E. (2d) 320.

Limitation upon Privilege of Driving at Maximum Rate.—By provision of this section, speed in excess of that which is reasonable and prudent under the circumstances when special hazards exist by reason of traffic, weather or highway conditions, is unlawful notwithstanding that the speed may be less than the prima facie limits prescribed. Hoke

v. Atlantic Greyhound Corp., 226 N. C. 692, 40 S. E. (2d) 345.

Motorist Must Decrease Speed When Special Hazards Exist.—A speed greater than is reasonable and prudent under the conditions then existing is prohibited by this section, and the duty is imposed upon the driver to decrease the speed of his automobile when special hazard exists with respect to pedestrians or other traffic. Baker v. Perrott, 228 N. C. 558, 46 S. E. (2d) 461.

The driver of an automobile is required at all times to operate his vehicle with due regard to traffic and conditions of the highway, and keep his car under control and decrease speed when special hazards exist by reason of weather or highway conditions or when necessary to avoid colliding with any other vehicle. This requirement, as expressed in this section and § 20-140, constitutes the hub of the motor vehicle law around which other provisions regulating the operation of motor vehicles revolve. Cox v. Lee, 230 N. C. 155, 52 S. E. (2d) 355.

Curves and hills in the road are conditions a motorist is required to take into consideration in regulating his speed "as may be necessary to avoid colliding with any person, vehicle, or other conveyance." Tyson v. Ford, 228 N. C. 778, 47 S. E. (2d) 251.

Evidence Tending to Show "Speed Greater than Is Reasonable and Prudent."—Evidence tending to show that the driver of a truck was traveling 35 to 40 miles per hour in an early morning fog which limited visibility to 100 or 125 feet, that he had overtaken a vehicle traveling in the same direction and was attempting to pass such vehicle 250 or 300 feet before reaching a curve, and collided with plaintiff's car which approached from the opposite direction, was held sufficient to be submitted to the jury on the issue of the negligence of the driver of the truck. Winfield v. Smith, 230 N. C. 392, 53 S. E. (2d) 251.

Burden of Showing Proximate Cause.—Plaintiff in a civil action has the burden of showing that excessive speed, when relied upon by him, was a proximate cause of injury. Hoke v. Atlantic Greyhound Corp., 226 N. C. 692, 40 S. E. (2d) 345.

Sufficient Evidence to Overrule Defendant's Motion to Nonsuit in Prosecution for Manslaughter.—

The state's evidence tending to show that defendant was driving some eighty to ninety miles per hour over a highway whereon several other vehicles were moving at the time, is sufficient to overrule defendant's motion to nonsuit and sustain a conviction of reckless driving under § 20-140, and driving at a speed in excess of fifty-five miles per hour in violation of this section. State v. Vanhoy, 230 N. C. 162, 52 S. E. (2d) 278.

Under this section prior to the 1947 amendment, evidence of speed greater than was reasonable and prudent under the conditions then existing and, in any event, in excess of 45 miles per hour, was evidence of negligence. Steelman v. Benfield, 228 N. C. 651, 46 S. E. (2d) 829.

Under this section prior to the 1947 amendment, where plaintiff's evidence tended to show that the driver was operating defendant's bus at a rate of 40 to 50 miles an hour in heavy traffic around a curve on an upgrade, an instruction that a speed of 45 miles per hour, rather than a speed in excess of 45 miles per hour, was prima facie evidence that the speed was unlawful, was held not prejudicial in view of the requirement in subsection 5(c) to reduce speed below the prima facie limits prescribed in traversing a curve or when special hazards exist with respect to other traffic. Garvey v. Atlantic Greyhound Corp., 228 N. C. 166, 45 S. E. (2d) 58.

Evidence Negativing Excessive Speed.—In Tysinger v. Coble Dairy Products, 225 N. C. 717, 36 S. E. (2d) 246, 250, it was held that in the light of admitted facts as to the length of marks on the shoulder of highway and the point at which truck came to rest, suggestion of a speed of forty-five miles per hour as the truck was leaving the highway and going on the shoulder was contrary to human experience.

Evidence held to show violation of this section, and to warrant submission to the jury of the issue of defendants' negligence. Winfield v. Smith, 230 N. C. 392, 53 S. E. (2d) 251.

The charge, in a prosecution for reckless driving and driving at an excessive speed, both as to the statement of the evidence and the law arising on the essential features of the evidence, was held to be in substantial compliance with the requirements of § 1-180. State v. Vanhoy, 230 N. C. 162, 52 S. E. (2d) 278.

Mere Reading of This Section Held Insufficient.—The mere reading of the statutory speed regulations laid down in this section, without separating the irrelevant provisions from those pertinent to the evidence and without application of the relevant provisions of the evidence adduced, is insufficient to meet the requirements of § 1-180. Lewis v. Watson, 229 N. C. 20, 47 S. E. (2d) 484.

Necessity of Referring to Subsection 4(c).—So material is the application of subsection 4(c) to questions of liability arising out of violation of statutory speed regulations where special hazards or unusual circumstances are shown that in Kolman v. Silbert, 219 N. C. 134, 12 S. E. (2d) 915, it was held error that the trial court in that case charged the jury as to the speed limits fixed by this section without calling attention to the clause above referred to. Garvey v. Atlantic Greyhound Corp., 228 N. C. 166, 45 S. E. (2d) 58.

Applied in Sparks v. Willis, 228 N. C. 25, 44 S. E. (2d) 343; State v. Blankenship, 229 N. C. 589, 50 S. E. (2d) 724.

Cited in Crone v. Fisher, 223 N. C. 635, 27 S. E. (2d) 642; Hobbs v. Queen City Coach Co., 225 N. C. 323, 331, 34 S. E. (2d) 211.

§ 20-143. Vehicles must stop at certain railway grade crossings.

As to article on automobile accidents at railroad crossings, see 23 N. C. Law Rev. 223.

§ 20-145. When speed limit not applicable.—

The speed limitations set forth in this article shall not apply to vehicles when operated with due regard for safety under the direction of the police in the chase or apprehension of violators of the law or of persons charged with or suspected of any such violation, nor to fire department or fire patrol vehicles when traveling in response to a fire alarm, nor to public or private ambulances when traveling in emergencies, nor to vehicles operated by the duly authorized officers, agents and employees of the North Carolina Utilities Commission when traveling in performance of their duties in regulating and checking the traffic and speed of busses, trucks, motor vehicles and motor vehicle carriers subject to the regulations and jurisdiction of the North Carolina Utilities Commission. This exemption shall not, however, protect the driver of any such vehicle from the consequence of a reckless disregard of the safety of others. (1937, c. 407, s. 107; 1947, c. 987.)

Editor's Note.—The 1947 amendment inserted the reference to the utilities commission.

§ 20-146. Drive on right side of highway.

A person walking along a public highway pushing a handcart is a pedestrian within the purview of § 20-174(d), and is not a driver of a vehicle within the meaning of this section and § 20-149. Lewis v. Watson, 229 N. C. 20, 47 S. E. (2d) 484.

Proximate Cause.—

Where there was testimony of witnesses who were at the scene of the collision almost immediately after it occurred to the effect that they saw glass, flour and mud on the south side of the highway, intestate's right side and defendant's left side of the highway, and nothing of the kind on the opposite side of the highway, the north side, it was held that this was evidence that defendant's truck was being operated in violation of this and the two following sections, which required defendant to drive his truck on his right side of the highway and to give plaintiff's coupe half of the main traveled portion of the roadway as nearly as possible, and that this violation proximately caused the collision which resulted in the death of plaintiff's intestate. Wyrick v. Ballard, etc., Co., 224 N. C. 301, 303, 29 S. E. (2d) 900.

Negligence Per Se.—

A violation of this section is negligence per se, but to be actionable, such negligence must be proximate cause of injury. Tysinger v. Coble Dairy Products, 225 N. C. 717, 36 S. E. (2d) 246, 251. See Hoke v. Atlantic Greyhound Corp., 226 N. C. 692, 40 S. E. (2d) 345.

Driving to Left to Avoid Collision.—Where bus driver cut his bus to the left and crossed the center line in an effort to avoid the collision, it was held that under the circumstances of case, such act was not negligence. Ingram v. Smoky Mountain Stages, 225 N. C. 444, 35 S. E. (2d) 337.

Evidence Sufficient to Show Violation of This Section.—

A passenger in the truck driven by intestate testified to the effect that intestate was driving on his right side of the road in an ordinary manner, that defendant's tractor with trailer-tanker was traveling in the opposite direction, and that the truck hit the trailer-tanker which was sticking out to its left as the tractor was being driven to its right of the road, resulting in intestate's death. It was held that the testimony is sufficient to support an inference that the defendant violated this section in failing to drive his tractor-trailer on his right half of the highway, proximately causing the death of plaintiff's intestate, and compulsory nonsuit was error. Gladden v. Setzer, 230 N. C. 269, 52 S. E. (2d) 804.

§ 20-148. Meeting of vehicles.

Cross Reference.—See annotations under § 20-146.

Violation as Negligence.—Violation of this section is negligence per se. Hobbs v. Queen City Coach Co., 225 N. C. 323, 331, 34 S. E. (2d) 211.

A violation of this section would be negligence per se, and if such violation were proximate cause of the injury it would be actionable. Wallace v. Longest, 226 N. C. 161, 37 S. E. (2d) 112; Hoke v. Atlantic Greyhound Corp., 226 N. C. 692, 40 S. E. (2d) 345.

Assumption That Vehicle Will Turn to Right.—

In accord with original. See Hoke v. Atlantic Greyhound Corp., 227 N. C. 412, 418, 42 S. E. (2d) 593.

The rule that a motorist traveling on his right or seasonably turning thereto has the right to assume that a car approaching from the opposite direction will comply with this section, and turn to its right in time to avoid a collision, is not applicable to a motorist who runs completely off the road to his right, loses control, and hits a car standing still completely off the hard surface on its left side of the highway with its lights on, since the rule merely absolves a motorist from blame if he continues at a reasonable rate of speed in his line of travel in reliance on the assumption, but does not relieve him from the duty of knowing the position of his car on the highway from his own observation. Webb v. Hutchins, 228 N. C. 1, 44 S. E. (2d) 350.

Notwithstanding the right of a motorist to so assume, still this does not lessen his duty to conform to the requirement of exercising due care under the existing circumstances, that is, to conform to the rule of the reasonably prudent man. Hoke v. Atlantic Greyhound Corp., 227 N. C. 412, 418, 42 S. E. (2d) 593, citing Sebastian v. Horton Motor Lines, 213 N. C. 770, 197 S. E. 539.

Proximate Cause Is for Jury.—Proximate cause is a matter for consideration of the jury under the law as declared by the court. Wallace v. Longest, 226 N. C. 161, 37 S. E. (2d) 112, 116.

Where evidence tended to show that driver of defendant's truck, in meeting the pick-up truck in which plaintiffs were riding, was not passing on his right side of highway, and was not giving oncoming truck at least one-half of the main traveled portion of the roadway as nearly as possible, in violation of the provisions of this section, question of whether defendant's truck was on left side of highway and, if so, whether proximate cause of collision would be for jury. Id.

Evidence held sufficient to show violation of this section. State v. Wooten, 228 N. C. 628, 46 S. E. (2d) 868.

Evidence held to show violation of this section and to warrant submission to the jury of the issue of defendants' negligence. Winfield v. Smith, 230 N. C. 392, 53 S. E. (2d) 251.

Evidence tending to show that the driver of a truck was traveling 35 to 40 miles per hour in an early morning fog which limited visibility to 100 or 125 feet, that he had overtaken a vehicle traveling in the same direction and was attempting to pass such vehicle 250 or 300 feet before reaching a curve, and collided with plaintiff's car which approached from the opposite direction, was held sufficient to be submitted to the jury on the issue of the negligence of the driver of the truck. Id.

Charge to Jury.—In an action for damages caused by the collision of two motor vehicles, a charge that "If plaintiff has satisfied you from the evidence and by the greater weight that on this occasion the driver of the defendant's truck at the time of the collision failed to drive the defendant's truck upon the right half of the highway, then that would constitute negligence on the part of defendant's driver," seems to be in accord with this section. Hopkins v. Colonial Stores, 224 N. C. 137, 140, 29 S. E. (2d) 455.

Cited in Ingram v. Smoky Mountain Stages, 225 N. C. 444, 35 S. E. (2d) 337.

§ 20-149. Overtaking a vehicle.

A violation of this section is negligence per se. Kleibor v. Colonial Stores, 159 F. (2d) 894.

A person walking along a public highway pushing a handcart is a pedestrian within the purview of § 20-174(d) and is not a driver of a vehicle within the meaning of § 20-146 and this section. Lewis v. Watson, 229 N. C. 20, 47 S. E. (2d) 484.

Applied in State v. Holbrook, 228 N. C. 620, 46 S. E. (2d) 843.

§ 20-150. Limitations on privilege of overtaking and passing.

Negligence Per Se.—

It is negligence per se for a motorist to overtake and pass another vehicle proceeding in the same direction at an intersection of a highway, unless permitted to do so by a traffic officer. Donivant v. Swain, 229 N. C. 114, 47 S. E. (2d) 707.

Evidence Sufficient to Show Violation of This Section.—The evidence tended to show that the driver of an automobile overtook and attempted to pass a truck proceeding in the same direction at an intersection of streets in a municipality at which no traffic officer was stationed, and that the vehicle collided when the driver of the truck made a left turn at the intersection. Held: It was error for the court to instruct the jury that the provisions of subsection (c) of this section did not apply. Donivant v. Swain, 229 N. C. 114, 47 S. E. (2d) 707.

Evidence tending to show that the driver of a truck was traveling 35 to 40 miles per hour in an early morning fog which limited visibility to 100 or 126 feet, that he had overtaken a vehicle traveling in the same direction and was attempting to pass such vehicle 250 or 300 feet before reaching a curve, and collided with plaintiff's car which approached from the opposite direction, was held sufficient to be submitted to the jury on the issue of the negligence of the driver of the truck. Winfield v. Smith, 230 N. C. 392, 53 S. E. (2d) 251.

Evidence held to show violation of this section and to warrant submission to the jury of the issue of defendants' negligence. Id.

Stated in Tysinger v. Coble Dairy Products, 225 N. C. 717, 36 S. E. (2d) 246.

§ 20-152. Following too closely.—(a) The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, with regard for the safety of others and due regard to the speed of such vehicles and the traffic upon and condition of the highway.

(b) The driver of any motor truck, when traveling upon a highway outside of a business or residence district, shall not follow another motor truck within three hundred feet, but this shall not be construed to prevent one motor truck overtaking and passing another. (1937, c. 407, s. 114; 1949, c. 1207, s. 4.)

Editor's Note.—The 1949 amendment substituted "three" for "one" in line four of subsection (b).

Contributory Negligence.—In Killough v. Williams, 224 N. C. 254, 255, 29 S. E. (2d) 697, plaintiff was held not guilty of contributory negligence in following too closely in the rear of a truck with which he collided.

Applied in State v. Holbrook, 228 N. C. 620, 46 S. E. (2d) 843.

Stated in State v. Steelman, 228 N. C. 634, 46 S. E. (2d) 845.

§ 20-153. Turning at intersection.

Circumstances Warranting Inference of Negligence.—The plaintiff was lawfully in an intersection, standing in a position where he was clearly visible to the driver of the defendants' taxicab as the latter approached the intersection. The taxi driver, had he been keeping a proper lookout, could have seen plaintiff in ample time to avoid a collision. Instead he "cut the corner" in violation of subsection (a) of this section without giving any signal or warning of his approach. A collision resulted. These circumstances, unrebutted, warranted an inference of negligence and were sufficient to require the submission of appropriate issues to the jury. Ward v. Bowles, 228 N. C. 273, 45 S. E. (2d) 354.

§ 20-154. Signals on starting, stopping or turning.—(a) The driver of any vehicle upon a highway before starting, stopping or turning from a direct line shall first see that such movement can be made in safety, and if any pedestrian may

be affected by such movement shall give a clearly audible signal by sounding the horn, and whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required in this section, plainly visible to the driver of such other vehicle, of the intention to make such movement.

(b) The signal herein required shall be given by means of the hand and arm in the manner herein specified, or by any mechanical or electrical signal device approved by the department, except that when a vehicle is so constructed or loaded as to prevent the hand and arm signal from being visible, both to the front and rear, the signal shall be given by a device of a type which has been approved by the department.

Whenever the signal is given the driver shall indicate his intention to start, stop, or turn by extending the hand and arm from and beyond the left side of the vehicle as hereinafter set forth.

Left turn—hand and arm horizontal, forefinger pointing.

Right turn—hand and arm pointed upward.

Stop—hand and arm pointed downward.

All signals to be given from left side of vehicle during last fifty feet traveled. (1937, c. 407, s. 116; 1949, c. 1016, s. 1.)

Editor's Note.—The 1949 amendment rewrote the first paragraph of subsection (b).

The stopping of a bus on the traveled portion of the highway to receive or discharge a passenger must be done with due regard to the provisions of this section. Banks v. Shepard, 230 N. C. 86, 52 S. E. (2d) 215.

Violation of Section as Negligence Per Se.—Mere stopping on the highway is not prohibited by law, and the fact of stopping in itself does not constitute negligence. It is the stopping without giving a signal, approved by statute, whenever the operation of any other vehicle may be affected thereby. A violation of the statute is negligence per se. Conley v. Pearce-Young-Angel Co., 224 N. C. 211, 29 S. E. (2d) 740.

The failure to give a signal as required by statute, before stopping a motor vehicle on a public highway, is negligence; and ordinarily it is for the jury to determine whether or not such negligence was the proximate cause of the injury. Banks v. Shepard, 230 N. C. 86, 52 S. E. (2d) 215.

Causal Relation.—The violation of this section and of § 20-138, if conceded, is not sufficient to sustain a prosecution for involuntary manslaughter unless a causal relation is shown between the breach of the statute and the death. State v. Lowery, 223 N. C. 598, 601, 27 S. E. (2d) 638.

Intervening Negligence Insulating Primary Negligence.—Plaintiff's evidence tended to show that plaintiff was standing at the rear of a car parked completely off the hard surface on the right, that a car traveling at a speed of 45 to 50 miles per hour slowed down rapidly as it came near the parked car, that the driver of a truck following 250 feet behind the car, immediately he saw the brake light on the car, applied his brakes without effect and then applied his hand brake and skidded off the highway, striking the rear of the car and the plaintiff. Oncoming traffic prevented the truck driver from turning to the left. The driver of the truck testified that had his brakes been working properly he did not think he would have had any trouble stopping the truck. Held: Even conceding negligence on the part of the driver of the car in violating this section, the intervening negligence of the driver of the truck in driving at excessive speed or in operating the car with defective brakes, insulated any negligence of the driver of the car as a matter of law, since neither the intervening negligence nor the resulting injury could have been reasonably anticipated by the driver of the car from his act in rapidly decreasing speed. Warner v. Lazarus, 229 N. C. 27, 47 S. E. (2d) 496.

Evidence Insufficient to Show Mechanical or Electrical Signal.—Plaintiff, a passenger in a bus, was injured when a truck following the bus collided with the rear thereof when the bus was stopped on the highway to permit a passenger to alight. Defendant bus company admitted that its driver gave no hand signal, but introduced evidence of a rule of the utilities commission as to the required lighting equipment on motor vehicles and evidence that the bus had been inspected and approved by an inspector of the utilities commission, and certificate of title issued by the department of motor vehicles, together with testimony of the driver that the stop lights were on only when the brakes were on and then only if one stopped the bus suddenly, and that he slowed down gradually before stopping the bus. Held: The evidence is insufficient to show that a mechanical or electrical signal as required by this section was given, and appellant's motion to nonsuit was properly denied. Banks v. Shepard, 230 N. C. 86, 52 S. E. (2d) 215.

§ 20-155. Right-of-way.—(a) When two vehicles approach or enter an intersection and/or junction at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right except as otherwise provided in § 20-156.

(b) The driver of a vehicle approaching but not having entered an intersection and/or junction, shall yield the right-of-way to a vehicle already within such intersection and/or junction whether the vehicle in the junction is proceeding straight ahead or turning in either direction: Provided, that this subsection shall not be interpreted as giving the right-of-way to a vehicle already in an intersection and/or junction when said vehicle is turning either to the right or left unless the driver of said vehicle has given a plainly visible signal of intention to turn as required in section 20-154.

(c) The driver of any vehicle upon a highway within a business or residence district shall yield the right-of-way to a pedestrian crossing such highway within any clearly marked cross-walk, or any regular pedestrian crossing included in the prolongation of the lateral boundary lines of the adjacent sidewalk at the end of a block, except at intersections where the movement of traffic is being regulated by traffic officers or traffic direction devices. (1937, c. 407, s. 117; 1949, c. 1016, s. 2.)

Editor's Note.—The 1949 amendment rewrote subsection (b).

Entering Intersection "at Approximately the Same Time."—It cannot be held as a matter of law that plaintiff's automobile and defendants' truck approached or entered the intersection "at approximately the same time," when the latter was 125 feet away from the intersection when the former was entering it, and when plaintiff's automobile had crossed within four feet of the opposite curb when defendants' truck collided therewith. Crone v. Fisher, 223 N. C. 635, 637, 27 S. E. (2d) 642.

Entering Intersection Ahead of Other Car.—If plaintiff's automobile enters the intersection of two streets, at a time when the approaching car of defendant is far enough away to justify a person in believing that, in the exercise of reasonable care and prudence, he may safely pass over the intersection ahead of the oncoming car, the plaintiff has the right-of-way and it is the duty of the defendant to reduce his speed and bring his car under control and yield. Yellow Cab Co. of Charlotte v. Sanders, 223 N. C. 626, 27 S. E. (2d) 631.

If Vehicle on Left Has Already Entered Intersection.—This section does not apply if the driver on the right, at the time he approaches the intersection and before reaching it, in the exercise of reasonable prudence ascertains that the vehicle on his left has already entered the intersection. Kennedy v. Smith, 226 N. C. 514, 39 S. E. (2d) 380.

§ 20-158. Vehicles must stop at certain through highways.—(a) The state highway and public works commission, with reference to state highways, and local authorities, with reference to highways under their jurisdiction, are hereby authorized to designate main traveled or through highways by erecting at the entrance thereto from

intersecting highways signs notifying drivers of vehicles to come to full stop before entering or crossing such designated highway, and whenever any such signs have been so erected it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto. No failure so to stop, however, shall be considered contributory negligence per se in any action at law for injury to person or property; but the facts relating to such failure to stop may be considered with the other facts in the case in determining whether the plaintiff in such action was guilty of contributory negligence.

(b) This section shall not interfere with the regulations prescribed by towns and cities.

(c) When a stop light has been erected or installed at any intersection in this State outside of the corporate limits of a municipality, no operator of a vehicle approaching said intersection shall enter the same with said vehicle while the stop light is emitting a red light or stop signal for traffic moving on the highway and in the direction that said approaching vehicle is traveling.

(d) Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than ten dollars or imprisoned not more than ten days. (1937, c. 407, s. 120; 1941, c. 83; 1949, c. 583, s. 2.)

Editor's Note.—

The 1949 amendment inserted present subsection (c) and redesignated former subsection (c) as subsection (d).

Failure to Stop at Intersection Not Negligence Per Se.—The failure of a motorist traveling upon a servient highway to stop in obedience to a sign before entering an intersection with a dominant highway is not negligence per se and is insufficient alone to make out a prima facie case of negligence, but is only evidence of negligence to be considered along with other facts and circumstances adduced by the evidence, and an instruction that failure to stop in obedience to the sign is negligence, must be held for reversible error. Hill v. Lopez, 228 N. C. 433, 45 S. E. (2d) 539. See Nichols v. Goldston, 288 N. C. 514, 46 S. E. (2d) 320; Lee v. Robertson Chemical Corp., 229 N. C. 447, 50 S. E. (2d) 181.

§ 20-161. Stopping on highway.

The stopping of a passenger bus on paved portion of highway outside of business or residential districts, for the purpose of permitting passenger to alight, is not parking or leaving a vehicle standing, within the meaning of this section. Morgan v. Carolina Coach Co., 225 N. C. 668, 36 S. E. (2d) 263.

"The mere fact that the driver of a bus stops such vehicle on the traveled portion of the highway, for the purpose of receiving or discharging a passenger, nothing else appearing, will not be held to be a violation of § 20-161. Leary v. Norfolk Southern Bus Corp., 220 N. C. 745, 18 S. E. (2d) 426; Peoples v. Fulk, 220 N. C. 635, 18 S. E. (2d) 147; Conley v. Pearce-Young-Angel Co., 224 N. C. 211, 29 S. E. (2d) 740; Morgan v. Carolina Coach Co., 228 N. C. 280, 45 S. E. (2d) 339." Banks v. Shepard, 230 N. C. 86, 52 S. E. (2d) 215.

Parking in a Residential or Business District.—The parking or leaving standing of any vehicle in a business or residential district is not a violation of this section. Hammett v. Miller, 227 N. C. 10, 17, 40 S. E. (2d) 480.

Parking on a paved highway at night, without flares or other warning, is negligence. Allen v. Dr. Pepper Bottling Co., 223 N. C. 118, 25 S. E. (2d) 388.

Negligent Parking Need Not Be Anticipated.—Where defendant leaves his truck unattended, partly on a paved or improved portion of a state highway, between sunset and sunup, without displaying flares or lanterns not less than two hundred feet to the front and rear of the vehicle, it is an act of negligence, and the driver of the car in which plaintiff was riding, traveling at about 30 to 35 miles per hour on his right side of the road, under conditions which made it impossible for him to see more than a few feet ahead, although apparently guilty of negligence, is not under the duty of anticipating defendant's negligent parking, so that the concurrent negligence of the two made the resulting collision inevitable and an exception to the denial of a motion of nonsuit cannot be sustained. Caulder v. Gresham, 224 N. C. 402, 30 S. E. (2d) 312.

Evidence Not Showing Contributory Negligence.—Where evidence tended to show that defendant's mud-spattered truck was parked on a dark, foggy morning, with all four wheels on the pavement without lights, flares, or any other mode of signal, and had been so parked for some time, and that plaintiff was compelled to dim his lights, when about 20 feet south of defendant's truck, in response to the dimmed lights of an oncoming car the lights of this car partly blinding plaintiff, who collided with the rear of defendant's truck, motion for nonsuit on the ground of contributory negligence was properly refused. Cummins v. Southern Fruit Co., 225 N. C. 625, 36 S. E. (2d) 11.

Evidence of Negligence Sufficient to Go to Jury.—Evidence that a disabled truck was left standing on the hard-surface of a highway at night without warning flares or lanterns as required by subsection (a) of this section, and that a car, approaching from the rear, collided with the back of the truck, resulting in injuries to the driver and passengers in the car, is held sufficient to be submitted to the jury on the issue of negligence in each of the actions instituted by the driver and occupants of the car against the driver and owner of the truck. Wilson v. Central Motor Lines, 230 N. C. 551, 54 S. E. (2d) 53.

Applied in Parkway Bus Co. v. Coble Dairy Products Co., 229 N. C. 352, 49 S. E. (2d) 623.

Cited in Riggs v. Gulf Oil Corp., 228 N. C. 774, 47 S. E. (2d) 254; Thomas v. Thurston Motor Lines, 230 N. C. 122, 52 S. E. (2d) 377.

§ 20-166. Duty to stop in event of accident.

Driver Must Stop at Scene of Accident.—This section requires the driver of a vehicle involved in an accident to stop at the scene, and in the event the accident involves the injury of any person, it requires him to give his name, address, operator's license and the registration number of his vehicle, and to render reasonable assistance to the injured person. State v. Brown, 226 N. C. 681, 40 S. E. (2d) 34.

Where defendant admitted that he knew he had hit a man and did not stop or return to the scene, his own testimony disclosed a violation of this section, and his good faith in stopping 200 yards away from the accident and obtaining aid for the injured man before proceeding on his way to his home was immaterial on the issue of guilt or innocence and the exclusion of testimony to this effect was without error. Id.

Knowledge of Accident Is Essential Element of Offense.—Knowledge of the driver that his vehicle had been involved in an accident resulting in injury to a person is an essential element of the offense of "hit and run driving." State v. Ray, 229 N. C. 40, 47 S. E. (2d) 494.

Former Jeopardy.—In a prosecution for hit and run driving the trial court properly refused to submit an issue of former acquittal based upon a prior prosecution for involuntary manslaughter arising out of the same collision, since the offenses are different, both in law and in fact, and therefore the plea of former jeopardy is inapposite as a matter of law. State v. Williams, 229 N. C. 415, 50 S. E. (2d) 4.

§ 20-169. Powers of local authorities. — Local authorities, except as expressly authorized by § 20-141 and § 20-158, shall have no power or authority to alter any speed limitations declared in this article or to enact or enforce any rules or regulations contrary to the provisions of this article, except that local authorities shall have power to provide by ordinances for the regulation of traffic by means of traffic or semaphores or other signaling devices on any portion of the highway where traffic is heavy or continuous and may prohibit other than one-way traffic upon certain highways, and may regulate the use of the highways by processions or assemblages and except that local authorities shall have the power to regulate the speed of vehicles on highways in public parks, but signs shall be erected giving notices of such special limits and regulations. (1937, c. 407, s. 131; 1949, c. 947, s. 2.)

Prior to the 1949 amendment the first reference in line

three was to "§ 20-141, subsection (g)," instead of "§ 20-141."

Cited in Stewart v. Yellow Cab Co., 225 N. C. 654, 36 S. E. (2d) 256.

Part 11. Pedestrians' Rights and Duties.

§ 20-174. Crossing at other than cross-walks.

Duty of Pedestrian to Yield Right of Way.—It is the duty of pedestrian, in crossing highway at a point other than within a marked cross-walk or within an unmarked cross-walk at an intersection, to yield right of way to truck approaching upon the roadway. Tysinger v. Coble Dairy Products, 225 N. C. 717, 36 S. E. (2d) 246.

Pedestrian Need Not Yield Right of Way at Unmarked Intersection.—An instruction placing the duty upon a pedestrian to yield the right of way to vehicles in traversing a highway at an unmarked intersection of highways must be held for error. Gaskins v. Kelly, 228 N. C. 697, 47 S. E. (2d) 34.

A person walking along a public highway pushing a handcart is a pedestrian within the purview of subsection (d) of this section, and is not a driver of a vehicle within the meaning of §§ 20-146 and 20-149. Lewis v. Watson, 229 N. C. 20, 47 S. E. (2d) 484.

Handcart Is Not "Vehicle."—A person pushing a handcart along the highway is a pedestrian within the purview of subsection (d) of this section, since a handcart, being propelled solely by human power, is not a vehicle as defined by § 20-38(ff). Lewis v. Watson, 229 N. C. 20, 47 S. E. (2d) 484.

Motorist Must Use Due Care to Avoid Striking Pedestrian on Wrong Side of Highway. — The evidence disclosed that intestate was pushing his handcart on the right-hand side of the highway in violation of subsection (d) of this section, and was struck from the rear by a vehicle traveling in the same direction. Plaintiff's evidence was to the effect that the operator of the vehicle was traveling at excessive speed and failed to keep a proper lookout. It was held that the fact that intestate was traveling on the wrong side of the road did not render him guilty of contributory negligence as a matter of law upon the evidence, since the operator of a vehicle is under the duty notwithstanding the provisions of subsection (d) to exercise due care to avoid colliding with any pedestrian upon the highway. Lewis v. Watson, 229 N. C. 20, 47 S. E. (2d) 484. For a discussion of this case, see 27 N. C. Law Rev. 274.

Subsection (e) States the Common Law.—Both the common law and subsection (e) of this section provide that notwithstanding the provisions of subsection (d) "every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway." Lewis v. Watson, 229 N. C. 20, 47 S. E. (2d) 484.

Necessity for Instruction.—The evidence disclosed that intestate was pushing a handcart on the rightside of the highway, and that he was struck from the rear by defendant's vehicle traveling in the same direction. Plaintiff contended that the handcart was a vehicle and that § 20-146 and § 20-149 applied. Defendant contended that intestate was a pedestrian and was required by subsection (d) of this section to push the handcart along the extreme left-hand side of the highway. Held: An instruction failing to define intestate's status and explain the law arising upon the evidence fails to meet the requirements of § 1-180. Lewis v. Watson, 229 N. C. 20, 47 S. E. (2d) 484.

Applied in Sparks v. Willis, 228 N. C. 25, 44 S. E. (2d) 343 (subsection (e)).

Part 11A. Blind Pedestrians—White Canes or Guide Dogs.

§ 20-175.1. Public use of white canes by other than blind persons prohibited.—It shall be unlawful for any person, except one who is wholly or partially blind, to carry or use on any street or highway, or in any other public place, a cane or walking stick which is white in color or white tipped with red. (1949, c. 324, s. 1.)

Section 6 of the act from which this part was codified provides that it shall become effective on Jan. 1, 1950.

§ 20-175.2. Right-of-way at crossings, intersections and traffic control signal points; white cane or guide dog to serve as signal for the blind.—At any street, road or highway crossing or intersection, where the movement of traffic is not regulated by a traffic officer or by traffic control signals, any blind or partially blind pedestrian shall be entitled to the right-of-way at such crossing or intersection, if such blind or partially blind pedestrian shall extend before him at arm's length a cane white in color or white tipped with red, or if such person is accompanied by a guide dog. Upon receiving such a signal, all vehicles at or approaching such intersection or crossing shall come to a full stop, leaving a clear lane through which such pedestrian may pass, and such vehicle shall remain stationary until such blind or partially blind pedestrian has completed the passage of such crossing or intersection. At any street, road or highway crossing or intersection, where the movement of traffic is regulated by traffic control signals, blind or partially blind pedestrians shall be entitled to the right-of-way if such person having such cane or accompanied by a guide dog shall be partly across such crossing or intersection at the time the traffic control signals change, and all vehicles shall stop and remain stationary until such pedestrian has completed passage across the intersection or crossing. (1949, c. 324, s. 2.)

§ 20-175.3. Rights and privileges of blind persons without white cane or guide dog.—Nothing contained in this part shall be construed to deprive any blind or partially blind person not carrying a cane white in color or white tipped with red, or being accompanied by a guide dog, of any of the rights and privileges conferred by law upon pedestrians crossing streets and highways, nor shall the failure of such blind or partially blind person to carry a cane white in color or white tipped with red, or to be accompanied by a guide dog, upon the streets, roads, highways or sidewalks of this state, be held to constitute or be evidence of contributory negligence by virtue of this part. (1949, c. 324, s. 3.)

§ 20-175.4. Violations made misdemeanor.—Any person violating any provision of this part shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding fifty dollars ($50.00) or imprisoned not exceeding thirty days, or both. (1949, c. 324, s. 4.)

Part 12. Penalties.

§ 20-176. Penalty for misdemeanor.

Quoted in State v. Wooten, 228 N. C. 628, 46 S. E. (2d) 868.

§ 20-179. Penalty for driving while under the influence of intoxicating liquor or narcotic drugs.—Every person who is convicted of violating § 20-138, relating to habitual users of narcotic drugs or driving while under the influence of intoxicating liquor or narcotic drugs, shall, for the first offense, be punished by a fine of not less than one hundred dollars ($100.00) or imprisonment for not less than thirty (30) days, or by both such fine and imprisonment, in the discretion of the court. For a second conviction of the same offense, the defendant shall be punished by a fine of not less than two hundred dollars ($200.00) or imprisonment for not less than six months, or by both such fine and imprisonment, in the discretion of the court. For a third or subsequent conviction of the same offense, the defendant shall be punished by a fine of not less than five hundred dollars ($500.00) or by both such fine

and imprisonment in the discretion of the court. (1937, c. 407, s. 140; 1947, c. 1067, s. 18.)

Editor's Note.—The 1947 amendment rewrote this section.

Applied in State v. Blankenship, 229 N. C. 589, 50 S. E. (2d) 724.

§ 20-180. Penalty for speeding and reckless driving.—Every person convicted of violating § 20-140 or § 20-141 shall be guilty of a misdemeanor. (1937, c. 407, s. 141; 1947, c. 1067, s. 19.)

Editor's Note. — The 1947 amendment rewrote this section.

Applied in State v. Blankenship, 229 N. C. 589, 50 S. E. (2d) 724.

Cited in State v. Cody, 224 N. C. 470, 31 S. E. (2d) 445.

§ 20-181. Penalty for failure to dim, etc., beams of headlamps.

Cars are required to dim or slant their headlights in passing. Cummins v. Southern Fruit Co., 225 N. C. 625, 36 S. E. (2d) 11, 15.

§ 20-182. Penalty for failure to stop in event of accident involving injury or death to a person.

Cited in State v. Ray, 229 N. C. 40, 47 S. E. (2d) 494.

Art. 3A. Motor Vehicle Law of 1947.

Part 1. Safe Use of Streets and Highways.

§ 20-183.1. Rights, privileges and duties; declarations of policy.—Fully cognizant of the fact that the preservation of human life is a sacred duty and obligation of the legislative, the judicial, and the executive branches of the government, the general assembly hereby recognizes the following rights, privileges, and duties, and makes the following declarations of policy:

(a) Each of the citizens of the state of North Carolina has the right and privilege of using the streets and highways of the state either as a pedestrian or a motorist or both, without needless exposure to accident, injury, or death occasioned by the reckless or otherwise unlawful operation by others of vehicles over or upon said streets and highways;

(b) The right and privilege of any person to use the streets and highways of the state is, however, subject to the right and privilege of other persons to use said streets and highways in a safe, lawful, sane, and prudent manner;

(c) In order to secure to law-abiding and prudent pedestrians and motorists the full enjoyment of the right and privilege herein declared to exist, those operators of vehicles who are heedless of the duties and obligations imposed upon them and unmindful of the rights of others shall be barred from the streets and highways of the state;

(d) To guarantee to motorists and pedestrians the safe use of the streets and highways of the state is the purpose of the general assembly in enacting this act. (1947, c. 1067, s. 1.)

Editor's Note.—The act from which this section was codified inserted §§ 20-183.1 to 20-183.8, repealed §§ 20-13 and 20-36, and amended §§ 20-7, 20-16, 20-17, 20-19, 20-28, 20-141, 20-179, 20-180 and 20-188. Except as otherwise expressly provided, the act is effective from July 1, 1947.

Session Laws 1947, c. 1067, s. 23, provides: "Notwithstanding any express repeal contained in this act or any repeal implied from its terms and provisions, the existing laws of the state shall be and continue in full force and effect with respect to all acts done, committed or occurring prior to the effective dates of the respective parts or sections of this act affected or which ought to be affected by their terms and provisions and with respect to all liabilities, penalties, and punishments incurred or which ought to have been incurred with respect to said acts done, committed, or occurring prior to the effective dates of the respective parts or sections of this act."

Session Laws 1947, c. 1067, s. 24, provides: "When in any part or section of this act a greater or higher punishment, penalty, or loss of rights or privileges is imposed for a second or subsequent conviction of any offense than is imposed for a first conviction of such offense, no conviction occurring prior to the effective date of the part or section under which the punishment, penalty, or loss of rights or privileges is to be imposed shall be considered as a prior conviction of such offense in determining whether or not the conviction under any part or section of this act is a second or subsequent conviction of such offense."

Part 2. Inspection of Motor Vehicles.

§§ 20-183.2 to 20-183.8: Repealed by Session Laws 1949, c. 164.

Art. 4. State Highway Patrol.

§ 20-185. Personnel; appointment; salaries.—The state highway patrol shall consist of a commanding officer, whose rank shall be designated by the governor, and such additional subordinate officers and men as the commissioner of motor vehicles, with the approval of the governor and advisory budget commission, shall direct. Members of the state highway patrol shall be appointed by the commissioner, with the approval of the governor, and shall serve at the pleasure of the governor and commissioner. The commanding officer, other officers and members of the state highway patrol shall be paid such salaries as may be established by the division of personnel of the budget bureau. (1929, c. 218, s. 1; 1931, c. 381; 1935, c. 324, s. 1; 1937, c. 313, s. 1; 1941, c. 36; 1947, c. 461, s. 1.)

Editor's Note.—Prior to the 1947 amendment the commanding officer was designated as "major."

§ 20-188. Duties of highway patrol.

Members of the state highway patrol, in addition to the duties, power and authority hereinbefore given, shall have the authority throughout the state of North Carolina of any police officer in respect to making arrests for any crimes committed in their presence and shall have authority to make arrests for any crime committed on any highway. (1929, c. 218, s. 4; 1933, c. 214, ss. 1, 2; 1935, c. 324, s. 3; 1939, c. 387, s. 2; 1941, c. 36; 1945, c. 1048; 1947, c. 1067, s. 20.)

Editor's Note.—The 1947 amendment changed the above paragraph which was added at the end of this section by the 1945 amendment. As the rest of the section was not affected by the amendments it is not set out.

As to duty to refer to state courts cases involving vehicles seized or arrests made for unlawful transportation of liquor, see § 18-6.1.

As to power of highway patrolman to make arrests, see 25 N. C. Law Rev. 338.

§ 20-191. Establishment of district headquarters.—The department of motor vehicles shall supply at its various district offices, or at some other point within the district if it shall be deemed advisable, suitable district headquarters, and the necessary clerical assistance for the commanding officer of the force at his headquarters in Raleigh and at the several district headquarters. (1929, c. 218, s. 6; 1937, c. 313, s. 1; 1941, c. 36; 1947, c. 461, s. 2.)

Editor's Note.—The 1947 amendment substituted "commanding officer" for "major."

§ 20-192. Shifting of patrolmen from one district to another.—The commanding officer of the

state highway patrol under such rules and regulations as the department of motor vehicles may prescribe shall have authority from time to time to shift the forces from one district to another, or to consolidate more than one district force at any point for special purposes. (1929, c. 218, s. 7; 1937, c. 313, s. 1; 1941, c. 36; 1947, c. 461, s. 3.)

Editor's Note.—The 1947 amendment substituted "commanding officer" for "major."

Art. 5. Enforcement of Collection of Judgments against Irresponsible Drivers of Motor Vehicles.

§§ 20-197 to 20-211: Repealed by Session Laws 1947, c. 1006, s. 58.

Art. 7. Miscellaneous Provisions Relating to Motor Vehicles.

§ 20-217. Motor vehicles to stop for school, church and Sunday school busses in certain instances.—Every person using, operating, or driving a motor vehicle upon or over the roads or highways of the State of North Carolina, or upon or over any of the streets of any of the incorporated towns and cities of North Carolina, upon approaching from any direction on the same highway any school bus transporting children to or from school or any church or Sunday school bus transporting children to or from church or Sunday school, while such bus is stopped and engaged in receiving or discharging passengers therefrom upon the roads or highways of the state or upon any of the streets of any incorporated cities and towns of the state, shall bring such motor vehicle to a full stop before passing or attempting to pass such bus and shall remain stopped until said passengers are received or discharged at that place and until the "stop signal" of such bus has been withdrawn or until such bus has moved on.

The provisions of this section are applicable only in the event the school, church or Sunday school bus bears upon the front and rear thereof a plainly visible sign containing the words "school bus" or the words "church bus" or "Sunday school bus" in letters not less than five inches in height.

Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not to exceed fifty dollars ($50.00) or imprisoned not to exceed thirty days. (1925, c. 265; 1943, c. 767; 1947, c. 527.)

Editor's Note.—

The 1947 amendment made this section applicable also to church and Sunday school busses.

A violation of this section is negligence per se, but such violation must be proximate cause contributing to injury and death of intestate to warrant recovery on that ground. Morgan v. Carolina Coach Co., 225 N. C. 668, 36 S. E. (2d) 263, 266.

Evidence Failing to Show Violation of This Section.—The evidence tended to show that a school bus and two following cars stopped on the right side of the highway, that two children alighted, one of whom ran immediately in front of the bus across the highway, and the other, a boy eight years old, waited until the three vehicles were in motion and crossed the highway after the third vehicle had passed, and was struck by defendant's truck operated by defendant's agent which was traveling in the opposite direction about thirty miles per hour, and which failed to give any warning of its approach and failed to reduce speed prior to the collision. Held: Although the evidence fails to show a violation of the letter of this section, since the school bus was in motion and its stop signal had been withdrawn prior to the impact, the evidence is sufficient to be submitted to the jury upon the issues of the negligence of the driver of the truck and the contributory negligence of defendant's intestate. Hughes v. Thayer, 229 N. C. 773, 51 S. E. (2d) 488.

§ 20-218. Standard qualifications for school bus drivers; speed limit.—No person shall drive or operate a school bus over the public roads of North Carolina while the same is occupied by children unless said person shall be fully trained in the operation of motor vehicles, and shall furnish to the superintendent of the schools of the county in which said bus shall be operated a certificate from the highway patrol of North Carolina, or from any representative duly designated by the commissioner of motor vehicles, and the chief mechanic in charge of school busses in said county showing that he has been examined by a member of the said highway patrol, or a representative duly designated by the commissioner of motor vehicles, and said chief mechanic in charge of school busses, in said county and that he is a fit and competent person to operate or drive a school bus over the public roads of the state.

It shall be unlawful for any person to operate or drive a school bus loaded with children over the public roads of North Carolina at a greater rate of speed than thirty-five miles per hour.

Any person violating paragraph two of this section shall, upon conviction, be fined not more than fifty dollars ($50.00) or imprisoned not more than thirty days. (1937, c. 397, ss. 1-3; 1941, c. 21; 1943, c. 440; 1945, c. 216.)

The 1945 amendment inserted after the word "patrol" in line thirteen the words "or a representative duly designated by the commissioner of motor vehicles."

§ 20-218.1: Repealed by Session Laws 1949, c. 163, s. 1.)

As to jurisdiction over violations of motor vehicle laws formerly vested by the repealed section, see § 110-21.1. For comment on the repealed section, see 21 N. C. Law Rev. 356.

Art. 8. Sales of Used Motor Vehicles Brought into State.

§§ 20-220 to 20-223: Repealed by Session Laws 1945, c. 635.

Art. 9. Motor Vehicle Safety and Financial Responsibility Act.

§ 20-224. Title.—The short title of this article shall be "Motor Vehicle Safety and Responsibility Act." (1947, c. 1006, s. 1.)

Editor's Note.—For discussion of this article, see 25 N. C. Law Rev. 455.

§ 20-225. Purposes and construction of article.—The purposes of this article are to promote greater safety in the operation of motor vehicles in this state and to require financial responsibility of reckless, inefficient and irresponsible operators of motor vehicles, and of operators and owners of motor vehicles involved in accidents; and it is the legislative intent that this article be liberally construed so as to effectuate these purposes, as far as legally and practically possible. (1947, c. 1006, s. 2.)

§ 20-226. Definitions.—Unless a different meaning is clearly required by the context—

"Chauffeur" means every person who is employed for the principal purpose of operating a motor vehicle, and every person who drives a

motor vehicle while in use as a public or common carrier of persons or property.

"Commissioner" means the commissioner of motor vehicles.

"Conviction" means conviction upon a plea of guilty, or of nolo contendere, or the determination of guilt by a jury or by a court though no sentence has been imposed or, if imposed, has been suspended, and it includes a forfeiture of bail or collateral deposited to secure appearance in court of the defendant, unless the forfeiture has been vacated.

"Department" means the department of motor vehicles, acting directly or through its duly authorized officers and agents.

"Insured" means the person in whose name there is issued a motor vehicle liability policy, as defined in this article, and any other person insured under its terms.

"Judgment" means any judgment which has become final by expiration without appeal of the time within which appeal might be perfected, or by final affirmance on appeal, rendered by a court of competent jurisdiction of this state, any other state of the United States, the United States, any territory, district or possession of the United States and under its exclusive control, the District of Columbia, the Dominion of Canada, Newfoundland, or any province or territorial subdivision of either.

"Motor vehicle" means every vehicle which is self-propelled, or designed for self-propulsion, and every vehicle drawn, or designed to be drawn, by a motor vehicle, and includes every device in, upon or by which any person or property is or can be transported or drawn upon a highway, except devices moved by human or animal power, and devices used exclusively upon stationary rails or tracks, and vehicles used in this state but not required to be licensed by the state.

"Nonresident" means every person who is not a bona fide resident of this state.

"Operator" means every person other than a chauffeur who is in actual physical control of a motor vehicle.

"Owner" means a person who holds the legal title to a vehicle. In the event a vehicle is the subject of an agreement for its conditional sale or lease with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to possession, the conditional vendee or lessee of the mortgagor is deemed the owner; provided, that in all such instances, when the rent paid by the lessee includes charge for services of any nature, or when the lease does not provide that title shall pass to the lessee upon payment of the rent stipulated, the lessor is to be deemed the owner and the vehicle shall be subject to such requirements of this article as are applicable to vehicles operated for compensation.

"Person" includes individuals, firms, partnerships, associations, corporations, receivers, trustees, assignees for the benefit of creditors, executors, and administrators, but does not include the state of North Carolina or any political subdivision thereof.

Masculine terms include feminine.—Whenever the masculine form of a word is used herein, it shall be construed to include the feminine, unless the context clearly requires the contrary. (1947, c. 1006, s. 3.)

§ 20-227. Motor vehicle liability policy defined; provisions and requisites of policy; coverage, etc. —(1) "Motor vehicle liability policy," when used herein, means an owner's or an operator's policy of liability insurance certified, as provided by this article, by an insurance carrier licensed to do business in this state, or by an insurance carrier not licensed to do business in this state upon compliance with the provisions of this article, as proof of financial responsibility, or a policy issued under the provisions of the assigned risk plan prescribed by this article and issued by an insurance carrier authorized to transact business in this state, to or for the benefit of the named insured.

(2) Every owner's policy shall—

(a) Designate by explicit description, or by appropriate reference, all motor vehicles with respect to which coverage is intended to be granted;

(b) Insure as insured the person named, and any other person using or responsible for the use of the motor vehicle with the permission, expressed or implied, of the named insured, or any other person in lawful possession; and

(c) Insure the insured or other person against loss from any liability imposed by law for damages, including damages for care and loss of services because of bodily injury to or death of any person, and injury to or destruction of property caused by accident and arising out of the ownership, use or operation of such motor vehicle or motor vehicles within this state, any other state of the United States, any territory, district or possession of the United States and under its exclusive control, the District of Columbia, the Dominion of Canada, Newfoundland, or any province or territorial subdivision of either subject to a limit exclusive of interest and costs, with respect to each motor vehicle, of five thousand dollars because of bodily injury to or death of one person in any one accident, and, subject to the limit for one person, to the limit of ten thousand dollars because of bodily injury to or death of two or more persons in any one accident, and to a limit of one thousand dollars because of injury to or destruction of property of others in any one accident.

(3) Every operator's policy shall insure the person named therein as insured against loss from liability imposed upon him by law for damages, including damages for care and loss of services because of bodily injury to or death of any person, and injury to or destruction of property, arising out of the use by him of any motor vehicle not owned by him, within the territorial limits and subject to the limits of liability set forth with respect to an owner's policy.

(4) Every policy of insurance subject to the provisions of this article—

(a) Must contain an agreement that the insurance is provided in accordance with the coverage defined in this article as respects bodily injury, death, property damage and destruction, and that it is subject to all the provisions of this article and of the laws of this state relating to this kind of insurance;

(b) May grant any lawful coverage in excess of or in addition to the coverage herein specified, and this excess or additional coverage shall not be subject to the provisions of this article, but shall be subject to other applicable laws of this state.

(5) Every policy shall be subject to the following provisions which need not be contained therein:

(a) The liability of any insurance carrier to the insured under a policy becomes absolute when loss or damage covered by the policy occurs, and the satisfaction by the insured of a judgment for the loss or damage shall not be a condition precedent to the right or duty of the carrier to make payment on account of the loss or damage.

(b) No policy shall be cancelled or annulled, as respects any loss or damage, by any agreement between the carrier and the insured after the insured has become responsible for the loss or damage, and any attempted cancellation or annullment shall be void.

(c) If the death of the insured occurs after the insured has become liable during the policy period, for loss or damage covered by the policy, the policy shall not be terminated by the death with respect to the liability, and the insurance carrier shall be liable thereunder as though death had not occurred.

(d) Upon the recovery of a judgment against any person for loss or damage if the person or the decedent he represents was at the accrual of the cause of action insured against the liability under the policy, the judgment creditor shall be entitled to have the insurance money applied to the satisfaction of the judgment.

(e) If the death, insolvency, or bankruptcy of the insured occurs within the policy period, the policy, during the unexpired portion of the period, shall cover the legal representative of the insured.

(f) No statement made by the insured or on his behalf, and no violation of the terms of the policy, shall operate to defeat or avoid the policy so as to bar recovery within the limits provided in this article.

(6) Any policy may provide—

(a) That the insured, or any other person covered by the policy shall reimburse the insurance carrier for payments made on account of any accident, claim or suit involving a breach of the terms, provisions or conditions of the policy;

(b) For proration of the insurance with other applicable valid and collectible insurance.

(7) Insurance carriers, authorized to issue policies as provided in this article, may, pending the issuance of the policy, execute an agreement to be known as a binder, which shall not be valid beyond thirty days from the date it becomes effective, or may, in lieu of a policy, issue an endorsement to an existing policy, each of which shall be construed to provide indemnity or protection in like manner and to the same extent as a formal policy. The provisions of this article apply to such binders and endorsements.

(8) When an insurance carrier has certified a policy under the provisions of this article, the insurance so certified cannot be cancelled or terminated until at least twenty days after a notice of cancellation or termination of the insurance has been filed in the office of the commissioner, except that a policy subsequently procured and certified shall, on the effective date of its certification, terminate the insurance previously certified with respect to any motor vehicle designated in both certificates. Provided, that when an insurance carrier has certified a policy under the provisions of this article, such policy shall be deemed to be continued in full force and effect and to provide the insured with financial responsibility as required by this article until twenty days after notice of cancellation or termination of the policy, whether such cancellation or termination is by reason of the expiration of the term of the policy or for other cause, it being the intent of this proviso to permit insurance carriers to issue renewal or substitute policies meeting the requirements of this article without the necessity of furnishing to the commissioner new certificates of insurance coverage upon the issuance of each renewal or substituted policy, and it being the further intent of this proviso to authorize the commissioner to rely upon the original certificate of liability insurance coverage so long as the insured maintains with the same insurance carrier adequate insurance coverage meeting the requirements of this article.

(9) No policy required under this article shall be issued or delivered in this state unless it complies with the terms and conditions of this article, and with all other applicable and not inconsistent laws of the state now or hereafter in force.

(10) Several policies of one or more insurance carriers which together meet the relevant requirements of this article shall be deemed a "motor vehicle liability policy" within the meaning of this article.

(11) Policies issued under the provisions of this article shall not insure any liability of the employer on account of bodily injury to, or death of, an employee of the insured for which benefits are payable under any workmen's compensation law. (1947, c. 1006, s. 4; 1949, c. 1161.)

Editor's Note.—The 1949 amendment added the proviso to subsection (8).

§ 20-228. Commissioner authorized to adopt regulations and administer article.—The commissioner shall administer and enforce the provisions of this article, and he is authorized to adopt regulations for its administration in accordance with the guiding principles prescribed in, and not inconsistent with, the terms of this article. (1947, c. 1006, s. 5.)

§ 20-229. When article does not apply.—This article, except its provisions as to the filing of proof of financial responsibility by a common carrier for its drivers and chauffeurs, does not apply to any vehicle operated under a permit or certificate of convenience and necessity issued by the North Carolina utilities commission, if public liability and property damage insurance for the protection of the public is required to be carried upon it, or to any motor vehicle owned by the state of North Carolina, or any political subdivision thereof. However, this article shall not be construed to exempt the driver or operator of any motor vehicle owned by the state of North Carolina, or any political subdivision thereof, from the provisions of this article. (1947, c. 1006, s. 6.)

§ 20-230. Proof of financial responsibility must

be given when driver's license is suspended or revoked.—Nothing in this article shall affect the authority or duty of the department of motor vehicles to issue, suspend or revoke operator's and chauffeur's license under the Uniform Drivers' License Act, article 2, chapter 20, of the General Statutes, and any amendments thereto; and any person whose operator's or chauffeur's license has been revoked or suspended under the provisions of the Uniform Drivers' License Act, as amended, shall not be entitled to have said license again issued or reinstated until such person shall have given and thereafter maintains proof of his financial responsibility, as provided in this article. Provided, in order to maintain the validity of any such reissuance or reinstatement, such person shall not be required to maintain such proof of financial responsibility, under this article, for more than two years after the reissuance or reinstatement of such license. (1947, c. 1006, s. 7; 1949, c. 977.)

Editor's Note.—The 1949 amendment added the proviso to this section.

For a brief comment on the 1949 amendments to this and the following section, see 27 N. C. Law Rev. 471.

§ 20-231. Revocation of license and registration certificates and plates upon conviction of certain offenses; provisions for reinstatement when proof of financial responsibility given.—The commissioner shall immediately revoke the operator's and chauffeur's license issued to any person, resident or nonresident, upon receiving a record of such person's conviction or forfeiture of bail in connection with any of the offenses set forth in General Statutes, § 20-17, and any amendments thereto, and such operator's and chauffeur's licenses shall remain suspended and revoked for at least one year, and shall not be reinstated or renewed thereafter unless and until such person shall have given, and thereafter maintains, proof of financial responsibility as provided in this article. Provided, in order to maintain the validity of any such reissuance or reinstatement, such person shall not be required to maintain such proof of financial responsibility, under this article, for more than two years after the reissuance or reinstatement of such license.

Whenever the motor vehicle operator's or chauffeur's license of any person has been suspended, cancelled or revoked under the provisions of sections 20-16 or 20-17 and the period of such suspension, cancellation or revocation shall have expired, and such person shall have met the requirements of this article if required to furnish proof of financial responsibility as a condition precedent to the right to have such license restored or reissued, such license shall be immediately restored or reissued to such person without a re-examination of such person if such person would not have been required to be re-examined at the time of the application for the restoration or reissuance of the license, if the offense for which the license was suspended, cancelled or revoked had not been committed; provided, however, if such person has not been re-examined since July 1, 1947, any license issued to such person shall expire at the same time as licenses issued to persons whose last names begin with the same letter as such person's, as provided in subsection (n) of section 20-7. (1947, c. 1006, s. 8; 1949, c. 977; c. 1032, s. 1.)

Editor's Note.—The first 1949 amendment added the proviso to the first paragraph of this section. The second 1949 amendment added the second paragraph.

§ 20-232. Revocation of licenses of mental incompetents and inebriates; procedure.—(a) The commissioner, upon receipt of notice that any person has been (1) legally adjudged to be insane, or a congenital idiot, an imbecile, epileptic or feeble-minded, or (2) committed to, or has entered, an institution as an inebriate or an habitual user of narcotic drugs, shall forthwith revoke his license and registration, but he shall not revoke the license if the person has been adjudged competent by judicial order or decree, or discharged as cured from an institution for the insane or feeble-minded, for the cure of inebriates, or for the treatment of habitual users of narcotic drugs, upon a certificate of the person in charge that the releasee is competent.

(b) In any case in which the person's license or registration has been revoked or suspended prior to his release it shall not be returned to him unless the commissioner is satisfied that he is competent to operate a motor vehicle with safety to persons and property and only then if he gives and maintains proof of financial responsibility.

(c) The clerk of the court in which any such adjudication is made shall forthwith send a certified copy of abstract thereof to the commissioner.

(d) The person in charge of every institution of any nature for the care or cure of the insane, idiots, imbeciles, epileptic, feeble-minded, inebriates or habitual users of narcotic drugs, shall forthwith report to the commissioner in sufficient detail for accurate identification the admission of every patient. (1947, c. 1006, s. 9.)

§ 20-233. Appeal from action of commissioner; review by court of record; effect.—Any person aggrieved by an order or act of the commissioner requiring a suspension or revocation of his license or registration under the provisions of this article, may file a petition in any court of record having criminal jurisdiction in the city or county in which the petitioner resides, for a review, but the commencement of such a proceeding shall not suspend the order or act, unless for good cause shown, a stay is allowed by the court pending final determination of the review. (1947, c. 1006, s. 10.)

§ 20-234. Revocation or suspension of license, etc., for failure to satisfy judgment.—(a) The commissioner shall suspend the operator's or chauffeur's license and all of the registration certificates and registration plates issued to any person who has failed for a period of sixty days to satisfy any judgment in amounts and upon a cause of action as hereinafter stated, immediately upon receiving authenticated report as hereinafter provided to that effect.

(b) The commissioner shall not, however, revoke the license of an owner, operator or chauffeur if the insurance carried by him was in a company which was authorized to transact business in this state and which subsequent to an accident involving the owner or operator and prior to settlement of the claim therefor went into liquidation, so that the owner, operator or chauf-

feur is thereby unable to satisfy the judgment arising out of the accident. (1947, c. 1006, s. 11.)

§ 20-235. Judgment specifically defined.—The judgment herein referred to means any judgment for more than fifty dollars for damages because of injury to or destruction of property, including loss of its use, or any judgment for damages, including damages for care and loss of services, because of bodily injury to or death of any person arising out of the ownership, use or operation of any motor vehicle. (1947, c. 1006, s. 12.)

§ 20-236. Commissioner's duty to revoke or suspend license, etc.—The commissioner shall take action as required in the two preceding sections upon receiving proper evidence that the person has failed for a period of sixty days to satisfy any judgment, in amount and upon a cause of action as stated in the two preceding sections, rendered by a court of competent jurisdiction of this state, any other state of the United States, the United States, any territory, district or possession of the United States and under its exclusive control, the District of Columbia, the Dominion of Canada, Newfoundland, or any province or territorial subdivision of either. (1947, c. 1006, s. 13.)

§ 20-237. When judgment deemed satisfied; credits on judgment.—(a) Every judgment herein referred to shall for the purpose of this article be deemed satisfied: (1) when paid in full or when five thousand dollars has been credited upon any judgment or judgments rendered in excess of that amount because of bodily injury to or death of one person as the result of any one accident; or (2) when, subject to the limit of five thousand dollars because of bodily injury to or death of one person, the judgment has been paid in full or when the sum of ten thousand dollars has been credited upon any judgment or judgments rendered in excess of that amount because of bodily injury to or death of two or more persons as the result of any one accident; or (3) when the judgment has been paid in full or when one thousand dollars has been credited upon any judgment or judgments rendered in excess of that amount because of injury to or destruction of property of others as a result of any one accident.

(b) Payments made in settlement of any claims because of bodily injury, death or property damage arising from a motor vehicle accident shall be credited in reduction of the amount provided for in this section. (1947, c. 1006, s. 14.)

§ 20-238. Installment payments on judgment by order of court.—A judgment debtor upon five days' notice to the judgment creditor may apply to the court in which the judgment was obtained for the privilege of paying it in installments and the court, without prejudice to other legal remedies which the judgment creditor may have, may so order, fixing the amounts and times of payment of the installments. (1947, c. 1006, s. 15.)

§ 20-239. Installments in default; licenses, etc., subject to revocation and suspension.—If the judgment debtor fails to pay any installments as permitted by the order of the court, then, upon notice of default, the commissioner shall forthwith suspend the license and registration certificates and registration plates of the judgment debtor until the judgment is satisfied as provided in this article, except that the judgment debtor may apply, after due notice to the judgment creditor, to the court which allowed installment payment of the judgment, within thirty days after the default, for resumption of the privilege of paying the judgment in installments, if past due installments are first paid. (1947, c. 1006, s. 16.)

Editor's Note.—The word "payment" in the fourth line from the end of this section does not appear in the authenticated copy of the act in the office of the secretary of state but has been supplied by the editor as expressing the obvious intent of the legislature.

§ 20-240. Effect of court order permitting installment payments.—The commissioner shall not suspend a license or registration of a motor vehicle, and shall restore any license or registration suspended following nonpayment of a judgment, if the judgment debtor obtains an order from the court in which the judgment was rendered permitting payment of the judgment in installments, and if the judgment debtor gives proof of his future financial responsibility as hereinafter provided, but default in payment of any installment will render the license or registration subject to suspension. (1947, c. 1006, s. 17.)

§ 20-241. Judgment creditor may consent to issuance or renewal of licenses pending satisfaction of judgment, upon proof of financial responsibility.—If the judgment creditor consents in writing, in such form as the commissioner prescribes, that the judgment debtor be allowed license and registration certificates and plates, the commissioner may allow same, notwithstanding default in the payment of the judgment or any installment thereof, for six months from the date of consent and thereafter until it is revoked in writing, if the judgment debtor furnishes proof of his future financial responsibility as hereinafter provided. (1947, c. 1006, s. 18.)

§ 20-242. Proof of financial responsibility required of unlicensed person at fault in accident.—Any unlicensed person involved in a motor vehicle accident, in which it should be determined that he is at fault, involving damages in excess of fifty dollars, must show and thereafter maintain proof of financial responsibility, as defined in this article, before obtaining license. (1947, c. 1006, s. 19.)

§ 20-243. State responsible for safekeeping of deposits held by treasurer under this article.—The state shall be responsible for the safekeeping of all bonds, cash and securities deposited with the treasurer of the state under the provisions of this article and if the deposit or any part thereof be lost, destroyed, or misappropriated the state shall make good the loss to any person entitled thereto. Bonds, cash or securities so deposited shall only be released by the treasurer upon consent of the commissioner given in conformity with the terms of this article. (1947, c. 1006, s. 20.)

§ 20-244. Bankruptcy listing of claim for damages does not relieve judgment debtor hereunder.—A discharge in bankruptcy listing a claim for damages arising out of the operation of a motor vehicle shall not relieve the judgment debtor from any of the requirements of this article. (1947, c. 1006, s. 21.)

§ 20-245. Applicable to resident and nonresi-

dent alike.—(a) Whenever by the laws of this state the commissioner has the power to suspend or revoke (1) the license of a resident operator or chauffeur, or (2) the registration certificates and registration plates of a resident owner, he is empowered (1) to suspend or revoke the license or to forbid the operation of a motor vehicle in this state by a nonresident operator or chauffeur, and (2) to forbid the operation within this state of any motor vehicle of a nonresident owner.

(b) Every provision of this article applies to any person who is not a resident of this state under the same circumstances as they would apply to a resident; and no nonresident may operate any motor vehicle in this state and no motor vehicle owned by him may be operated in this state, unless and until the nonresident, or the owner of the motor vehicle, if another person, has complied with the requirements of this article with respect to furnishing security and giving proof of future financial responsibility. (1947, c. 1006, s. 22.)

§ 20-246. Commissioner to transmit record of conviction in North Carolina to officials of home state of nonresident.—Upon conviction of a nonresident or in case any unsatisfied judgment results in suspension of a nonresident's driving privileges in this state and the prohibition of the operation within this state of any motor vehicle owned by him, or upon suspension of a nonresident's driving privileges in this state and the prohibition of the operation within this state of any motor vehicle owned by the nonresident pursuant to any other provision or provisions of this article, the commissioner shall transmit a certified copy of the record of the conviction or the unsatisfied judgment or any other action pursuant to this article resulting in suspension of a nonresident's driving privileges in this state and the prohibition of the operation within this state of any motor vehicle owned by such nonresident to the commissioner of motor vehicles or officer performing the functions of a commissioner in the state, the District of Columbia, any territory, district or possession of the United States and under its exclusive control, the Dominion of Canada, Newfoundland, or any province or territorial subdivision of either, in which the nonresident resides. (1947, c. 1006, s. 23.)

§ 20-247. Suspension or revocation upon conviction or adverse judgment against North Carolina resident in out-of-state court.—(a) The commissioner shall suspend or revoke the license and registration certificate and plates of any resident of this state upon receiving notice of his conviction, in a court of competent jurisdiction of this state, any other state of the United States, the United States, any territory, district or possession of the United States and under its exclusive control, the District of Columbia, the Dominion of Canada, Newfoundland, or any province or territorial subdivision of either, of an offense therein, which if committed in this state would be grounds for the suspension or revocation of the license granted to him, or registration of any motor vehicle registered in his name.

(b) The commissioner shall take like action upon receipt of notice that a resident of this state has failed, for a period of thirty days, to satisfy any final judgment in amount and upon a cause of action as stated herein, rendered against him in a court of competent jurisdiction of any other state of the United States, the United States, any territory, district or possession of the United States and under its exclusive control, the District of Columbia, the Dominion of Canada, Newfoundland or any province or territorial subdivision of either. (1947, c. 1006, s. 24.)

§ 20-248. Proof of financial responsibility by owner on behalf of chauffeur or member of household.—When the commissioner finds that any person required to give proof or furnish security under this article is or later becomes a chauffeur or motor vehicle operator, however designated, or a member of the immediate family or household, in the employ or home of an owner of a motor vehicle, the commissioner shall accept proof of financial responsibility given by the owner in lieu of proof by such person to permit him to operate a motor vehicle for which the owner has given proof as herein provided. In case the person is one who is furnished proof of financial responsibility by his employer, he shall not be required to furnish security. The commissioner shall designate the restrictions imposed by this section on the face of such person's, operator's, or chauffeur's license. (1947, c. 1006, s. 25.)

§ 20-249. Proof of financial responsibility on behalf of another by owner who holds certificate from utilities commission.—If the owner of a motor vehicle is one whose vehicles are operated under a permit or certificate of convenience and necessity issued by the state utilities commission, proof by the owner on behalf of another as provided by this article may be made if there is filed with the commissioner satisfactory evidence that the owner has complied with the law with respect to his liability for damage caused by the operation of vehicles by providing the required insurance or other security, or has qualified as a self-insurer as described in § 20-275. (1947, c. 1006, s. 26.)

§ 20-250. Revoked and suspended licenses, certificates and plates to be surrendered to commissioner; penalty for failure.—(a) Any person whose operator's or chauffeur's license or registration certificates or registration plates have been suspended or revoked as provided in this article and have not been reinstated shall immediately return every such license, registration certificate and set of registration plates held by him to the commissioner. Any person wilfully failing to comply with this requirement is guilty of a misdemeanor.

(b) The commissioner is authorized to take possession of any license, registration certificate or set of registration plates upon their suspension or revocation under the provisions of this article or to direct any police officer to take possession of and return them to the office of the commissioner. (1947, c. 1006, s. 27.)

§ 20-251. Proof of financial responsibility specifically defined.—Proof of financial responsibility means proof of ability to respond in damages for liability thereafter incurred arising out of the ownership, maintenance, use or operation of a motor vehicle, in the amount of five thousand dollars because of bodily injury to or death of

any one person, and subject to a limitation of five thousand dollars, for one person, in the amount of ten thousand dollars because of bodily injury to or death of two or more persons in any one accident, and in the amount of one thousand dollars because of injury to or destruction of property in any one accident. Proof in these amounts shall be furnished for each motor vehicle registered by the person. (1947, c. 1006, s. 28.)

§ 20-252. Proof of financial responsibility; how made.—(a) Proof of financial responsibility may be made: (1) by filing with the commissioner the written certificate of any insurance carrier, authorized to do business in this state, certifying that there is in effect a motor vehicle liability policy for the benefit of the person required to furnish proof of financial responsibility. This certificate shall give the effective date of the policy which must be the same date as the effective date of the certificate and, unless the policy is issued to a person who is not the owner of a motor vehicle, must designate by explicit description or by appropriate reference all motor vehicles covered. The commissioner is authorized to accept from the holder of a restricted or limited chauffeur's or motor vehicle operator's license, as proof of financial responsibility, a certificate of an insurance carrier, authorized to do business in this state, certifying that there is in effect a motor vehicle liability policy for the benefit of the holder of such license covering the operation by such person of a motor vehicle in accordance with the restriction or limitation to which such person's chauffeur's or operator's license is subject; (2) by filing with the commissioner proof that a satisfactory bond has been executed; (3) that an adequate deposit of cash or securities has been made; or (4) that self-insurance certificates have been filed.

(b) No motor vehicle shall be, or continue to be, registered in the name of any person required to file proof of financial responsibility unless it is so designated in the certificate. (1947, c. 1006, s. 29; 1949, c. 1160.)

Editor's Note.—The 1949 amendment inserted in subsection (a) the provision as to proof of financial responsibility of holder of restricted or limited operator's license.

§ 20-253. Nonresidents; how proof of financial responsibility established.—The nonresident owner of a foreign vehicle may give proof of financial responsibility by filing with the commissioner a written certificate or certificates of an insurance carrier not authorized to transact business in this state, but authorized to transact business in the state, the District of Columbia, any territory, district or possession of the United States and under its exclusive control, the Dominion of Canada, Newfoundland, or any province or territorial subdivision of either, in which each motor vehicle described in the certificate is registered; or if the nonresident does not own a motor vehicle, then in the like jurisdiction in which the insured resides and otherwise conforming to the provisions of this article, and the commissioner shall accept the same if the insurance carrier, in addition to having complied with all other provisions of this article as requisite shall (1) execute a power of attorney authorizing the commissioner to accept service on its behalf of notice or process in any action arising out of a motor vehicle accident in this state; (2) duly adopt a resolution, which shall be binding upon it, declaring that its policies are to be deemed to be varied to comply with the law of this state and the terms of this article relating to the terms of motor vehicle liability policies issued herein; (3) agree to accept as final and binding the judgment of any court of competent jurisdiction in this state from which judgment no appeal is, or can be taken, duly rendered in any action arising out of a motor vehicle accident; or (4) deposit with the treasurer of North Carolina cash or securities such as are mentioned in § 20-264 or the surety bond of a company authorized to do business in North Carolina, equal in value to eleven thousand dollars for each insurance policy filed as proof of financial responsibility. (1947, c. 1006, s. 30.)

§ 20-254. Nonresident may elect to file certificate of insurance carrier authorized to transact business in this state; default of foreign insurance carriers; effect.—(a) If a nonresident required to file a certificate of insurance under this article files the certificate of insurance of a company authorized to do business in this state the provisions of the foregoing section shall not apply.

(b) If any foreign insurance carrier which has qualified to furnish proof of financial responsibility defaults in any of its undertakings or agreements, the commissioner shall not thereafter accept any certificate of that carrier so long as the default continues and shall revoke licenses theretofore granted on basis of its policies unless the default be immediately repaired. (1947, c. 1006, s. 31.)

§ 20-255. Liability under other statutes not affected; article not applicable to certain policies.—This article does not apply to or affect (1) policies of automobile insurance against liability which may now or hereafter be required by any other law of this state but such policies if endorsed to conform to the requirements of this article shall be accepted as proof of financial responsibility when required under this article; (2) policies insuring solely the insured named in the policy against liability resulting from the maintenance, use or operation by persons in the insured's employ or in his behalf of motor vehicles now owned by the insured. (1947, c. 1006, s. 32.)

§ 20-256. Bond as proof of financial responsibility.—A person required to give proof of financial responsibility may file with the commissioner a bond meeting the requirements of this article. (1947, c. 1006, s. 33.)

§ 20-257. Nature of bond required; sureties.—The bond referred to in the foregoing section shall be executed by the person giving proof and by a surety company duly authorized to transact business in this state, or by the person giving proof and by one or more individual sureties owning real estate within this state and having an equity therein in at least the amount of the bond, which real estate shall be scheduled therein, but the commissioner may not accept any real estate bond unless it is first approved by the clerk of the superior court of county wherein the real estate is located. (1947, c. 1006, s. 34.)

§ 20-258. Conditions of bond to conform to

those of motor vehicle liability policy.—The commissioner shall not accept any such bond unless it is conditioned for payments in amounts and under the same circumstances as would be required in a motor vehicle liability policy furnished by the person giving proof. (1947, c. 1006, s. 35.)

§ 20-259. Cancellation of bond; notice required.—No such bond shall be cancelled unless twenty days' prior written notice of cancellation is given the commissioner but cancellation of the bond shall not prevent recovery thereon with respect to any right or cause of action arising prior to the date of cancellation. (1947, c. 1006, s. 36.)

§ 20-260. Bond constitutes a lien in favor of state; notice of cancellation; recordation of bond.—(a) A bond with individual sureties shall constitute a lien in favor of the state upon the real estate of any individual surety, which lien shall exist in favor of any holder of any final judgment against the principal on account of damage to property or injury to or death of any person or persons resulting from the ownership, maintenance, use or operation of his, or any other, motor vehicle, upon the recording of the bond in the office of the register of deeds of the county where the real estate is located.

(b) Notice of cancellation is to be signed by the commissioner or by someone designated by him and the seal of the department placed thereon. Notwithstanding any other provision of law the register of deeds shall record the notice in the books kept for the recording of deeds and shall index the same in the indexes thereto for grantors and grantees, under the respective names of the individual sureties in the column for grantors, and the State of North Carolina in the column for grantees, for which he shall receive the sum of two dollars and fifty cents to be paid by the principal in full payment of all services in connection with the recordation and release of the bond. The register of deeds shall place on the notice a statement showing the time of recording and the book and page of recording and return the notice to the commissioner. (1947, c. 1006, s. 37.)

§ 20-261. Release of bond by commissioner; certificate of cancellation.—When a bond with individual sureties filed with the commissioner is no longer required under this article, the commissioner shall, upon request, cancel it as to liability for damage to property or injury to or death of any person or persons thereafter caused, and when a bond has been cancelled by the commissioner or otherwise he shall upon request furnish a certificate of the cancellation signed by him or by someone designated by him with the seal of the department thereon. The certificate, notwithstanding any other provision of law, may be recorded in the office of the register of deeds in which the bond was admitted to record. (1947, c. 1006, s. 38.)

§ 20-262. Discharge of lien of bond by order of court.—Upon satisfactory proof that the bond has been cancelled and that there are no claims or judgments against the principal in the bond on account of damage to property or injury to or death of any person or persons resulting from the ownership, maintenance, use or operation of a motor vehicle of the principal caused while the bond was in effect, the clerk of the superior court in the county in which the bond was admitted to record, may enter an order discharging the lien of the bond on the real estate of the sureties thereon, upon their petition and at their proper cost. (1947, c. 1006, s. 39.)

§ 20-263. Judgment creditor may sue on bond or proceed against parties to bond, if judgment unsatisfied.—(a) If a final judgment rendered against the principal on the bond filed with the commissioner as provided in this article be not satisfied within sixty days after its rendition, the judgment creditor may, for his own use and benefit and at his sole expense, bring an action on the bond in the name of the state against the company or persons executing the bond.

(b) When the sureties on the bond are individuals the judgment creditor may proceed against any or all parties to the bond at law for a judgment or for a decree and foreclosure of the lien on the real estate of the sureties. The proceeding may be against one, all or intermediate number of parties to the bond and when less than all are joined other or others may be impleaded in the same proceeding and after final judgment or decree other proceedings may be instituted until full satisfaction be obtained. (1947, c. 1006, s. 40.)

§ 20-264. Deposit of cash or securities as proof of financial responsibility.—A person may give proof of financial responsibility by delivering to the commissioner eleven thousand dollars in cash, or in securities, such as fiduciaries may invest in under General Statutes, chapter 36, as amended. (1947, c. 1006, s. 41.)

§ 20-265. State treasurer custodian of deposits; depletion of deposits; duties of treasurer.—(a) All money or securities so delivered to the commissioner shall be placed by him in the custody of the state treasurer and shall be subject to execution to satisfy any judgment within the limits on amounts required by this article for motor vehicle liability insurance policies.

(b) Whenever the moneys or securities are subjected to attachment, garnishment, execution, or other legal process, or are otherwise depleted or threatened with depletion or impairment in amount or value the depositor must immediately furnish additional moneys or securities, free from lien, claim, or threat of impairment, in sufficient amount or value fully to comply with the requirements of this article.

(c) The treasurer shall notify the commissioner promptly of any depletion, impairment, or decrease or of any legal threat of depletion, impairment, or decrease in the value of the securities or in the moneys on deposit with him under the provisions of this article. (1947, c. 1006, s. 42.)

§ 20-266. Cancellation or substitution of bond or certificate of insurance; legal determination of disputes as to ownership or liability.—(a) The commissioner may cancel any bond or return any certificate of insurance, and upon the substitution and acceptance by him of other adequate proof of financial responsibility, pursuant to this article, and upon his direction to such effect, the state

treasurer shall return any money or securities on deposit with him to the person entitled thereto.

(b) The commissioner and the treasurer, or either, may proceed by bill of interpleader for the determination of any dispute as to ownership of or rights in any deposit, and may have recourse to any other appropriate proceeding for determination of any question that arises as to their rights or liabilities or as to the rights or liabilities of the state under this article. (1947, c. 1006, s. 43.)

§ 20-267. Commissioner must require replacement of unsatisfactory proof of financial responsibility.—Whenever any proof of financial responsibility filed by any person under the provisions of this article no longer fulfills the purpose for which required the commissioner shall require other proof of financial responsibility as required by this article and shall suspend his operator's or chauffeur's license, registration certificate and registration plates pending the furnishing of proof as required. (1947, c. 1006, s. 44.)

§ 20-268. When commissioner may consent to cancellation or release of bonds, policies, funds or securities; waiver of requirement of proofs of financial responsibility.—The commissioner, upon request and subject to the provisions of the succeeding section, shall consent to the cancellation of any bond or insurance policy, or to the return to the person entitled thereto of any money or securities deposited pursuant to this article as proof of financial responsibility, or he shall waive the requirements of filing proof of financial responsibility, in the event (1) of the death of the person on whose behalf the proof was filed; or (2) of his permanent incapacity to operate a motor vehicle; or (3) that the person who has given proof of financial responsibility surrenders his operator's or chauffeur's license, and all of his registration certificates and registration plates to the commissioner. (1947, c. 1006, s. 45.)

§ 20-269. When commissioner may not release proof.—(a) Notwithstanding the provisions of the preceding section, the commissioner shall not release the proof in the event: (1) any action for damages upon a liability included in this article is then pending; or (2) any judgment upon any such liability is then outstanding and unsatisfied; or (3) the commissioner has received notice that the person involved has within the period of twelve months immediately preceding been involved as a driver in any motor vehicle accident.

(b) An affidavit of the applicant of the nonexistence of these facts shall be sufficient evidence thereof in the absence of evidence in the records of the department to indicate the contrary. (1947, c. 1006, s. 46.)

§ 20-270. Re-establishment of proof as requisite to reissuance of license.—Whenever any person to whom proof has been surrendered as provided in § 20-268 applies for an operator's or chauffeur's license or the registration of a motor vehicle, the application shall be refused unless the applicant re-establishes proof as requisite. (1947, c. 1006, s. 47.)

§ 20-271. Commissioner to furnish abstract of record of licensee.—The commissioner upon request shall furnish any insurance carrier or any person or surety a certified abstract of the operating record of any person subject to the provisions of this article, which abstract shall fully designate the motor vehicles, if any, registered in the name of the person, and if there exists no record of the conviction of the person of a violation of any provisions of any statute or ordinance relating to the operation of a motor vehicle or of any injury or damage caused by him as provided in this article the commissioner shall so certify, upon the payment to him of a fee of one dollar ($1.00); provided further, however, that such certified abstract shall not be admissible in evidence in any court proceedings. (1947, c. 1006, s. 48.)

§ 20-272. Operation of motor vehicle while revocation or suspension of license, etc., in effect; penalties.—Any person whose operator's or chauffeur's license or registration certificate or other privilege to operate a motor vehicle has been suspended or revoked, restoration thereof or the issuance of a new license or registration certificate being contingent upon the furnishing of proof of financial responsibility and who, during the period of suspension or while revocation is in effect, or in the absence of full authorization from the commissioner, drives any motor vehicle upon any highway, and any nonresident from whom the privilege of operating any motor vehicle on the highways of this state has been withdrawn as provided in this article who operates a motor vehicle in this state, shall be guilty of a misdemeanor. (1947, c. 1006, s. 49.)

§ 20-273. Forgery of evidence of ability to respond in damages; penalties.—Any person who forges or without authority signs any evidence of ability to respond in damages as required by the commissioner in the administration of this article shall be guilty of a misdemeanor. (1947, c. 1006, s. 50.)

§ 20-274. Additional penalties.—Any person who violates any provision of this article for which another penalty is not prescribed by law shall be guilty of a misdemeanor. (1947, c. 1006, s. 51.)

§ 20-275. Self-insurers.—(a) Any person may become a self-insurer who shall obtain from the commissioner a certificate of self-insurance as provided for in subsection (b) of this section; (b) the commissioner may, in his discretion and upon the application of such a person, issue a certificate of self-insurance when he is reasonably satisfied that such person is possessed and will continue to be possessed of financial ability to respond to judgment as hereinbefore described, obtained against such person arising out of the ownership, maintenance, use, or operation of any such person's motor vehicles; (c) upon the due notice and hearing, the commissioner may in his discretion and upon reasonable grounds cancel a certificate of self-insurance. (1947, c. 1006, s. 52.)

§ 20-276. Assignment of risk.—The commissioner of insurance, after consultation with representatives of the insurance carriers licensed to write motor vehicle liability insurance in this state, shall consider such reasonable plans and procedures as such insurance carriers may submit to him for the equitable apportionment among such insurance carriers of those applicants for motor vehicle liability insurance who are entitled

to such coverage under this article but who are unable to secure such insurance through ordinary methods.

Upon the approval by the commissioner of insurance of any such plans and procedures thus submitted, all insurance carriers licensed to write motor vehicle liability insurance in this state, as a prerequisite to further engaging in writing such insurance in this state shall formally subscribe to, and participate in, such plans and procedures so submitted.

In the event the commissioner of insurance, in the exercise of his discretion, does not approve any plan so submitted, or should no such plan be submitted, then the commissioner of insurance shall formulate and put into effect reasonable plans and procedures for the apportionment among such insurance carriers of all such applications for motor vehicle liability insurance submitted to him in accordance with the provisions of this article by persons entitled to coverage under this article but unable to obtain such coverage through ordinary methods.

Should no such plan be submitted by the insurance carriers and approved by the commissioner of insurance, then, as a prerequisite to further engaging in the selling of motor vehicle liability insurance in this state, every insurance carrier licensed to write motor vehicle liability insurance in this state shall formally subscribe to and participate in the plans and procedures formulated by the commissioner of insurance as provided in this section, and every such insurance carrier shall accept any and all risks assigned to it by the commissioner of insurance under such plan and shall upon payment of a proper premium issue a policy covering the same, such policy to meet at least the minimum requirements for establishing financial responsibility as provided in this article.

Every person who has been unable to obtain a motor vehicle liability insurance policy through ordinary methods shall have the right to apply to the commissioner of insurance to have his risk assigned to an insurance carrier licensed to write, and writing motor vehicle liability insurance in this state, and the insurance carrier shall issue a motor vehicle liability policy which will meet at least the minimum requirements for establishing financial responsibility, as provided for in this article. In each instance where application is made to the commissioner of insurance to have a risk assigned to an insurance carrier, it shall be deemed that the applicant has been denied the issuance of a liability insurance policy, and the commissioner of insurance shall, upon receipt of such application, which shall have attached thereto a statement from the motor vehicles department that the suspension of the applicant's license will be no longer in effect after the date noted therein, immediately assign the risk to an insurance carrier which carrier shall be required, as a prerequisite to the further engaging in selling motor vehicle liability insurance in this state, to issue a motor vehicle liability policy which will meet at least the minimum requirements for establishing financial responsibility, as provided for in this article.

The power granted the commissioner of insurance under the provisions of this article to deny, directly or indirectly, insurance to any person applying for insurance hereunder, shall be restricted to persons whose license has been suspended and continues to be suspended by the department of motor vehicles under authority of section 20-16 or otherwise and the power of the commissioner of insurance to approve the revocation or cancellation of insurance under the provisions of this article shall be exercised only when the department of motor vehicles suspends the license of the insured under the authority granted to it under the motor vehicles act.

The commissioner of insurance shall have the authority to make reasonable rules and regulations for the assignment of risks to insurance carriers.

The commissioner of insurance shall establish, or cause to be established, such rate classifications, rating schedules, rates, rules and regulations to be used by insurance carriers issuing assigned risk motor vehicle liability policies in accordance with this article, as appear to him to be proper.

In the establishment of rate classification, rating schedules, rates, rules and regulations, the commissioner of insurance shall be guided by such principles and practices as have been established under his statutory authority to regulate motor vehicle liability insurance rates, and he may act in conformity with his statutory discretionary authority in such matters, and may in his discretion assign to the North Carolina automobile rate administrative office, or other state bureau or agency any of the administrative duties imposed upon him by this article.

The commissioner of insurance is empowered, if in his judgment he deems such action to be justified after reviewing all information pertaining to the applicant or policyholder available from his records, the records of the department of motor vehicles, or from other sources—

(a) To refuse to assign an application.

(b) To approve the rejection of an application by an insurance carrier.

(c) To approve the cancellation of a motor vehicle liability policy by an insurance carrier; or

(d) To refuse to approve the renewal or the reassignment of an expiring policy.

The commissioner of insurance shall not be held liable for any act, or omission, in connection with the administration of the duties imposed upon him by the provisions of this article, except upon proof of actual malfeasance.

The provisions of this article relevant to assignment of risks shall be available to nonresidents who are unable to obtain a motor vehicle liability insurance policy with respect only to motor vehicles registered and used in this state. (1947, c. 1006, s. 53; 1949, c. 1209, ss. 1, 2.)

Editor's Note.—The 1949 amendment added the second sentence to the fifth paragraph and inserted the sixth paragraph.

For a brief discussion of the 1949 amendment, see 27 N. C. Law Rev. 459.

§ 20-277. Judgments subsequently obtained arising out of accidents prior to effective date of article unaffected.—Persons against whom judgments are obtained subsequent to the effective date of this article, as a result of an action for damages arising out of an accident involving the operation of a motor vehicle prior to the effective date of

this article, are not subject to the provisions hereof. (1947, c. 1006, s. 54.)

§ 20-278. Clerk of court required to furnish abstract of convictions and judgments.—The clerk of the court, or the court when it has no clerk shall forward to the commissioner a certified copy or abstract of any conviction, and of any forfeiture of bail or collateral deposited to secure a defendant's appearance in court unless the forfeiture has been vacated, upon a charge of a violation of any of the offenses set forth in § 20-17 of the General Statutes, and any amendments thereto, and a certified copy or abstract of any judgment for damages, the rendering and nonpayment of which judgment, under the terms of this article, require the commissioner to suspend the operator's or chauffeur's license and registrations in the name of the judgment debtor. Every such copy or abstract of conviction or forfeiture shall be forwarded to the commissioner immediately upon the expiration of fifteen days after the conviction or forfeiture, and every such copy or abstract of judgment shall be forwarded to the commissioner immediately upon the expiration of sixty days after the judgment has become final by expiration without appeal or other action of the time within which appeal or other action might have been perfected, or has become final by affirmation on appeal, and has not been otherwise stayed or satisfied. (1947, c. 1006, s. 55.)

§ 20-279. Other remedies unaffected.—This article shall not be construed to prevent the plaintiff in any action at law from relying for security upon any other remedy now or hereafter provided by law. (1947, c. 1006, s. 56.)

Chapter 22. Contracts Requiring Writing.

§ 22-1. Contracts charging representative personally; promise to answer for debt of another.

Section Is Not Applicable to Action on Parol Trust.—The portion of this section providing in substance that an action on a promise to pay the debt of another may not be maintained unless the agreement upon which it is based shall be in writing, and signed by the party charged, or by some other person lawfully authorized, is not applicable to an action on a parol trust. Cuthrell v. Greene, 229 N. C. 475, 50 S. E. (2d) 525.

Plaintiff alleged that her employer changed the beneficiary in a policy of insurance on his life to another employee under an agreement, understood, discussed and acquiesced in by all parties, that upon his death such other employee would pay out of the proceeds of such insurance the balance due on a mortgage on plaintiff's home, and thus recompense both employees for services faithfully rendered. It was held that the action was one to establish a parol trust and not one to recover on a promise by the employer to answer for the debt of plaintiff, and therefore this section had no application. Id.

Or to Promise Creating Original Obligation.—Where the promise is for the benefit of the promisor, and he has a personal, immediate, and pecuniary benefit in the transaction, or where the promise to pay the debt of another is all or part of the consideration for property conveyed to the promisor, or is a promise to make good notes transferred in payment of property, the promise is valid although in parol. If, however, the promise does not create an original obligation, and it is collateral, and is merely superadded to the promise of another to pay the debt, he remaining liable, the promisor is not liable, unless there is a writing; and this is true whether the promise is made at the time the debt is created or not. Myers v. Allsbrook, 229 N. C. 786, 51 S. E. (2d) 629.

The mere fact that there may be a new consideration for the oral promise of a defendant to pay the subsisting debt of another is not sufficient of itself to take the promise out of the prohibition of the statute of frauds. To say that any consideration will take a promise based thereon out of the statute is to make the statute useless. For if there is no consideration the promise is invalid without the statute. The statute is aimed at what were valid contracts; that is to say, it makes invalid contracts not in writing which would otherwise have been valid. Myers v. Allsbrook, 229 N. C. 786, 51 S. E. (2d) 629.

Promise to Pay Out of Money Placed in Hands of Promisor by Debtor.—While the statute of frauds does not apply to an oral promise to pay the debt of another out of money or property which the debtor has placed in the hands of the promisor for the purpose of paying the debt, evidence tending to show that the debtor entrusted certain funds to the promisor for the purpose of carrying on the debtor's business, without evidence that he entrusted the funds for the specific purpose of paying debtor's debts, is insufficient to bring the promise within this rule. Myers v. Allsbrook, 229 N. C. 786, 51 S. E. (2d) 629.

Facts Showing Promise within Statute.—The evidence was to the effect that a check given by an automobile retailer to plaintiff in payment of a car was returned unpaid, that plaintiff went to the debtor's place of business and that defendant, who was the debtor's brother, and who was handling the business during debtor's illness, told plaintiff to redeposit the check in about two weeks and that if it were not then paid by the bank he would send plaintiff a cashier's check for part and a personal check for the balance. It was alleged that after the debtor's death the defendant and two others purchased the business, but it was not alleged that at the time of the promise defendant contemplated purchasing the business or any interest therein. Held: While the evidence is sufficient to justify a finding that defendant personally promised to pay the check if his brother's funds were insufficient, and plaintiff's forbearance to take any action on the check for a period of two weeks was sufficient consideration for the promise, there is no allegation that the defendant made the promise to obtain any personal advantage from such forbearance, and therefore the promise comes within the statute of frauds, and defendant's motion to nonsuit was properly allowed. Myers v. Allsbrook, 229 N. C. 786, 51 S. E. (2d) 629.

§ 22-2. Contract for sale of land; leases.

I. IN GENERAL.

Purpose to Prevent Fraud.—

A suitor will not be permitted to make use of the statute of frauds, not to prevent a fraud upon himself, but to commit a fraud upon his adversary. Johnson v. Noles, 224 N. C. 542, 31 S. E. (2d) 637.

Who May Plead Statute.—Any person, plaintiff or defendant, against whom enforcement is sought may plead the statute of frauds against a contract voidable under the statute of frauds. Davis v. Lovick, 226 N. C. 252, 37 S. E. (2d) 680.

Parol Trusts.—

Where co-tenants of the equity in lands, subject to a mortgage, agreed orally among themselves that one of their number, himself or through another for him, should bid off the lands at foreclosure sale, the other co-tenants refraining from bidding, and hold the same in trust for the benefit of all the co-tenants, to be sold and proceeds divided, after reimbursing the purchaser for his outlay, the agreement was held not in violation of the statute of frauds. Embler v. Embler, 224 N. C. 811, 32 S. E. (2d) 619.

Effect of Noncompliance.—

Our statute of frauds affects not only the enforcement of contracts coming within its terms but also their validity. Jamerson v. Logan, 228 N. C. 540, 46 S. E. (2d) 561.

Rights of Vendee under Parol Contract.—

In accord with original. See Dupree v. Moore, 227 N. C. 626, 629, 44 S. E. (2d) 37.

Purchaser Takes with Notice of Enforceable Parol Lease.—Purchaser of real property takes with notice that the premises may be under parol lease for a term not exceeding three years, but beyond that period he is protected by provision that the lease must have been in writing. Wright v. Allred, 226 N. C. 113, 37 S. E. (2d) 107, 108.

Recovery on Quantum Meruit for Services Rendered Pursuant to Parol Contract.—A parol contract to devise realty in consideration of personal services is unenforceable un-

der the statute of frauds, but where the services have been rendered in reliance upon the promise to devise, the law substitutes in place of the unenforceable promise a valid promise to pay the reasonable worth of the services, and recovery may be had upon quantum meruit, the mainspring of the statute of frauds being to prevent frauds and not to promote them. Stewart v. Wyrick, 228 N. C. 429, 45 S. E. (2d) 764.

As to recovery on quantum meruit for services rendered pursuant to oral contract to devise, see 26 N. C. Law Rev. 417.

Applied in Russos v. Bailey, 228 N. C. 783, 47 S. E. (2d) 22.

Cited in Buford v. Mochy, 224 N. C. 235, 29 S. E. (2d) 729; Williams v. Joines, 228 N. C. 141, 44 S. E. (2d) 738.

II. WHAT CONSTITUTES AN INTEREST IN OR CONCERNING LAND.

Growing trees are a part of the land, and a contract for the sale thereof comes within the meaning and intent of the statute of frauds. Johnson v. Wallin, 227 N. C. 669, 44 S. E. (2d) 83.

A Contract to Devise Real Property.—

An oral contract to give or devise real estate is void by reason of the statute of frauds, and no action for a breach thereof can be maintained. Daughtry v. Daughtry, 223 N. C. 528, 27 S. E. (2d) 446. See Neal v. Wachovia Bank and Trust Co., 224 N. C. 103, 29 S. E. (2d) 206.

A parol promise to devise land is not subject to specific enforcement. Coley v. Dalrymple, 225 N. C. 67, 69, 33 S. E. (2d) 477, citing Daughtry v. Daughtry, 223 N. C. 528, 27 S. E. (2d) 446.

An agreement to devise realty is within the statute of frauds, and an agreement to bequeath personalty, simpliciter, is not. Stewart v. Wyrick, 228 N. C. 429, 45 S. E. (2d) 764.

An indivisible contract to devise real and personal property comes within the statute of frauds. Jamerson v. Logan, 228 N. C. 540, 46 S. E. (2d) 561.

Mortgage Absolute in Form.—For discussion of effect of this section upon mortgage deeds absolute in form, see 26 N. C. Law Rev. 405.

Lease for One Year with Provision for Renewals.—An oral lease of realty for one year, together with provision for annual renewals for four successive years, is but a single contract, the agreement for renewal being a part of and inseparable from lease for the original term, and holding for extended term would be under the original oral lease, and contract may not be divided so as to validate it for the initial period and disregard the other portion of the contract. Wright v. Allred, 226 N. C. 113, 37 S. E. (2d) 107, 108.

Parol Lease for Three Years.—

A parol lease agreement for more than three years is void. Barbee v. Lamb, 225 N. C. 211, 34 S. E. (2d) 65.

Lease for Duration of Life Estate.—An agreement by the remainderman to rent the locus in quo from the life tenant for the entire period of the life estate is for an indefinite term and one which may last beyond three years and therefore such agreement comes within this section. Davis v. Lovick, 226 N. C. 252, 37 S. E. (2d) 680.

III. SUFFICIENCY OF COMPLIANCE WITH SECTION.

A. In General.

As to Seal.—

A seal is not necessary to the validity of a lease regardless of the length of the term, and the common law, which did not require leases to be in writing, is in full force and effect, modified only by the requirement of this section that a lease of more than three years be in writing. Moche v. Leno, 227 N. C. 159, 41 S. E. (2d) 369.

Receipts for principal and interest and for taxes, in which no mention is made of any agreement by the person signing same to sell or convey land, are insufficient under the provisions of this section. Chason v. Marley, 224 N. C. 844, 32 S. E. (2d) 652.

Mere Recital of Agreement in Pleading Is Not Waiver of Statute.—A party is not estopped by his pleading from asserting the defense of the statute of frauds unless the pleading asserts the voidable contract as a necessary basis for the relief sought, and the mere recital of the parol agreement in the pleading does not adopt it or ratify it or waive the right to thereafter assert the statute in subsequent pleadings. Davis v. Lovick, 226 N. C. 252, 37 S. E. (2d) 680.

Writing Must Describe Subject Matter.—In order to take an agreement relating to land out of the statute of frauds, the writing must describe the subject matter with certainty or refer to matters aliunde from which the description can be made certain. Searcy v. Logan, 226 N. C. 562, 39 S. E. (2d) 593.

Sufficiency of Description.—

A memorandum "Received of C. L. $50.00 for home place where he now lives which he has no deed for" dated and signed by the owner of land is sufficiently definite to admit of parol evidence for the purpose of identifying the land, and memorandum being sufficient under statute of frauds, purchaser may introduce another receipt executed by owner, even though it does not purport to identify the land, and show by parol that it was part of the consideration for the land contracted to be conveyed. Searcy v. Logan, 226 N. C. 562, 39 S. E. (2d) 593.

C. Statement of Consideration.

Contract Must Fix the Price.—A contract for the sale of land or any interest therein, must fix the price, and where it does not, plaintiff cannot establish by parol evidence a change as to one of the essential terms of the contract as this would open the door to "all the mischiefs which the statute was intended to prevent." Harvey v. Linker, 226 N. C. 711, 713, 40 S. E. (2d) 202.

Change of Purchase Price in Option.—Where purchase price of land was changed in an option it constituted a new contract, unenforceable unless signed by the parties to be charged. Harvey v. Linker, 226 N. C. 711, 712, 40 S. E. (2d) 202.

V. PLEADING AND PRACTICE.

Estoppel by Pleading.—See Davis v. Lovick, 226 N. C. 252, 37 S. E. (2d) 680.

When Statute Is Pleaded, Parol Evidence Is Incompetent.—When the statute of frauds is specifically pleaded, testimony of a contract or promise to lease land exceeding in duration three years from making thereof, resting entirely in parol, is incompetent. Wright v. Allred, 226 N. C. 113, 37 S. E. (2d) 107.

Defendant's failure to object to parol evidence offered to show the existence of the contract is not a waiver of his defense of the statute of frauds, a fortiori if the evidence admitted without objection does not tend to show the existence of the contract but tends only to support a recovery on implied assumpsit, since the denial of the contract casts the burden on plaintiff to establish his cause of action by legal evidence. Jamerson v. Logan, 228 N. C. 540, 46 S. E. (2d) 561.

Complaint Good in Ejectment Independent of Contract.—Where plaintiff alleged that he was life tenant of realty and defendant, remainderman, was in possession under parol agreement to pay a stipulated sum yearly rental to the life tenant, with proviso that the amount should be increased as his necessities might require, that he had demanded an increased rental which defendant had refused to pay, and that he had thereupon demanded possession and defendant admitted allegations except increase of rental, it was held that complaint was good in action in ejectment independently of rental contract, and plaintiff was not estopped from pleading the statute of frauds in his reply. Davis v. Lovick, 226 N. C. 252, 37 S. E. (2d) 680.

General Issue or General Denial.—In a suit to enforce specific performance of an oral contract to convey land, the denial of the contract in the answer raises the defense of the statute of frauds. Grady v. Faison, 224 N. C. 567, 31 S. E. (2d) 760.

In an action on a contract to convey land, the defense being that the contract is not in writing as required by this section the parties sought to be charged may simply deny the contract or plead the statute of frauds, or they may do both, and if either plea is made good the contract cannot be enforced. Chason v. Marley, 224 N. C. 844, 32 S. E. (2d) 652.

Denial of the contract as alleged is sufficient to raise the defense of the statute of frauds, since it places the burden upon plaintiff of establishing the contract by competent evidence, and if the contract be within the statute, the writing itself is the only competent evidence to prove its existence. Jamerson v. Logan, 228 N. C. 540, 46 S. E. (2d) 561.

Demurrer.—

Procedurally, the defense of the statute of frauds cannot be taken advantage of by demurrer; it can only be raised by answer. This may be done in either of two ways: The defendant may plead the statute, in which case when it develops on the trial that the contract is in parol, it must be declared invalid; or the defendant may enter a general denial, and on trial may object to the parol evidence to establish the contract, which will be equally fatal to the maintenance of the action. Embler v. Embler, 224 N. C. 811, 815, 32 S. E. (2d) 619.

Chapter 23. Debtor and Creditor.

Art. 1. Assignments for Benefit of Creditors.

§ 23-2. Trustee to file schedule of property.

Editor's Note.—In line six of this section in the original volume the word "and" should read "an."

Chapter 24. Interest.

§ 24-2. Penalty for usury; corporate bonds may be sold below par.

I. GENERAL CONSIDERATION.

Intent to Charge Usurious Interest.—
To constitute a usurious transaction, corrupt intent to take more than the legal rate of interest is an essential element. Bailey v. Inman, 224 N. C. 571, 573, 31 S. E. (2d) 769.

Where Person Is Not Entitled to Statutory Penalty.—
In accord with 1st paragraph in original. See Bailey v. Inman, 224 N. C. 571, 573, 31 S. E. (2d) 769.

Cited in Flythe v. Wilson, 227 N. C. 230, 41 S. E. (2d) 751.

§ 24-5. Contracts, except penal bonds, and judgments to bear interest; jury to distinguish principal.

Assessments against Policyholder in Mutual Insurance Company.—In Miller v. Barnwell Bros., 137 F. (2d) 257, 263, it was held that under this section interest should be allowed on assessments against policyholder in mutual insurance company under policies in suit from the dates of the respective demands by the receiver.

Chapter 25. Negotiable Instruments.

Art. 1. General Provisions.

§ 25-3. What constitutes reasonable time.

Cross Reference.—
The cross reference under this section in the original volume should be to § 25-151 instead of to § 25-48.

Art. 2. Form and Interpretation.

§ 25-15. When payable to bearer.—The instrument is payable to bearer (1) when it is expressed to be so payable; or (2) when it is payable to a person named therein or to bearer; or (3) when it is payable to the order of a fictitious or nonexisting or living person not intended to have any interest in it, and such fact was known to the person making it so payable, or known to his employee or other agent who supplies the name of such payee; or (4) when the name of the payee does not purport to be the name of any person; or (5) when the only or last endorsement is an endorsement in blank. (Rev., s. 2159; 1899, c. 733, s. 9; 1949, c. 953; C. S. 2990.)

Editor's Note.—The 1949 amendment rewrote this section. For comment on the 1949 amendment, see 27 N. C. Law Rev. 427.

Art. 3. Consideration.

§ 25-29. Presumption of consideration.

Burden of Proof.—
When plaintiff declares on a past-due negotiable note, regular in form, and offers evidence of its execution by defendants, a prima facie case is made out, which imposes upon defendant the burden of going forward with evidence to rebut the presumption created by this section, or incur the risk of an adverse verdict. Beam v. Wright, 224 N. C. 677, 32 S. E. (2d) 213.

§ 25-30. What constitutes consideration.

A person who accepts a check for a pre-existing debt owed him by the maker is a purchaser for value. National Bank v. Marshburn, 229 N. C. 104, 47 S. E. (2d) 793.

Art. 5. Rights of Holder.

§ 25-65. Who deemed holder in due course.

Defective Title—Holder's Burden of Proof.—
Upon proof of fraud in the inception of the contract, the burden shifts to the holder of a negotiable instrument to show that he is a holder in due course for value and without notice of the infirmity. Hancammon v. Carr, 229 N. C. 52, 47 S. E. (2d) 614.

Art. 6. Liabilities of Parties.

§ 25-69. When person deemed indorser.

Indorsement by Board of Directors.—Where a resolution, by the board of directors of a corporation, authorized two of their number, by their signatures, to bind each of the directors individually on any notes due by the company or renewals thereof, the indorsement of such notes, by the two directors so authorized, binds the other directors as indorsers only and not as principals. Hertford Bkg. Co. v. Stokes, 224 N. C. 83, 29 S. E. (2d) 24.

Art. 11. Acceptance.

§ 25-144. Liability of drawee retaining or destroying bill; conditional payment of checks by drawee banks.—Where a drawee to whom a bill is delivered for acceptance destroys the same or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or nonaccepted to the holder, he will be deemed to have accepted the same.

Any payment made by a drawee bank for a check presented to it shall be conditional, subject to revocation, unless the bank accepts or certifies the check; but such conditional payment shall become unconditional at midnight of the next business day following the presentment of the check unless prior to such time the check is returned by the drawee bank, either by delivery, or by deposit in the mails, to the bank or person presenting it; provided, that this section shall not prevent the presentment and payment of checks on other terms, in accordance with clearing house rules or practices, or pursuant to special collection agreements, and shall not apply to

checks presented over the counter otherwise than for credit to a depositor's account. (Rev., s. 2287; 1899, c. 733, s. 137; 1949, c. 954; C. S. 3119.)

Editor's Note.—The 1949 amendment added the second paragraph.

Art. 17. Promissory Notes and Checks.

§ 25-192. Check defined.

Cited in National Bank v. Marshburn, 229 N. C. 104, 47 S. E. (2d) 793.

§ 25-197. Check not assignment of funds.

In General.—

The payee of an unaccepted, uncertified check has no right of action against the bank upon which the check is drawn, for he is in no position to allege a breach of legal duty and no action at law can be maintained except there is shown to have been a failure in the performance of some legal duty. General American Life Ins. Co. v. Stadiem, 223 N. C. 49, 25 S. E. (2d) 202.

STATE OF NORTH CAROLINA

Department of Justice

Raleigh, North Carolina

November 30, 1949

I, Harry McMullan, Attorney General of North Carolina, do hereby certify that the foregoing 1949 Cumulative Supplement to the General Statutes of North Carolina was prepared and published under the supervision of the Division of Legislative Drafting and Codification of Statutes of the Department of Justice of the State of North Carolina.

Harry McMullan,
Attorney General of North Carolina

THE GENERAL STATUTES OF NORTH CAROLINA OF 1943

1949 CUMULATIVE SUPPLEMENT

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

UNDER THE DIRECTION OF
A. HEWSON MICHIE, GEORGE P. SMITH, JR.
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Supreme Court Reporter volumes 63 (p. 862)-69.

North Carolina Law Review volumes 22 (p. 280)-27.

the last known residence of such absent person, shall have jurisdiction over such decedent's estate.

The administrator so appointed shall have all the powers and duties with respect to the property and estate of such missing person as are now or may be hereafter conferred by law upon administrators generally; and before entering upon the discharge of the duties of such administration he shall be required to enter into such bond as is now required by law in the matter of administration of estates of deceased persons, with the additional requirement that such bond shall include as a basis the value of all real estate or interest in real estate in addition to the value of the personal property of the estate committed to his charge.

The public laws relating to the administration of the estates of decedents, including the laws relating to the distribution of personal property and the devolution of real estate, shall apply to the estates of such missing persons.

No action shall be maintained against such administrator, or the sureties on his bond, by reason of his appointment and taking over the administration of such estate, or any of his acts with reference to said estate, where it appears they were done under authority of this section, except for failure to administer said estate as is now provided under G. S. chapter 28. (1947, c. 921.)

Editor's Note.—For discussion of section, see 25 N. C. Law Rev. 423.

Art. 3. Right to Administer.

§ 28-6. Order in which persons entitled; nomination by person renouncing right to administer. —(a) Letters of administration, in case of intestacy, shall be granted to the persons entitled thereto and applying for the same, in the following order:

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

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

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

4. To any other person legally competent.

(b) Any person who renounces his right to qualify as administrator may at the same time nominate in writing some other qualified person to be named as administrator, and such designated person shall be entitled to the same priority of right to qualify as administrator as the person making the nomination. Provided, that the qualification of the appointee shall be within the discretion of the clerk of court. (Rev., s. 3; Code, s. 1376; C. C. P., s. 456; R. C., c. 46, ss. 2, 3; 1868-9, c. 113, s. 115; 1949, c. 22; C. S. 6.)

Editor's Note.—The 1949 amendment designated the former section as subsection (a) and added subsection (b). For brief comment on amendment, see 27 N. C. Law Rev. 413.

§ 28-7. Husband to administer wife's estate; right in surplus.

This section and § 28-149 must be construed in pari materia as separate parts of a single scheme of devolution. Wachovia Bank, etc., Co. v. Shelton, 229 N. C. 150, 48 S. E. (2d) 41.

If there is no child, the husband takes the whole personal estate of his wife who dies intestate. Wachovia Bank, etc., Co. v. Shelton, 229 N. C. 150, 48 S. E. (2d) 41. See § 28-149 and note.

§ 28-10. Divorce a vinculo or felonious slaying is forfeiture.

Heir Murdering Ancestor Excluded from Beneficial Interest in Estate.—The fact that this and other sections forfeiting a murderer's interest in the estate of his victim (§§ 30-4 and 52-19) apply only to the relation of husband and wife does not deprive equity of the power of excluding an heir who has murdered his ancestor from all beneficial interest in the estate of his victim. Garner v. Phillips, 224 N. C. 160, 47 S. E. (2d) 845. For suggested revisal of this section and related statutes, see 26 N. C. Law Rev. 232.

§ 28-15. Failure to apply as renunciation.

Cited in In re Estate of Loflin, 224 N. C. 230, 29 S. E. (2d) 692.

Art. 4. Public Administrator.

§ 28-19. Bond.

Local Modification.—Forsyth: 1945, c. 58.

§ 28-20. When to obtain letters.

Cited in In re Estate of Loflin, 224 N. C. 230, 29 S. E. (2d) 692.

Art. 5. Administrator with Will Annexed.

§ 28-24. Administrator cum testamento annexo must observe will.—Whenever letters of administration with the will annexed are issued, the will must be observed and performed by such administrator, both with respect to real and personal property. Such administrator has all the rights and powers, discretionary or otherwise, unless a contrary intent clearly appears from the will, and is subject to the same duties, as if he had been named executor in the will. (Rev., s. 3146; Code s. 2168; C. C. P., s. 455; 1945, c. 162; C. S. 4170.)

Editor's Note.—The 1945 amendment rewrote this section. For comment on the 1945 amendment, see 23 N. C. Law Rev. 362.

Cited in Welch v. Wachovia Bank, etc., Co., 226 N. C. 357, 38 S. E. (2d) 197.

Art. 6. Collectors.

§ 28-25. Appointment of collectors.

Pending Probate and Filing of Will.—Pending the appointment and qualification of administrator or probate and filing of will, collector may be appointed in order that action for wrongful death may be instituted within the statutory time. Harrison v. Carter, 226 N. C. 36, 39, 36 S. E. (2d) 700, 164 A. L. R. 697, citing In re Palmer's Will, 117 N. C. 133, 23 S. E. 104.

Art. 7. Appointment and Revocation.

§ 28-31. Letters of administration revoked on proof of will.

This section does not empower the clerk to set aside probate in common form upon proffer of proof of a later will. In re Will of Puett, 229 N. C. 8, 47 S. E. (2d) 488.

Quoted in Harrison v. Carter, 226 N. C. 36, 39, 36 S. E. (2d) 700, 164 A. L. R. 697.

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

Clerk Has Primary and Original Jurisdiction.—The appointment of one as administrator of an estate should be revoked upon renunciation of the widow, who has a prior right to administer the estate or to nominate in her stead, and the clerk of the court has jurisdiction and should appoint on her request a fit and competent person nominated by her. In re Estate of Loflin, 224 N. C. 230, 29 S. E. (2d) 692.

Clerk Exercises Discretion.—In revoking letters of administration under this section the clerk exercises a legal discretion which is reviewable on appeal. In re Galloway's Estate, 229 N. C. 547, 50 S. E. (2d) 563.

Question Determinable by Clerk.—In a proceeding under this section for revocation of letters of administration, the question determinable by the clerk is solely whether the administrators have been guilty of default or misconduct in

the due execution of their office, and the rights and liabilities of adverse parties in the estate may not be litigated in such proceeding. In re Galloway's Estate, 229 N. C. 547, 50 S. E. (2d) 563.

Remand of Cause.—Where heirs at law of an estate were appointed administrators of the estate, an order of the clerk revoking the letters of administration upon consideration of evidence of their failure to account for rents and profits from the realty is based upon a confusion of their duties, obligations and liabilities as administrators and their rights and liabilities as heirs at law, and the cause will be remanded in order that the evidence may be considered in its true legal light. In re Galloway's Estate, 229 N. C. 547, 50 S. E. (2d) 563.

§ 28-33. On revocation, successor appointed and estate secured.

The clerk is required to immediately appoint some person to succeed in administration of the estate, and it is immaterial in so far as continuity of the succession is concerned, whether successor be administrator d. b. n., executor, administrator c. t. a., administrator c. t. a., d. b. n., or collector. Harrison v. Carter, 226 N. C. 36, 40, 36 S. E. (2d) 700, 164 A. L. R. 697.

Art. 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 per cent (10%) thereof. The value of said personal property shall be ascertained by the clerk by examination, on oath, of the applicant or of some other competent person. If the personal property of any decedent is insufficient to pay his debts and the charges of administration, and it becomes necessary for his executor or administrator to apply for the sale of real estate for assets, and the bond previously given is not double the value of both the real and personal estate of the deceased, such executor (if bond is required of him by law) or administrator shall, before or at the time of filing his petition for such sale, give another bond payable and conditioned as the one above prescribed and with like security, in double the value of the real estate for the sale of which application is made, provided, however, that where such bond shall be executed by a duly authorized surety company, the penalty of said bond need not exceed one and one-fourth times the value of said real estate. (Rev., s. 319; Code, s. 1388; 1870-1, c. 93; C. C. P., s. 468; 1935, c. 386; 1949, c. 971; C. S. 33.)

Editor's Note.—The 1949 amendment inserted the third sentence. For a brief comment on amendment, see 27 N. C. Law Rev. 409.

§ 28-39.1. Conveyances by foreign executors validated.—If any nonresident executor, 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 resided, and now or hereafter recorded in this state, shall have sold and conveyed real estate situated in this state prior to January first, one thousand nine hundred and forty-five, then said sale and conveyance so had and made shall be as valid and sufficient in law as though such executor had given bond and obtained letters of administration in this state prior to the execution of such deed. (1945, c. 652.)

Art. 9. Notice to Creditors.

§ 28-47. Advertisement for claims.—Every executor, administrator and collector, within twenty days after the granting of letters, shall notify all persons having claims against the decedent to exhibit the same to such executor, administrator or collector, on or before a day to be named in such notice; which day must be twelve months from the day of the first publication of such notice. The notice shall be published once a week for six consecutive weeks in a newspaper qualified to publish legal advertisements, if any such newspaper is published in the county. If there is no newspaper published in the county, then the notice shall be posted at the courthouse and four other public places in the county. Personal representatives are not required to publish the notices herein provided for when the deceased person did not own any real property or any interest in real property at the time of his death and the only assets of the estate consist of proceeds received for wrongful death. (Rev., s. 39; Code, ss. 1421, 1422; 1868-9, c. 113, s. 29; 1881, c. 278, s. 2; 1945, c. 635; 1949, c. 47; c. 63, s. 1; C. S. 45.)

Local Modification.—Forsyth: 1949, c. 621, s. 4.

Editor's Note.—The 1945 amendment substituted "on" for "at" in line six. The 1949 amendments rewrote the second sentence and added the last sentence. For brief comment on the 1949 amendments, see 27 N. C. Law Rev. 414.

Art. 11. Assets.

§ 28-68. Payment to clerk of sums not exceeding $500 due and owing intestates.—Where any person dies intestate and at the time of his or her death there are sums of money owing to the said intestate not in excess of five hundred dollars ($500), such sum may be paid into the hands of the clerk of the superior court, whose receipt for same shall be a full and complete release and discharge for such debt or debts, and the said clerk of the superior court is authorized and empowered to pay out such sum or sums in the following manner: First, for satisfaction of widow's year's allowance, after same has been assigned in accordance with law, if such be claimed; second, for payment of funeral expenses, and if there be any surplus the same to be disposed of as is now provided by law. (1921, c. 93; Ex. Sess. 1921, c. 65; 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; C. S. 65(a).)

Editor's Note.—
The 1945 amendments made this section applicable to the counties of Madison, Washington and Chatham, respectively.
The 1947 amendments made this section applicable to Scotland and Northampton counties, respectively.
The first, second and fourth 1949 amendments made this section applicable to Carteret, Richmond and Sampson counties, respectively. The third 1949 amendment rewrote the section, making it applicable throughout the state, and increasing the maximum amount involved from three hundred to five hundred dollars.

Art. 13. Sales of Personal Property.

§ 28-72.1. Procedure when no order of sale is obtained.—The procedure set out in this article is applicable when an order of sale is not obtained, but when an order of sale is obtained, the procedure for the sale shall be as provided in article 29A of chapter 1 of the General Statutes. (1949, c. 719, s. 2.)

§ 28-74. Collector may sell or rent only on order of court.—All sales or rentals of personal property by collectors shall be made only upon order obtained, by motion, from the clerk of the superior court. (Rev., s. 61; Code, s. 1409; 1868-9, c. 113, s. 17; 1949, c. 719, s. 2; C. S. 67.)

Editor's Note.—The 1949 amendment, effective Jan. 1, 1950, made this section applicable to "rentals", and struck out the words "who shall specify in his order a descriptive list of the property to be sold" formerly appearing after the word "court" at the end of the section.

§ 28-75. Terms and notice of public sale.—All public sales of personal estate by executors or administrators shall be made on credit or for cash after twenty days' notification posted at the court house and four public places in the county. (Rev., s. 63; Code, ss. 1410, 1411; 1868-9, c. 113, ss. 18, 19; 1949, c. 719, s. 2; C. S. 68.)

Editor's Note. — Prior to the 1949 amendment, effective Jan. 1, 1950, this section also applied to sales by collectors.

§ 28-76. Clerk may order private sale in certain cases.—Whenever the executor or administrator of any estate shall be of the opinion that the interests of said estate will be promoted and conserved by selling the personal property belonging to it at private sale instead of selling same at public sale, such executor or administrator may, upon a duly verified application to the clerk of the superior court, obtain an order to sell, and may sell, such personal property at private sale. (Rev., s. 64; 1893, c. 346; 1919, c. 66; 1925, c. 267; 1939, c. 167; 1947, c. 468; 1949, c. 719, s. 2; C. S. 69.)

Editor's Note.—The 1949 amendment, effective Jan. 1, 1950, struck out much of this section including the paragraph added by the 1947 amendment.

§ 28-77. Confirmation required on objection of interested party.—When any person interested, either as creditor, distributee or legatee, on the day of sale objects to the completion of any sale on account of the insufficiency of the amount bid, title to such property shall not pass until the sale is reported to and confirmed by the clerk. (Rev., s. 63; Code, s. 1411; 1868-9, c. 113, s. 19; 1945, c. 635; C. S. 70.)

Editor's Note.—The 1945 amendment inserted the word "distributee" in line two.

§ 28-78. Security required; representative's liability for collection.—The proceeds of all sales of personal estate and rentings of real property by public auction or privately shall be secured by bond and good personal security, and such proceeds shall be collected as soon as practicable; otherwise the executor or administrator shall be answerable for the same. (Rev., s. 65; Code, s. 1413; 1893, c. 346, s. 2; 1868-9, c. 113, s. 21; 1949, c. 719, s. 2; C. S. 71.)

Editor's Note.—Prior to the 1949 amendment, effective Jan. 1, 1950, this section also applied to collectors.

§ 28-79. Hours of public sale; penalty.—All public sales or rentings provided for in this chapter shall be between the hours of ten o'clock a. m. and four o'clock p. m. of the day on which the sale or renting is to be made, except that in towns or cities of more than five thousand inhabitants public sales of goods, wares, and merchandise may be continued until the hour of ten o'clock p. m. Provided, a certain hour for such sales shall be named and the sale shall begin within one hour after the time fixed, unless postponed as provided by law, or delayed by other sales; and every executor or administrator who otherwise makes any sale or renting shall forfeit and pay two hundred dollars to any person suing for the same. (Rev., s. 66; Code, s. 1414; 1893, c. 346, s. 3; 1868-9, c. 113, s. 22; 1927, c. 19, s. 2; 1949, c. 719, s. 2; C. S. 72.)

Editor's Note.—Prior to the 1949 amendment, effective Jan 1, 1950, this section also applied to collectors.

§ 28-80. Debts uncollected after year may be sold; list filed.—Every executor, administrator and collector, at any time after one year from the grant of letters, is authorized to sell in accordance with the provisions of article 29A of chapter 1 of the General Statutes, all bills, bonds, notes, accounts, or other evidences of debt belonging to the decedent, which he has been unable to collect or which may be deemed insolvent. Before offering such evidences of debt at public sale he shall file with the clerk a descriptive list thereof, and obtain an order of sale therefor from the clerk, and shall make return of the proceeds of such sale as in other cases of assets. (Rev., s. 67; Code, s. 1412; 1868-9, c. 113, s. 20; 1949, c. 719, s. 2; C. S. 73.)

Editor's Note.—The 1949 amendment, effective Jan. 1, 1950, struck out in the first sentence the words "at public auction, in the manner prescribed in this chapter", and inserted in lieu thereof the words "in accordance with the provisions of article 29A of chapter 1 of the General Statutes."

Art. 14. Sales of Real Property.

§ 28-81. Sales of realty ordered, if personalty insufficient for debts.—When the personal estate of a decedent is insufficient to pay all his debts, including the charges of administration, the executor, administrator or collector may, at any time after the grant of letters, apply to the superior court of the county where the land or some part thereof is situated, by petition, to sell the real property for the payment of the debts of such decedent. When there is dower or rights of dower in the land petitioned to be sold as aforesaid, the person entitled thereto shall be made a party to said proceeding, and upon the consummation of sale pursuant to decree of confirmation, the fiduciary shall, based on the completed age of the person so entitled on such day of consummation, compute the value of her annuity at six per cent (6%) on one-third of the net sale price during her probable life or expectancy, and shall pay same to her absolutely out of the proceeds; or in lieu of such payment of the value of her annuity of six

per cent (6%) on such one-third of the net sale price, at her election, one-third of the net proceeds shall be paid into the office of the clerk of the superior court and the income on said one-third shall be paid to her annually: Provided, that nothing herein contained shall be construed to deprive the widow from claiming her dower right by metes and bounds in her husband's land: Provided, further, if the person entitled to said dower shall not claim the same by metes and bounds in her husband's lands, or elect to receive the income from one-third of the net proceeds of said sale, within the time allowed by law for filing pleadings in such special proceeding, such person shall be presumed to have elected to receive said dower interest in cash as provided in this section.

Where land is sold as provided in this section, and in lieu of paying cash therefor the purchaser executes a note or notes secured by a mortgage or deed of trust, and there are insufficient funds from said sale with which to pay the person entitled to dower her interest in full as provided in this section, said person shall be entitled to the legal rate of interest on the unpaid balance of her dower interest until same is paid in full. (Rev., s. 68; Code, s. 1436; 1868-9, c. 113, s. 42; 1923, c. 55; 1935, s. 43; 1937, c. 70; 1943, c. 637; 1949, c. 719, s. 2; C. S. 74.)

Editor's Note.—The 1949 amendment, effective Jan. 1, 1950, struck out the former third paragraph of this section.

Cited in In re Daniel's Estate, 225 N. C. 18, 21, 33 S. E. (2d) 126.

§ 28-82. When representatives authorized to rent, borrow or mortgage.

Cited in Pearson v. Pearson, 227 N. C. 31, 40 S. E. (2d) 477.

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

—All conveyances of real property of any decedent made by any devisee or heir at law within two years of the death of the decedent shall be void as to the creditors, executors, administrators and collectors of such decedent, except as hereinafter provided, but such conveyances to bona fide purchasers for value and without notice, if made after two years from the death of the decedent, or if made after the filing of the final account by the duly authorized executor or administrator of the decedent and the approval thereof by the clerk of the superior court having jurisdiction of the estate, shall be valid even as against creditors: Provided, that if the decedent was a nonresident, such conveyances shall not be valid unless made after two years from the grant of letters.

(1947, c. 112.)

Editor's Note.—

The 1947 amendment inserted in the first sentence, beginning in line ten, the words "or if made after the filing of the final account by the duly authorized executor or administrator of the decedent and the approval thereof by the clerk of the superior court having jurisdiction of the estate." As the rest of the section was not affected by the amendment it is not set out.

For comment on the 1943 amendments, see 21 N. C. Law Rev. 359.

§ 28-87. Heirs and devisees necessary parties

All Heirs Necessary Parties.—

Heirs at law of intestate are necessary parties to an action by an administrator to subject an interest in lands of his intestate to the payment of debts of the estate. In re Daniel's Estate, 225 N. C. 18, 33 S. E. (2d) 126.

§ 28-88. Adverse claimant to be heard.

Claims of Undivided Interest.—

Where land is claimed by another, such claimant may be admitted to be heard as a party to a proceeding to sell lands of intestate to make assets to pay debts, or may be brought in as a party thereto. In re Daniel's Estate, 225 N. C. 18, 21, 33 S. E. (2d) 126.

§ 28-89. Upon issues joined, transferred to term.

Procedure.—

When an issue of law or fact is joined between parties to a proceeding to sell lands of intestate to make assets to pay debts, the course of procedure shall be prescribed in such cases for other special proceedings. In re Daniel's Estate, 225 N. C. 18, 21, 33 S. E. (2d) 126.

§ 28-90. Order granted, if petition not denied; procedure for sale.

—As soon as all proper parties are made to the proceeding, the clerk of the superior court before whom it is instituted, if the allegations in the petition are not denied or controverted, shall have power to hear the same summarily and to decree a sale. The procedure for the sale shall be as is provided in article 29A of chapter 1 of the General Statutes. (Rev., s. 79; Code, s. 1443; 1868-9, c. 113, s. 48; 1949, c. 719, s. 2; C. S. 83.)

Editor's Note.—The 1949 amendment, effective Jan. 1, 1950, added the second sentence.

§§ 28-91, 28-92: Repealed by Session Laws 1949, c. 719, s. 2.

Editor's Note.—Section 6 of the repealing act provides that it shall become effective Jan. 1, 1950.

§ 28-93. Court may authorize private sale.

—If it is made to appear to the court by petition and by satisfactory proof that it will be more for the interest of said estate to sell such real estate by private sale, the court may authorize said petitioner, or any commissioner appointed by the court, to sell the same at private sale in accordance with the provisions of G. S., § 1-339.34 through G. S., § 1-339.40. (1917, c. 127, s. 2; 1927, c. 16; 1949, c. 719, ss. 2, 3; C. S. 86.)

Editor's Note.—The 1949 amendment, effective Jan. 1, 1950, rewrote this section after striking out the former second sentence and rewriting the former third sentence to appear as § 1-339.76.

§ 28-97. Where executor with power dies, power executed by survivor, etc.

Cited in Welch v. Wachovia Bank, etc., Co., 226 N. C. 357, 38 S. E. (2d) 197.

§ 28-99. Title in representative for estate; he or successor to convey.

—When land is conveyed to a personal representative for the benefit of the estate he represents, he may sell and convey same upon such terms as he may deem just and for the advantage of said estate; the procedure for the sale shall be as is provided in article 29A of chapter 1 of the General Statutes, unless the conveyance is made to the party entitled to the proceeds. If such land is not conveyed by such personal representative during his life or term of office, his successor may sell and convey such land as if the title had been made to him: Provided, if the predecessor has contracted in writing to sell said lands, but fails to convey same, his successor in office may do so upon payment of the purchase price. (Rev., s. 71; 1905, c. 342; 1949, c. 719, s. 2; C. S. 92.)

Local Modification.—Forsyth: 1947, c. 359; Surry: 1947, c. 359.

Editor's Note.—The 1949 amendment, effective Jan. 1,

1950, rewrote that part of the first sentence appearing after the semicolon.

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

Local Modification.—Alexander: 1945, c. 950.

Art. 15. Proof and Payment of Debts of Decedent.

§ 28-105. Order of payment of debts.

This section relates exclusively to application of personal property, the only estate with which the administrator has any right to deal. Moore v. Jones, 226 N. C. 149, 36 S. E. (2d) 920.

The Lien of a Docketed Judgment.—

Where realty sold under order of court to make assets is subject to a docketed judgment and a subsequently recorded mortgage, the judgment must be satisfied in full before application of any part of the proceeds to the mortgage or to the payment of other debts. Moore v. Jones, 226 N. C. 149, 36 S. E. (2d) 920, 922.

There is nothing in this section, or in any other provision of the law, that indicates intent to nullify the lien of a docketed judgment or to destroy any right acquired under the law prior to the death of the judgment debtor. Id.

Where debtor's lands are sold under order of court to make assets, proceeds remain real estate until all liens are discharged and are to be applied to payment of liens in the order of their priority, and only the residue, if any, is payable to administrator as personal property to be distributed in the order provided by this section. Moore v. Jones, 226 N. C. 149, 36 S. E. (2d) 920, 922, citing Murchison v. Williams, 71 N. C. 135.

In such case no part of the proceeds may be taxed with costs of administration. However, a referee's fee by § 6-21 is taxable in the discretion of the court. Williams v. Johnson, 230 N. C. 338, 53 S. E. (2d) 277.

§ 28-111. Disputed debt may be referred.

Filing Claim.—If the judgment creditor wishes to share in the distribution of the personal estate of his deceased judgment debtor, and to protect himself against the running of the statute of limitations as against the debt (§ 1-22), he must file his claim with the personal representative of the deceased. William v. Johnson, 230 N. C. 338, 53 S. E. (2d) 277.

Cited in Craver v. Spaugh, 226 N. C. 450, 38 S. E. (2d) 525.

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

Illustration.—Thus, in action against administrator to enforce claim against estate which had been rejected and not referred, a suit not instituted within six months of receipt of written notice of rejection is barred. Craver v. Spaugh, 226 N. C. 450, 38 S. E. (2d) 525; Craver v. Spaugh, 227 N. C. 129, 41 S. E. (2d) 82.

Art. 16. Accounts and Accounting.

§ 28-120.1. Perpetual care of cemetery lot.—It shall be lawful for an executor or administrator to provide for perpetual care for the lot upon which is located the grave of his testator or intestate, and the cost thereof shall be paid and credited as such in final accounts: Provided, that the provisions of this subsection shall be applicable to an interment made in a cemetery authorized by law to operate as a perpetual care cemetery or association, and the cost thereof shall be in the sound discretion of the executor or administrator having due regard to the value of the estate and to the interest of the widow and legatees or distributees of the estate. Provided, where the executor or administrator desires to spend more than two hundred fifty dollars ($250.00) for such purpose he shall file his petition before the clerk of the superior court and such order as will be made by the court shall specify the amount to be expended for such purpose. (1945, c. 756.)

§ 28-121.1. Final accounts; immediate settlement.—The personal representative of a deceased person who did not own any real property or any interest in real property at the time of his death may file his final account for settlement at any time within one year after his appointment when the only assets of the estate consist of proceeds received for wrongful death. (1949, c. 63, s. 2.)

For brief comment on section, see 27 N. C. Law Rev. 414.

§ 28-147. Suits for accounting at term.

Extent of Jurisdiction.—While the clerk of the Superior Court has exclusive original jurisdiction as to matters of probate and the judge has no power therein unless the matter is brought before him by appeal, the Superior Court in term is by this section constituted a forum for the settlement of controversies over estates. State v. Griggs, 223 N. C. 279, 25 S. E. (2d) 862.

Concurrent Jurisdiction.—

In accord with 1st and 2nd paragraphs in original. See Privette v. Morgan, 227 N. C. 264, 41 S. E. (2d) 845.

The Superior Court is given concurrent jurisdiction with the probate courts, that is, clerks of Superior Court in actions of class mentioned in this section. Maryland Cas. Co. v. Lawing, 223 N. C. 8, 14, 25 S. E. (2d) 183.

This section is not confined to actions pertaining to final settlement in the administration of estates of deceased persons. Maryland Cas. Co. v. Lawing, 223 N. C. 8, 14, 25 S. E. (2d) 183.

Action by Surety on Guardian's Bond.—Where a guardian uses guardianship funds to improve and keep up property in which she is individually interested along with the wards, contributing nothing from her own funds, but taking her share of the rents, and violates her obligations as guardian in other respects, the surety on the guardian's bond may maintain an action in the Superior Court at term time prior to termination of the guardianship to enforce the liability of the guardian in exoneration of the surety, and to surcharge and correct the guardian's accounts either at common law or under this section. Maryland Cas. Co. v. Lawing, 223 N. C. 8, 13, 25 S. E. (2d) 183.

Cited in Maryland Cas. Co. v. Lawing, 225 N. C. 103, 33 S. E. (2d) 609.

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

Cited in Pearson v. Pearson, 227 N. C. 31, 40 S. E. (2d) 477.

Art. 17. Distribution.

§ 28-149. Order of distribution.

1. If a married man die intestate leaving one child and a wife, the estate shall be equally distributed between the child and wife; the child or children of any child or children of the intestate who may have died prior to the father, shall represent his, her or their parent in such distribution.

2. If there is more than one child, the widow shall share equally with all the children and be entitled to a child's part; the child or children of any child or children of the intestate who may have died prior to the father shall represent his, her or their parent in such distribution.

10. An adopted child shall be entitled by succession, inheritance, or distribution of personal property, including, without limiting the generality of the foregoing, any recovery of damages for the wrongful death of such adopted parent by, through, and from its adoptive parents the same as if it were the natural, legitimate child of the adoptive parents.

11. The adoptive parents shall be entitled by succession, inheritance, or distribution of personal property including, without limiting the general ity of the foregoing, any recovery of damages for the wrongful death of such adopted child by, through, and from an adopted child the same a

if the adopted child were the natural, legitimate child of the adoptive parents.

12. When any child born out of wedlock shall have been legitimated in accordance with the provisions of G. S. § 49-10 or G. S. § 49-12 such child shall be entitled to all the rights of succession, inheritance, or distribution of personal property of its father and mother as it would have had had it been born their issue in lawful wedlock. (Rev., s. 132; Code, s. 1478; R. C., c. 64, s. 1; R. S. c. 64, s. 1; 1893, c. 82; 1868-9, c. 113, s. 53; 1913, c. 166; 1915, c. 37; 1921, c. 54; 1927, c. 231; 1945, c. 46; 1947, c. 879; C. S. 7, 137.)

Editor's Note.—The 1945 amendment rewrote subsections 1 and 2, and the 1947 amendment added subsections 10, 11 and 12. As the rest of the section was not affected by the amendments it is not set out.

For comment on the 1945 amendment, see 23 N. C. Law Rev. 348.

For discussion of the 1947 amendment, see 25 N. C. Law Rev. 443.

Distributees are named in this section. Wachovia Bank, etc., Co. v. Shelton, 229 N. C. 150, 48 S. E. (2d) 41. See note to § 31-42.

Collateral relatives do not share in the personal estate of a married woman dying intestate and leaving a husband or child, or both, surviving. Wachovia Bank, etc., Co. v. Shelton, 229 N. C. 150, 48 S. E. (2d) 41. See § 28-7.

For history of subsections 8 and 9, see Wachovia Bank, etc., Co. v. Shelton, 229 N. C. 150, 48 S. E. (2d) 41.

Court Will Look Beyond Nominal Party Plaintiff.—Where an administrator instituted action for wrongful death against intestate's husband upon allegations that the husband's negligence caused the death of his intestate, and intestate left no children surviving her, it was held that the husband being the sole beneficiary of any recovery under this section, the courts will look beyond the nominal party plaintiff, and recovery will not be allowed under the principle that a wrongdoer will not be permitted to enrich himself as a result of his own misconduct. Davenport v. Patrick, 227 N. C. 686, 44 S. E. (2d) 203.

Cited in McMillan v. Robeson, 225 N. C. 754, 36 S. E. (2d) 235.

§ 28-159. Legacy or distributive share recoverable after two years.

When Suit for Legacy May Be Maintained.—Only after final account is filed or after the lapse of two years could a suit for the legacy be maintained. King v. Richardson, 136 F. (2d) 849, 863.

Where executors never delivered stock to the trustees of a trust, they are not protected by the conveyance made by the trustees to the holder of the life interest, who was one of their number but they too are liable for the value of the stock, since as executors, they held it as trustees for those to whom it was devised. King v. Richardson, 136 F. (2d) 849, 863.

§ 28-160. Payment to clerk after one year discharges representative pro tanto.

Applied in Hunter v. Nunnamaker, 230 N. C. 384, 53 S. E. (2d) 292.

Art. 17A. Uniform Simultaneous Death Act.

§ 28-161.1. Disposition of property where no sufficient evidence of survivorship.—Where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he had survived, except as provided otherwise in this article. (1947, c. 1016, s. 1.)

§ 28-161.2. Beneficiaries of another person's disposition of property.—Where two or more beneficiaries are designated to take successively by reason of survivorship under another person's disposition of property and there is no sufficient evidence that these beneficiaries have died otherwise than simultaneously the property thus disposed of shall be divided into as many equal portions as there are successive beneficiaries and these portions shall be distributed respectively to those who would have taken in the event that each designated beneficiary had survived. (1947, c. 1016, s. 2.)

§ 28-161.3. Joint tenants or tenants by the entirety.—Where there is no sufficient evidence that two joint tenants or tenants by the entirety have died otherwise than simultaneously the property so held shall be distributed one-half as if one had survived and one-half as if the other had survived. If there are more than two joint tenants and all of them have so died the property thus distributed shall be in the proportion that one bears to the whole number of joint tenants. (1947, c. 1016, s. 3.)

§ 28-161.4. Insurance policies.—Where the insured and the beneficiary in a policy of life or accident insurance have died and there is no sufficient evidence that they have died otherwise than simultaneously the proceeds of the policy shall be distributed as if the insured had survived the beneficiary. (1947, c. 1016, s. 4.)

§ 28-161.5. Article does not apply if decedent provides otherwise.—This article shall not apply in the case of wills, living trusts, deeds, or contracts of insurance wherein provision has been made for distribution of property different from the provisions of this article. (1947, c. 1016, s. 6.)

§ 28-161.6. Uniformity of interpretation.—This article shall be so construed and interpreted as to effectuate its general purpose to make uniform the law in those states which enact it. (1947, c. 1016, s. 7.)

§ 28-161.7. Short title. — This article may be cited as the Uniform Simultaneous Death Act. (1947, c. 1016, s. 8.)

Art. 18. Settlement.

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

Under this section an executor is forbidden to hold after two years from his qualification more of the estate than amounts to his necessary charges. King v. Richardson, 136 F. (2d) 849, 867 (dis. op.).

§ 28-167. Procedure where person entitled unheard of for seven years.—When the party entitled to the money has not been heard of for seven years or more, the fund shall be distributed among the next of kin of the absent deceased person as prescribed by statute, in the following manner: An administrator shall be appointed and made a party to a special proceeding in which a verified petition shall be filed setting forth the facts, with names of the parties entitled, and such other evidence as may be required by the clerk in whose office said fund was deposited, and the proceedings conducted as other special proceedings; and the order disposing of the fund shall be approved and confirmed by the judge, either at term or at chambers. (Rev., s. 151; Code s. 1526; 1868-9, c. 113, s. 97; 1893, c. 317; C. S. 154.)

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

§ 28-168. Parties to proceeding for settlement.—In all actions and proceedings by administrators or executors for a final settlement of their es-

tates and trusts, whether at the instance of distributees, legatees or creditors or of themselves, if the personal representative dies or is removed pending such actions or proceedings, the administrator de bonis non or administrator with the will annexed, as the case may be, shall be made party as provided in other cases, or in such way as the court may order, and the action or proceeding shall be conducted to its end, and such judgment shall be rendered on the confirmation of the report, or upon the terms of settlement, if any shall be agreed upon by the parties, as will fully protect and discharge all parties to the record. (Rev., s. 154; 1893, c. 206; C. S. 155.)

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

Art. 19. Actions by and against Representative.

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

Editor's Note.—

For a discussion of this section, see note to Hoke v. Atlantic Greyhound Corp., 226 N. C. 332, 38 S. E. (2d) 105, in 25 N. C. Law Rev. 84.

A cause of action which survives against successor personal representatives of estate likewise survives in favor of successor personal representatives of estate. Harrison v. Carter, 226 N. C. 36, 39, 36 S. E. (2d) 700, citing Suskin v. Maryland Trust Co., 214 N. C. 347, 199 S. E. 276.

Applied in Hoke v. Atlantic Greyhound Corp., 227 N. C. 412, 42 S. E. (2d) 593.

Cited in Morgan v. Carolina Coach Co., 225 N. C. 668, 36 S. E. (2d) 263.

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

I. IN GENERAL.

Not a Common-Law Right.—

In accord with original. See Wilson v. Massagee, 224 N. C. 705, 32 S. E. (2d) 335; Webb v. Eggleston, 228 N. C. 574, 46 S. E. (2d) 700; Lewis v. North Carolina State Highway, etc., Comm., 228 N. C. 618, 46 S. E. (2d) 705.

The right to maintain an action for wrongful death is purely statutory. No such right existed at common law, and the provisions of this section authorizing the institution and maintenance of such an action are no more binding upon the courts than the provisions of this section which direct how the recovery in such action shall be distributed. Davenport v. Patrick, 227 N. C. 686, 689, 44 S. E. (2d) 203.

Creates New Cause of Action.—

The wrongful death statutes (now this and the following section), confer a new right of action with damages limited to fair and just compensation for the pecuniary injury resulting from death, recoverable by the personal representative for the benefit of the next of kin. Hoke v. Atlantic Greyhound Corp., 226 N. C. 332, 38 S. E. (2d) 105. See McCoy v. Atlantic Coast Line R. Co., 229 N. C. 57, 47 S. E. (2d) 532.

Right Must Be Asserted in Conformity with Section.—The right to maintain an action for damages for wrongful death must be asserted in conformity with this section. Webb v. Eggleston, 228 N. C. 574, 46 S. E. (2d) 700.

Recovery of Burial Expenses.—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. Davenport v. Patrick, 227 N. C. 686, 691, 44 S. E. (2d) 203.

What Constitutes a Cause of Action.—

Plaintiff must show failure on part of defendant to exercise proper care in performance of some legal duty which the defendant owed plaintiff's testator under the circumstances in which they were placed and that such negligent breach of duty was the proximate cause of injury which produced death—a cause that produced the result in continuous sequence, and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under the existing facts. Tysinger v. Coble Dairy Products, 225 N. C. 717, 36 S. E. (2d) 246, 249.

Enforcement of Right of Contribution by Parties Defendant.—One of several defendants, in an action for wrongful death arising out of a joint tort, may have still another joint tort-feasor brought in and made a party defendant for the purpose of enforcing contribution, where plaintiff's right of action against such other tort-feasor, originally subsisting, has been lost by the lapse of time. Godfrey v. Tidewater Power Co., 223 N. C. 647, 27 S. E. (2d) 736.

Nonsuit.—In a civil action under this and the succeeding section to recover damages for alleged wrongful death, where issues of fact are raised which the jury alone may decide, it is error for the court to allow a motion for judgment as of nonsuit. Henson v. Wilson, 225 N. C. 417, 35 S. E. (2d) 245.

Applied in Hoke v. Atlantic Greyhound Corp., 227 N. C. 412, 42 S. E. (2d) 593; Hahn v. Perkins, 228 N. C. 727, 46 S. E. (2d) 854.

Cited in Barber v. Minges, 223 N. C. 213, 25 S. E. (2d) 837; Morgan v. Carolina Coach Co., 225 N. C. 668, 36 S. E. (2d) 263; United States v. Atlantic Coast Line R. Co., 64 F. Supp. 289; Martin v. Currie, 230 N. C. 511, 53 S. E. (2d) 447.

II. LIMITATION OF THE ACTION.

Condition Affecting Cause.—

The one year limitation in this section has been consistently construed as a condition precedent to maintenance of the right of action. Moore v. Atlantic Coast Line R. Co., 153 F. (2d) 782. See also, Harrison v. Carter, 226 N. C. 36, 39, 36 S. E. (2d) 700; Webb v. Eggleston, 228 N. C. 574, 46 S. E. (2d) 700, discussed in 27 N. C. Law Rev. 160; McCoy v. Atlantic Coast Line R. Co., 229 N. C. 57, 47 S. E. (2d) 532; Wilson v. Chastain, 230 N. C. 390, 53 S. E. (2d) 290.

And when the action is not brought within the prescribed time the liability created by the statute ceases. Lewis v. North Carolina State Highway, etc., Comm., 228 N. C. 618, 46 S. E. (2d) 705; Webb v. Eggleston, 228 N. C. 574, 46 S. E. (2d) 700, discussed in 27 N. C. Law Rev. 160.

The personal representative must allege and prove that the action is instituted within the time prescribed. Wilson v. Chastain, 230 N. C. 390, 53 S. E. (2d) 290. See Webb v. Eggleston, 228 N. C. 574, 46 S. E. (2d) 700, discussed in 27 N. C. Law Rev. 160.

Provision as to Time Strictly Construed.—

In accord with original. See McCoy v. Atlantic Coast Line R. Co., 229 N. C. 57, 47 S. E. (2d) 532.

Where a demurrer is sustained to the complaint and an amended complaint is thereafter filed, the action is instituted for the purpose of applying the provisions of this section from the date the amended complaint was filed, since the action could not be maintained on the original complaint. Webb v. Eggleston, 228 N. C. 574, 46 S. E. (2d) 700, discussed in 27 N. C. Law Rev. 160.

Demurrer.—The fact that the amended complaint stating for the first time a cause of action for wrongful death is filed more than one year after the death of plaintiff's intestate may be taken advantage of by demurrer. Webb v. Eggleston, 228 N. C. 574, 46 S. E. (2d) 700, discussed in 27 N. C. Law Rev. 160.

Effect of Soldier's and Sailor's Relief Act.—At the time of intestate's death plaintiff administrator was in the armed forces. Plaintiff was appointed administrator within one year after discharge from the army and instituted this suit for wrongful death. Intestate had other adult children not in the armed forces. It was held that the Soldiers' and Sailors' Civil Relief Act, Title 50, U. S. C. A., sec. 525, does not justify maintenance of the action more than one year after intestate's death, since plaintiff in an action for wrongful death, even though a distributee, does not maintain the action as in his own right but solely in his official capacity as a representative of the estate. McCoy v. Atlantic Coast Line R. Co., 229 N. C. 57, 47 S. E. (2d) 532.

Action Instituted within Prescribed Limitation.—In an action for wrongful death it was alleged that death occurred "on or about midnight of November 21-22, 1947, and which is less than one year next preceding the institution of this action." The summons and complaint were stamped "filed Nov. 22, 1948, at 2:35 p. m." It was held that a demurrer on the ground that it appeared upon the face of the complaint and record that the action was not brought within one year of death, was properly overruled. Wilson v. Chastain, 230 N. C. 390, 53 S. E. (2d) 290.

Probate of Will in Another State.—Where duly appointed administrator instituted action for wrongful death within time allowed and on motion of defendant order was entered revoking the letters and appointing administrator c. t. a. upon discovery of will probate in another state, and later administrator c. t. a. resigned, original administrator who at instance of beneficiary of estate was appointed administrator c. t. a., d. b. n., could enter the action for wrongful death as plaintiff. Harrison v. Carter, 226 N. C. 36, 36 S. E. (2d) 700.

Conflict of Laws.—
In Moore v. Atlantic Coast Line R. Co., 153 F. (2d) 782, the court was held bound by the interpretation of the North Carolina supreme court that the one year time limit of this section constitutes "a statute of limitation."

III. PARTIES TO THE ACTION.

In General.—While any sum recovered is not a part of decedent's estate, such sum can only be recovered in name of personal representative, and must be distributed under laws of intestacy in this state. Harrison v. Carter, 226 N. C. 36, 36 S. E. (2d) 700, citing Neill v. Wilson, 146 N. C. 242, 59 S. E. 674; Hines v. Foundation Co., 196 N. C. 322, 145 S. E. 612.

Suit Must Be Brought by Personal Representative.—
The personal representative alone can maintain the action, and only in his official capacity. He sues in his own right and not en autre droit. McCoy v. Atlantic Coast Line R. Co., 229 N. C. 57, 47 S. E. (2d) 532.

The real party in interest in an action under this section is not the administrator, but the beneficiary under the statute for whom the recovery is sought. Davenport v. Patrick, 227 N. C. 686, 688, 44 S. E. (2d) 203.

IV. DISTRIBUTION OF RECOVERY.

The North Carolina law is materially different from that of most states in that distribution is made, not to designated classes, but in accordance with the canons of descent and distribution. McCoy v. Atlantic Coast Line R. Co., 229 N. C. 57, 47 S. E. (2d) 532.

Existence of Beneficiaries Immaterial.—
In accord with original. See Davenport v. Patrick, 227 N. C. 686, 688, 44 S. E. (2d) 203; McCoy v. Atlantic Coast Line R. Co., 229 N. C. 57, 47 S. E. (2d) 532, holding that evidence as to the number of children left is inadmissible.

Rights of Distributees Fixed.—
In accord with original. See Davenport v. Patrick, 227 N. C. 686, 689, 44 S. E. (2d) 203.

Joinder.—Where plaintiff sues defendant under this section, alleging that her intestate was killed by his negligence, defendant may not join as a joint tort-feasor under § 1-240 a railway company by which the plaintiff's intestate was employed in interstate commerce. Wilson v. Massagee, 224 N. C. 705, 709, 32 S. E. (2d) 335.

V. ADMISSION OF DECLARATIONS.

Testimony of Statement Held Inadmissible.—In a workmen's compensation case, testimony of a statement by an officer shortly before his death from coronary occlusion that he "had had a time all the morning" arresting three men who resisted him, is incompetent as a dying declaration, not having been brought within the terms of this section. West v. North Carolina Dept. of Conservation and Development, 229 N. C. 232, 49 S. E. (2d) 398.

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

Nature and Quantum of Damages Recoverable.—
Exemplary or punitive damages are not recoverable in an action for wrongful death. Martin v. Currie, 230 N. C. 511, 53 S. E. (2d) 447.

The measure of damages in an action for wrongful death is the present worth of the pecuniary loss suffered by those entitled to the distribution of the recovery, which is to be measured by the probable gross income of the deceased during his life expectancy less the probable cost of his own living and usual or ordinary expenses. Hanks v. Norfolk, etc., R. R., 230 N. C. 179, 52 S. E. (2d) 717.

In action for wrongful death of child nine years of age the rule for measuring damages is that expectancy of life may be determined by jury based upon constitution, health and habits of the infant and where the jury was so instructed, it was not error for the court in illustrating the rule to use figures fifty and twenty in referring to life expectancy. Rea v. Simowitz, 226 N. C. 379, 38 S. E. (2d) 194.

Where injured person lives for 31 days, and thereafter dies as a result of injuries, personal representative may recover damages sustained by injured person during his lifetime, and for the benefit of the next of kin the pecuniary injury resulting from death, the amounts recoverable being determinable upon separate issues without overlapping. Hoke v. Atlantic Greyhound Corp., 226 N. C. 332, 38 S. E. (2d) 105.

The measure of damages for wrongful death is the present value of the accumulations of income which would have been derived from person's own exertions, after deducting the probable cost of living and ordinary expenses, based upon person's life expectancy. Rea v. Simowitz, 226 N. C. 379, 38 S. E. (2d) 194, 196.

Recovery for pain and suffering and for hospital and medical expenses relate to a single cause of action and should be submitted upon a single issue of damages. Hoke v. Atlantic Greyhound Corp., 226 N. C. 332, 38 S. E. (2d) 105.

Evidence Held Competent in General.—In an action for wrongful death, evidence relating to the age, health and life expectancy of deceased, his earning capacity, his habits, his ability and skill, the business in which he was employed and the means he had of earning money is competent. Hanks v. Norfolk, etc., R. R., 230 N. C. 179, 52 S. E. (2d) 717.

The inventory of the estate of the deceased showing salary due decedent at the time of death and the present action for wrongful death as the total assets of the estate, is competent as an aid to the jury in arriving at a proper estimate of the pecuniary worth of the decedent to those entitled to the distribution of the recovery. Hanks v. Norfolk, etc., R. R., 230 N. C. 179, 52 S. E. (2d) 717.

Evidence Showing Attitude of Deceased towards His Family.—In an action for wrongful death verified complaint in an action heretofore instituted by deceased against his wife for absolute divorce, alleging that he and his wife had entered into an agreement respecting custody and support of the minor children of the marriage, and setting forth the agreement, is competent upon the issue of damages to show the attitude of the deceased toward his family. Hanks v. Norfolk, etc., R. R., 230 N. C. 179, 52 S. E. (2d) 717.

Authenticated copies of court records showing that deceased was sentenced for nonsupport of his minor children, with sentence suspended on condition that he pay a stipulated sum weekly for their support, was held competent on the issue of damages, since it imported more than a single act of dereliction and revealed a serious defect of character. Hanks v. Norfolk, etc., R. R., 230 N. C. 179, 52 S. E. (2d) 717.

Complaint and order for temporary alimony which had not been served on deceased because of his death were properly excluded. Hanks v. Norfolk, etc., R. R., 230 N. C. 179, 52 S. E. (2d) 717.

Evidence as to Number of Children Inadmissible.—
In accord with original. See McCoy v. Atlantic Coast Line R. Co., 229 N. C. 57, 47 S. E. (2d) 532.

Evidence of the pecuniary state of defendant is irrelevant in an action for wrongful death, and objection is properly sustained to a question asked defendant as to the amount of land he owned. Martin v. Currie, 230 N. C. 511, 53 S. E. (2d) 447.

Cited in United States v. Atlantic Coast Line R. Co., 64 F. Supp. 289.

§ 28-175. Actions which do not survive.

Editor's Note.—
Public Laws of 1915, ch. 38, which amended the survival statutes (now this section and § 28-172) by striking out the words "or other injuries to the person, where such injury does not cause death of the injured party" from the exceptions to the causes of action which survive, has the effect of prescribing that causes of actions for wrongful injury do survive the death of the injured party. Hoke v. Atlantic Greyhound Corp., 226 N. C. 332, 38 S. E. (2d) 105.

§ 28-176. To sue or defend in representative capacity.

Action to collect note payable to decedent and maturing before his death must be instituted by the representative of his estate in his representative capacity. Cannon v. Cannon, 228 N. C. 211, 45 S. E. (2d) 34.

There is no statutory authority for a foreign executor or administrator to come into our courts and prosecute or defend an action in his representative capacity. Cannon v. Cannon, 228 N. C. 211, 45 S. E. (2d) 34.

Cited in Harrison v. Carter, 226 N. C. 36, 36 S. E. (2d) 700, 164 A. L. R. 697.

§ 28-181. Action to continue, though letters revoked.

Quoted in Harrison v. Carter, 226 N. C. 36, 36 S. E. (2d) 700, 164 A. L. R. 697.

Art. 20. Representative's Powers, Duties and Liabilities.

§ 28-183. Representative may purchase for estate to prevent loss.

Cited in Pearson v. Pearson, 227 N. C. 31, 40 S. E. (2d) 477.

Art. 22. Estates of Missing Persons.

§ 28-193. Petition for administration; service upon next of kin, etc.; notice to appear and answer.—When, by verified application or petition for probate of a will or letters of administration, it shall be made to appear to the satisfaction of the clerk of the superior court that any person has disappeared from the community of his or her residence, that his or her whereabouts are unknown, and that such absentee has not been heard from in said community within seven years last past, such clerk shall cause summons and a copy of said petition to be served upon all persons shown therein to be in possession of property of the missing person and all next of kin of said missing person who are known and shown to reside within this state, and, by publication provided by G. S. § 1-99, said clerk shall give notice of such petition, directing the missing person, his or her spouse, heirs and next of kin, to appear before his court within twenty days from service of said notice and answer or demur to the allegations contained in said petition. (1949, c. 581.)

Editor's Note.—For discussion of this article, see 27 N. C. Law Rev. 410.

§ 28-194. Appointment of guardian ad litem; notice to produce evidence that missing person, etc., alive; presumption and declaration of death; administration of estate.—Upon failure of the missing person to appear as provided in the preceding section, said clerk shall appoint some suitable person or persons to act as guardian ad litem for the missing person and such spouse and child, or issue thereof, who may be living but have made no appearance, and shall cause to be published once a week for four weeks a notice requiring the missing person, spouse and children or their issue, if alive, or any other person for them, to produce to the court evidence of the continuation in life of the missing person, spouse, child or issue thereof. If within twenty days from service of such notice evidence is not produced to the clerk that the missing person is alive, he or she shall be presumed to be deceased, may be so declared by the clerk upon hearing of said petition, and the estate of the missing person may thereupon be administered as provided in this article and by law. (1949, c. 581.)

§ 28-195. Findings of clerk as to spouse and issue of missing person.—If it shall appear from the aforesaid petition that the spouse of the missing person is also missing and has not been heard from in the community of his or her residence within seven years last past, or if it appears therein that said missing person had no child at the time of disappearance and that no child has been so heard from within said seven-year period, upon the hearing of said petition, if the spouse of the missing person does not appear, and there is no evidence that such spouse is alive, it shall be presumed that such spouse is deceased, or if no child or issue thereof appears, and there is no evidence that a child or issue thereof be alive, it shall be presumed that said missing person died without a child or issue thereof surviving, and the clerk may so find as to said spouse, child or issue thereof. (1949, c. 581.)

§ 28-196. Effect of declaration and findings.—Until set aside on subsequent appearance in said proceeding by the missing person, spouse, child or issue thereof, such declaration and finding or findings shall be conclusive, and effective as of the date thereof, in the administration of the estate of the missing person, in subsequent sales or partition of his or her property, and in determination of any other interest, estate or trust to be vested or contingent upon the death of such missing person. (1949, c. 581.)

§ 28-197. Validity of conveyances of real property of missing persons.—All conveyances of real property of said missing person made by any devisee or heir at law within two years of said declaration and findings shall be void as to said missing person, his or her spouse and unknown children or issue thereof, but such conveyances to bona fide purchasers for value, if made after said two-year period, shall be valid. (1949, c. 581.)

§ 28-198. Distribution of property held by or in trust for missing person; bond of distributee.—Before any distribution of property held by or in trust for the missing person is made, the persons entitled to such distribution shall give their bond, with such sureties as the clerk may require, or secured by the property so received, conditioned that if the missing person, spouse, children or issue thereof, shall in fact be alive at the time, they will, respectively, refund to whosoever may be entitled thereto, the property or amounts received with interest thereon, but no surety or security shall be required when the missing person has been absent for a period of twenty-five years and has not been heard from in the community of his or her residence during said period. (1949, c. 581.)

§ 28-199. Limitation of action on bond; civil immunity of purchasers for value and fiduciaries.—No action shall be instituted on such bond after the expiration of two years from date thereof, no action may be maintained against the purchaser for value of any property sold by any administrator, executor or other fiduciary pursuant to the declaration or findings authorized in this article, and no action may be maintained against any administrator, executor or other fiduciary for any act done prior to revocation of the probate or letters authorized by this article in reliance upon said declaration or findings, or under authority of this article. (1949, c. 581.)

§ 28-200. Action against distributee for recovery of property or its value.—Nothing in this article shall bar any action, or affect the statute of limitation applicable thereto, brought by any missing person, spouse, child or issue thereof, to recover any property delivered to and in possession of a distributee as authorized in this article, or to recover from any distributee the value of any property alienated by him, but the possession of such distributee shall be deemed to be adverse and the statute of limitation shall begin to run as against such action from the date of the declaration and findings of the clerk as provided in this article. (1949, c. 581.)

§ 28-201. Jurisdiction of clerk of county of last known residence or where property located; publication of notices.—The clerk of the superior court of the county of the last known residence of the missing person shall have prior right to

jurisdiction of the proceedings provided for in this article and probate of a will or appointment of an administrator for the estate of a missing person, but if no prior appointment has been made after the expiration of ten years from such disappearance, jurisdiction may be assumed by the clerk of the superior court of any county in which the missing person had property, or in which property is held in trust for him: Provided, that when jurisdiction is assumed by the clerk of any county other than that of the last known residence of the missing person, the notices required in this article shall be published in the county of the court taking jurisdiction and in the county where the missing person had a last known residence. (1949, c. 581.)

Chapter 29. Descents.

§ 29-1. Rules of descent.

Rule 2, Females inherit with males, younger with other children; advancements.

Provides for Equality.—
The purpose of Rule 2 is to produce equality among those equally entitled to property descending from a parent, in accord with the presumed intention of the parent. Harrelson v. Gooden, 229 N. C. 654, 50 S. E. (2d) 901.

Definition of Advancement.—
In its legal sense an advancement is an irrevocable gift in praesenti of money or property, real or personal, to a child by a parent, to enable the donee to anticipate his inheritance to the extent of the gift. Harrelson v. Gooden, 229 N. C. 654, 50 S. E. (2d) 901.

Presumption.—
When a parent dies intestate having previously made a conveyance of land of substantial value to one of several children for a nominal consideration, the presumption is that he intended the land thus conveyed as an advancement. Harrelson v. Gooden, 229 N. C. 654, 50 S. E. (2d) 901.

Intention of Parent Governs.—
Whether the gift is an advancement or not depends on the intention of the parent at the time the gift is made. Harrelson v. Gooden, 229 N. C. 654, 50 S. E. (2d) 901.

The nature of the gift, the consideration expressed, and the circumstances under which it is made are material in determining the intention. Id.

Payments Made for Land Conveyed as an Advancement.—
In ascertaining the value of an advancement of realty for the purpose of equalizing the heirs' share in the real estate, or in charging the child advanced in the distributive share of the personalty in the event the advancement exceeds the value of his share of the realty, the commissioners should take into consideration any payments found to have been made for the land conveyed as an advancement. Harrelson v. Gooden, 229 N. C. 654, 50 S. E. (2d) 901.

Rule 4, Collateral descent of estate derived from ancestor.

In General.—
This rule applies where, and only to the extent that, the inheritance (1) has been transmitted by descent from an ancestor, or (2) has been derived by gift, devise or settlement from an ancestor, to whom the person thus advanced would, in the event of such ancestor's death, have been the heir or one of the heirs. Jones v. Jones, 227 N. C. 424, 429, 42 S. E. (2d) 620.

A husband who had acquired real estate by descent, devised same to his wife by will. The wife took by purchase, and since she is not an "heir," the provisions of this rule do not apply, and upon her death without lineal descendants the land descends to her collateral heirs rather than to those of her husband. Id.

Rule 6, Half blood inherits with whole; parents from child.

Personal Property.—
The citation to this paragraph in the original should be "178 N. C. 442, 444."

Rule 10, Heirs of illegitimate. Illegitimate children shall be considered legitimate as between themselves and their representatives, and their estates shall descend accordingly in the same manner as if they had been born in wedlock; and upon the death of an illegitimate child not leaving issue capable of inheriting, his estate shall descend in the following order:

(1) To the children of his mother, whether legitimate or illegitimate, or their issue.

(2) If there are no such children or their issue, then to the mother.

(3) If there are no such children or their issue, nor mother, then to the brothers and sisters of the mother, or their issue.

(4) If there are none who can take under paragraphs (1), (2), or (3) of this rule, then to the surviving spouse.

Nothing herein shall be construed to change the existing rules with respect to curtesy and dower or other rights of inheritance by virtue of marriage, nor to allow illegitimate children to inherit from legitimate children of the same mother. (Rev., s. 1556; Code, s. 1281; R. C., c. 38, Rule 11; 1935, c. 256; 1945, c. 520; C. S. 1654.)

Rule Prior to 1935.—Prior to 1935 when an illegitimate child died leaving no issue and his mother had predeceased him, the collateral relatives of the mother could not inherit from her illegitimate child. Board of Education v. Johnston, 224 N. C. 86, 29 S. E. (2d) 126.

Rule 14, Succession and inheritance rights of adopted child. An adopted child shall be entitled by succession or inheritance to any real property by, through, and from its adoptive parents the same as if it were the natural, legitimate child of the adoptive parents.

Rule 15, Succession and inheritance rights of adoptive parents. The adoptive parents shall be entitled by succession or inheritance to any real property by, through, and from an adopted child the same as if the adopted child were the natural, legitimate child of the adoptive parents.

Rule 16, Succession and inheritance rights of legitimate children. When any child born out of wedlock shall have been legitimated in accordance with the provisions of G. S. § 49-10 or G. S. § 49-12 such child shall be entitled to all the rights of succession or inheritance to any real property of its father and mother as it would have had had it been born their issue in lawful wedlock. (1947, c. 832.)

Editor's Note.—The 1945 amendment rewrote Rule 10 and the 1947 amendment added Rules 14, 15 and 16. As the rest of the section was not affected by the amendments, it is not set out.

For comment on the 1945 amendment, see 23 N. C. Law Rev. 347.

For discussion of the 1947 amendment, see 25 N. C. Law Rev. 443.

Chapter 30. Widows.

Art. 1. Dissent from Will.

§ 30-1. Time and manner of dissent.

Cross Reference.—
See 23 N. C. Law Rev. 380 for elections under will.

Filing of Dissent Is Ministerial in Nature.—Where clerk was one of the executors of the will, the act of filing a dissent was purely ministerial, and the clerk was not disqualified to receive and file the written dissent. In re Smith's Estate, 226 N. C. 169, 37 S. E. (2d) 127, 128.

Notice to Executors and Devisees.—The fact that no previous notice of husband's will is given to the executors or devisees of filing of widow's dissent is immaterial as this and the following section do not require notice. In re Smith's Estate, 226 N. C. 169, 37 S. E. (2d) 127, 128.

Disposal of Motion to Strike Dissent.—Where widow duly filed dissent, and executor moved to strike on the ground that husband had obtained a decree of absolute divorce, and widow moved in the court in which the divorce decree had been rendered to set aside the decree for want of legal service and for fraud, it was held that while the motion to set aside the divorce decree is pending, it was error for court to strike out the dissent. In re Smith's Estate, 226 N. C. 169, 37 S. E. (2d) 127.

Dissent to Will Probated in Another State.—Testator died in South Carolina and his will was duly probated there. His widow filed a dissent valid under the laws of the state. The court held that she was entitled to her dower rights in lands owned by testator within North Carolina upon the filing of an authenticated copy of the will as proven and probated, without also dissenting here. Coble v. Coble, 227 N. C. 547, 42 S. E. (2d) 898.

§ 30-2. Effect of dissent.

Stated in In re Smith's Estate, 226 N. C. 169, 37 S. E. (2d) 127.

Art. 2. Dower.

§ 30-4. Who entitled to dower.

Heir Murdering Ancestor Excluded from Beneficial Interest in Estate. — The fact that this and other sections forfeiting a murderer's interest in the estate of his victim (§§ 28-10 and 52-19) apply only to the relation of husband and wife does not deprive equity of the power of excluding an heir who has murdered his ancestor from all beneficial interest in the estate of his victim. Garner v. Phillips, 229 N. C. 160, 47 S. E. (2d) 845. For suggested revisal of this section and related statutes, see 26 N. C. Law Rev. 232.

Applied in Artis v. Artis, 228 N. C. 754, 47 S. E. (2d) 228.

§ 30-5. In what property widow entitled to dower.

I. GENERAL CONSIDERATION OF DOWER.

Where Trustees and Cestuis Are Identical Persons.—Under an active trust, which gives trustees power to sell and convey lands, in their discretion, such trustees and cestuis being identical persons, the respective wives of the trustees have no dower interests in the land and are not necessary parties to a conveyance. Blades v. Norfolk Southern Ry. Co., 224 N. C. 32, 29 S. E. (2d) 148.

Applied in Artis v. Artis, 228 N. C. 754, 47 S. E. (2d) 228.

§ 30-6. Dower not affected by conveyance of husband; exception.

Applied in Artis v. Artis, 228 N. C. 754, 47 S. E. (2d) 228.

§ 30-7. Dower conveyed by wife's joinder in deed.—The right to dower under this chapter shall pass and be effectual against any widow or person claiming under her upon the wife joining with the husband in the deed of conveyance and by her acknowledgment of the same as provided by law. (Rev., s. 3086; Code, s. 2107; 1868-9, c. 93, s. 36; 1945, c. 73, s. 1; C. S. 4102.)

Editor's Note.—The 1945 amendment substituted at the end of the section the words "by her acknowledgment of same as provided by law" for the words "being privately examined as to her consent thereto in the manner prescribed by law."

§ 30-8. Conveyance of home site by wife's joinder in deed or other conveyance.—No deed or other conveyance, except to secure purchase money, made by the owner of a home site, which shall include the residence and other buildings together with the particular lot or tract of land upon which the residence is situated, whether actually occupied by said owner or not, shall be valid to pass possession or title during the lifetime of the wife except upon the wife joining with her husband in the deed or other conveyance and her acknowledgment of same as provided by law: Provided, the wife does not commit adultery, or has not abandoned and does not abandon the husband and live separate and apart from him: Provided, further, that all married women under the age of twenty-one shall have the same privilege to renounce their dower rights in and to the home site as is now conferred upon married women twenty-one years and over, and the deed or other conveyance thereof made by the owner of a home site with the joinder and acknowledgment of his wife, even though the wife be under twenty-one years of age, shall be valid and immediately pass possession and title thereto as though said married women were twenty-one years or over: Provided, further, that all conveyances of a home site, as defined in this section, made prior to February twenty-seven, one thousand nine hundred and thirty-seven, by the owner thereof, with the voluntary signature and assent of his wife, signified on her private examination according to law, shall be valid and pass the title and possession thereto as of the date thereof, even though the wife of said owner was under twenty-one years of age at the time of such signature and assent. (1919, c. 123; 1937, c. 69; 1945, c. 73, s. 2; C. S. 4103.)

Editor's Note.—
The 1945 amendment substituted the exception clause immediately preceding the first proviso for the words "without the voluntary signature and assent of his wife, signified on her private examination according to law." The amendment also made a somewhat similar substitution in the second proviso.

The husband, without joinder of his wife, conveyed the home site to his wife and one of his sons. In special proceedings for partition instituted after the husband's death it was determined that the wife was entitled to dower in all of his lands but no dower was actually allotted to her and the lands other than the home site were partitioned among all the children. It was found as a fact that the value of the home site did not exceed the value of one-third interest in all the lands of which the husband died seized. It was held that the allotment to the wife of a life estate in the home site as and for the value of her dower is without error, since the grantees in the deed took subject to dower. Artis v. Artis, 228 N. C. 754, 47 S. E. (2d) 228.

§ 30-9. Conveyance without joinder of insane wife; certificate of lunacy.—Every man whose wife is a lunatic or insane may bargain, sell, lease, mortgage, transfer and convey any of his real estate by deed, mortgage deed, deed of trust or lease, without the signature of his wife: Provided, that the clerk of the superior court of the county in which the wife was adjudged a lunatic or declared insane, or the superintendent of an insane institution of the state, or any other state shall certify under his hand and seal that she has been adjudged a lunatic or declared insane, and

that her sanity has not been declared restored as is provided by law, and this certificate must be attached to the husband's deed, mortgage deed, deed of trust, or lease. Such deed, mortgage deed, deed of trust or lease executed, probated and registered in accordance with law shall convey all the estate and interest as therein intended of the grantor in the land conveyed, free and exempt from the dower rights and all other interests of his wife: Provided, this section shall not apply to the homestead of the husband which has been actually allotted. (1923, c. 65, s. 1; 1945, c. 73, s. 3; C. S. 4103(a).)

Editor's Note.—
The 1945 amendment struck out the words "or private examination" formerly appearing after the word "signature" in line five.

Art. 3. Allotment of Dower.

§ 30-12. Petition filed in superior court.—If no such agreement be made, the widow may apply for assignment of dower by petition in the superior court, and, if she fail to make such application within three months after the death of her husband, any heir, devisee, owner, or other person having any interest in said land, or claiming estates in, may file a petition reciting the facts that the widow is entitled to dower in certain lands and has not applied for it and demand that her dower be assigned to her. In all cases the widow and all heirs and devisees and persons in possession of, or claiming estates in, the lands shall be made parties, and the court shall hear and pass upon the petition in like manner as in other cases of special proceedings. And in all such cases the clerk of the superior court, upon application by the widow, shall have authority to issue a writ of assistance to place her in possession of the land allotted to her as dower. (Rev., s. 3088; Code, ss. 2111, 2112; 1891, c. 133; 1868-9, c. 93, ss. 40, 41; 1945, c. 116; 1947, c. 141; C. S. 4105.)

Editor's Note.—The 1945 amendment inserted in the first sentence the words "owner, or other person having any interest in said land, or claiming estates in."
The 1947 amendment added the last sentence.

Art. 4. Year's Allowance.

Part 3. Assigned in Superior Court.

§ 30-27. Widow or child may apply to superior court.

Irrelevant Allegations in Answer.—Upon petition for allotment of a widow's year's allowance, allegations in the answer to the effect that the widow did not need an allotment for her support, that deceased's will evidenced a desire that the widow should receive no part of the estate, and that defendants were the aged and infirm parents of deceased dependent upon the estate left them by the will, are irrelevant to the issues and could not be shown in evidence, and were properly stricken upon motion, since even the reading of the pleadings would be highly prejudicial to petitioner. Edwards v. Edwards, 230 N. C. 176, 52 S. E. (2d) 281.

§ 30-32. Exceptions to the report.—The personal representative, or any creditor, distributee or legatee of the deceased, within ten days after the return of the report, may file exceptions thereto. The plaintiff shall be notified thereof and cited to appear before the court on a certain day, within twenty and not less than ten days after service of the notice, and answer the same; the case shall thereafter be proceeded in, heard and decided as provided in special proceedings between parties. (Rev., s. 3109; Code, s. 2133; 1868-9, c. 93, s. 25; 1947, c. 484, s. 1; C. S. 4126.)

Editor's Note.—The 1947 amendment substituted "ten" for "twenty" in line three. Section 5 of the amendatory act provides that estates, proceedings and actions pending on June 30th, 1947, shall not be affected by its provisions.

Chapter 31. Wills.

Sec.

Art. 3. Witnesses to Will.

31-10.1. Corporate trustee not disqualified by witnessing of will by stockholder.

Art. 5. Probate of Will.

31-31.1. Validation of probates of wills when witnesses examined before notary public; acts of deputy clerks validated.

Art. 1. Execution of Will.

§ 31-1. Infants incapable.

Editor's Note.—For article on the "Drafting and Probate of Wills in North Carolina," see 23 N. C. Law Rev. 306.

§ 31-3. Formal execution.

I. IN GENERAL.

Natural Right to Dispose of Property by Will.—
The right to dispose of property by will is conferred and regulated by statute, and therefore letters written by a member of the armed forces which are not offered or proven in the manner or form prescribed by this section and § 31-26, are ineffectual as a testamentary disposition of property. Wescott v. First, etc., Nat. Bank, 227 N. C. 39, 40 S. E. (2d) 461.

The testamentary disposition of property is governed by statute. In re Will of Puett, 229 N. C. 8, 47 S. E. (2d) 488.

Compliance with Statute Required.—In order that a paper-writing, designed as a testamentary disposition of property, may effectuate this purpose it must have been executed and proven in strict compliance with the statutory requirements. In re Will of Puett, 229 N. C. 8, 47 S. E. (2d) 488.

Applied in In re Will of Goodman, 229 N. C. 444, 50 S. E. (2d) 34.

II. SIGNING, ATTESTATION AND DATE.

Signing in Presence of Witnesses Not Necessary.—
It is not required that testator sign the will in the presence of the attesting witnesses. In re Will of Etheridge, 229 N. C. 280, 49 S. E. (2d) 480.

Art. 2. Revocation of Will.

§ 31-5. Revocation by writing or by cancellation or destruction.—No will or testament in writing, or any clause thereof, shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, canceling, tearing, or obliterating the same, by the testator himself, or in his presence and by his direction and consent; but all wills or testaments shall remain and continue in force until the same be burnt, canceled, torn, or obliterated by the testator, or in his presence and by his consent and direction; or unless the same be altered or revoked by some other will or codicil in writing, or other writing of the testator, signed by him, or some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least; or unless the same be altered or revoked by some other will or codicil

in writing, or other writing of the testator, all of which shall be in the handwriting of the testator, and his name subscribed thereto or inserted therein, and lodged by him with some person for safekeeping, or left by him in some secure place, or among his valuable papers and effects, every part of which will or codicil or other writing shall be proved to be in the handwriting of the testator, by three witnesses at least: Provided, that where a married person makes a will or testament devising or bequeathing property to his or her spouse, a subsequent absolute divorce of the parties shall operate as a revocation of that portion of the will or testament which devises or bequeaths property to the spouse of the testator or testatrix and the property described in such portion of the will shall pass under an appropriate residuary clause, if any, of the will. If there is no appropriate residuary clause, such property shall descend or be distributed as if the testator or testatrix had died intestate. (Rev., s. 3115; Code, s. 2176; R. C., c. 119, s. 22; 1784, c. 204, s. 14; 1819, c. 1004, ss. 1, 2; 1840, c. 62; 1945, c. 140; C. S. 4133.)

Editor's Note.—The 1945 amendment added the proviso at the end of the section.

Cited in In re Will of Goodman, 229 N. C. 444, 50 S. E. (2d) 34.

§ 31-6. Revocation by marriage; exceptions.—A will is revoked by the subsequent marriage of the maker, except as follows:

(1) A will made prior to the marriage of the maker which contains an express statement to the effect that it is made in contemplation of marriage to a person named therein is not revoked by the maker's marriage to such person.

(2) A will made in the exercise of a power of appointment, or so much thereof as is made in the exercise of a power of appointment, if the real or personal estate thereby appointed would not, in default of such appointment, pass to the maker's heirs or next of kin, is not revoked by the maker's subsequent marriage. (Rev., s. 3116; Code, s. 2177; R. C., c. 119, s. 23; 1844, c. 88, s. 10; 1947, c. 110; C. S. 4134.)

Editor's Note.—The 1947 amendment inserted the provision contained in subsection (1) and made changes in the provision contained in subsection (2).

Applied in Potter v. Clark, 229 N. C. 350, 49 S. E. (2d) 636.

Art. 3. Witnesses to Will.

§ 31-10.1. Corporate trustee not disqualified by witnessing of will by stockholder.—A corporation named as a trustee in a will is not disqualified to act as trustee by reason of the fact that a person owning stock in the corporation signed the will as a witness. (1949, c. 44.)

Art. 5. Probate of Will.

§ 31-16. What shown on application for probate.

Applied in In re Will of Hine, 228 N. C. 405, 45 S. E. (2d) 526.

§ 31-17. Proof and examination in writing.

The will of a nonresident recorded here, under this section should include as a muniment of title, the proceedings in dissent as same appear of record in the probate court in the county in which the will was probated. Coble v. Coble, 227 N. C. 547, 42 S. E. (2d) 898.

Applied in In re Will of Hine, 228 N. C. 405, 45 S. E. (2d) 526.

§ 31-18. Manner of probate.

Compliance with Statutory Requirements.—In order that a paper-writing, designed as a testamentary disposition of property, may effectuate this purpose it must have been executed and proven in strict compliance with the statutory requirements. In re Will of Puett, 229 N. C. 8, 47 S. E. (2d) 488.

Applied in In re Will of Hines, 228 N. C. 405, 45 S. E. (2d) 526.

Cited in McMillan v. Robeson, 225 N. C. 754, 36 S. E. (2d) 235.

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

Conclusively Valid until Declared Void.—When executed, proven and recorded in manner and form as prescribed, a paper-writing designed as a testamentary disposition of property is given conclusive legal effect as the last will and testament of the decedent, subject only to be vacated on appeal or declared void by a court of competent jurisdiction in a proceeding instituted for that purpose. Until so set aside it is presumed to be the will of the testator. In re Will of Puett, 229 N. C. 8, 47 S. E. (2d) 488.

Cannot Be Attacked Collaterally.—

A probated will constitutes a muniment of title unassailable except in a direct proceeding. Whitehurst v. Abbott, 225 N. C. 1, 5, 33 S. E. (2d) 129; In re Will of Puett, 229 N. C. 8, 47 S. E. (2d) 488.

Where a paper-writing has been duly probated in common form, offer of proof of a will alleged to have been subsequently executed by the testatrix is a collateral attack, and the clerk is without jurisdiction to set aside the probate upon such proof. In re Will of Puett, 229 N. C. 8, 47 S. E. (2d) 488.

The probate of a will may be set aside upon motion after notice where it is clearly made to appear that the court was imposed upon or misled, but otherwise the probate is conclusive and cannot be collaterally attacked, and the paper-writing stands as the last will and testament until declared void in a direct proceeding in the nature of a caveat under § 31-32. In re Will of Puett, 229 N. C. 8, 47 S. E. (2d) 488.

Clerk May Not Set Aside Probate on Grounds Determinable by Caveat.—While the clerk of the superior court in proper instances may set aside a probate in common form, he may not do so on grounds which are properly determinable by caveat. In re Will of Hine, 228 N. C. 405, 45 S. E. (2d) 526.

After Cause Transferred to Civil Issue Docket.—See note to § 31-36.

Effect of Order of Clerk.—An order of the clerk adjudging paper writing to be fully proved in common form is not "conclusive in evidence of the validity of the will," under this section, on the issue of devisavit vel non, but as between the probated instrument and the prior purported wills, the former stands until "declared void by a competent tribunal." In re Neal's Will, 227 N. C. 136, 138, 41 S. E. (2d) 90.

§ 31-20. Wills filed in clerk's office.

Cross Reference.—

See note to § 31-21.

§ 31-21. Validation of wills heretofore certified and recorded.

Statute Not Retroactive.—Public Laws 1921, ch. 21 (§§ 31-20, 31-21), does not control rights which accrued prior to its enactment. Hence, when an original will probated in 1910 is invalidated by judicial decree, a certified copy thereof recorded in another county becomes void and one who purchases with notice of the caveat cannot convey any title thereunder, either before or after notice of its invalidity has been filed in the county where the certified copy has been recorded. The only purpose of such certified copy was to give notice of the source of title. Whitehurst v. Abbott, 225 N. C. 1, 33 S. E. (2d) 129.

§ 31-26. Probate of wills of members of the armed forces.—In addition to the methods already provided in existing statutes therefor, a will executed by a person while in the armed forces of the United States or the Merchant Marine, shall be admitted to probate (whether there were subscribing witnesses thereto or not, if they, or either of them, is out of the state at the time said will

is offered for probate) upon the oath of at least three credible witnesses that the signature to said will is in the handwriting of the person whose will it purports to be. Such will so proven shall be effective to devise real property as well as to bequeath personal estate of all kinds. This section shall not apply to cases pending in courts and at issue on the date of its ratification. (1919, c. 216; Ex. Sess. 1921, c. 39; 1943, c. 218; 1945, c. 81; C. S. 4151.)

Editor's Note.—

The 1945 amendment substituted in the first sentence the words "a will executed by a person while in the armed forces of the United States or the merchant marine" for the words "the will of a member of the armed forces of the United States, or the merchant marine, executed while in the active service of the United States."

For comment on the 1943 amendment, see 21 N. C. Law Rev. 381.

§ 31-27. Certified copy of will of nonresident recorded.

Due Record and Certificate of Foreign Probate—Effect.—A will, duly proven and allowed in New York according to this section, when it appears that an exemplified copy thereof so showing has been recorded here in the county where the land lies, is admissible in evidence in the courts of this state, as a link in a chain of title. Vance v. Guy, 223 N. C. 469, 27 S. E. (2d) 117.

Applied in In re Will of Chatman, 228 N. C. 246, 45 S. E. (2d) 356.

§ 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.)

Art. 6. Caveat to Will.

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

When Proceeding in Nature of Caveat Necessary.—Where there is no allegation that the probate of the will was otherwise than in strict accord with the statute, and there is no suggestion that the court was imposed upon or misled, the validity of the will may be attacked only by direct proceeding in the nature of a caveat under this section. In re Will of Puett, 229 N. C. 8, 47 S. E. (2d) 488.

Statute Gives Right and Outlines Procedure.—In this jurisdiction the right to contest a will by caveat is given by statute; and the procedure to be followed is outlined in the statute conferring the right. In re Will of Brock, 229 N. C. 482, 50 S. E. (2d) 555.

Caveat a Proceeding in Rem—Nonsuit.—

When a will is probated in common form, any interested party may appear and enter a caveat. But a caveat is an in rem proceeding. In effect it is nothing more than a demand that the will be produced and probated in open court, affording caveators an opportunity to attack it for the causes and upon the grounds set forth and alleged in the caveat. It is an attack upon the validity of the instrument purporting to be a will and not an "action affecting the title to real property." The will and not the land devised is the res involved in the litigation. Whitehurst v. Abbott, 225 N. C. 1, 4, 33 S. E. (2d) 129.

The contest of a will by caveat is not an ordinary civil action, but a special proceeding in rem leading to the establishment of the will as a testamentary act under the issue devisavit vel non. The in rem nature of the proceeding dominates the investigation, and in many important respects the parties litigant have little of the usual control over the course of trial on the issue. In re Will of Brock, 229 N. C. 482, 50 S. E. (2d) 555.

Once the will is propounded for probate in solemn form the proceeding must go on until the issue devisavit vel non is appropriately answered; and no nonsuit can be taken by the propounders or by the caveators. In re Will of Brock, 229 N. C. 482, 50 S. E. (2d) 555. See In re Will of Hine, 228 N. C. 405, 45 S. E. (2d) 526.

A caveat to a will may be filed only by persons "entitled under such will or interested in the estate." And § 31-33, directing the issue of citations, "to all devisees, legatees, or other parties in interest," does not enlarge the definition of interest given in this section. In re Will of Brock, 229 N. C. 482, 50 S. E. (2d) 555.

It is immaterial whether those appearing and protesting call themselves interveners, objectors or caveators if they place themselves in opposition to the propounders. By a caveat legal rights are put in stake. In re Will of Rowland, 202 N. C. 373, 162 S. E. 897; In re Will of Puett, 229 N. C. 8, 47 S. E. (2d) 488.

Applied in In re Will of Hine, 228 N. C. 405, 45 S. E. (2d) 526.

§ 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 by reason of his failure to prosecute his suit with effect, 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; and he shall also forthwith issue a citation to all devisees, legatees or other parties in interest within the state, and cause publication to be made, for four weeks, in some newspaper printed in the state, for nonresidents to appear at the term of the superior court, to which the proceeding is transferred and to make themselves proper parties to the proceeding, if they choose. At the term 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 persons 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, and who shall appear to him to be able so to do, to file such bond within such time as he shall direct and before trial; and on failure to file such bond the judge shall dismiss the proceeding. (Rev., s. 3136; Code, s. 2159; 1899, c. 13; 1901, c. 748; C. C. P., s. 447; 1909, c. 74; 1947, c. 781; C. S. 4159.)

Editor's Note.—The 1947 amendment rewrote the first sentence down to the semicolon. For brief comment on amendment, see 25 N. C. Law Rev. 478.

The persons interested are not cited as parties to the proceeding but merely as interested persons to view proceedings and participate if they elect to do so, although no doubt the court, when properly and timely advised, would cause citation to issue to anyone designated by statute as interested who has been omitted. In re Will of Brock, 229 N. C. 482, 50 S. E. (2d) 555.

In a caveat proceeding, neither the grantees in deeds executed by testator prior to his death nor the persons to whom such grantees have conveyed the property, either before or after testator's death, nor the heirs at law of deceased grantees are necessary parties to the determination of the issue of devisavit vel non when such persons are not beneficiaries under the will nor heirs of testator, and therefore, even if it be conceded they are proper parties, the trial judge, in the exercise of his discretion, is under no legal obligation to order citations to bring them in. Id.

When Personal Representative of Executrix Not Necessary Party.—Where the executrix has fully administered the estate and filed her final account prior to the filing of a caveat, and has died pending the caveat proceeding, it is not necessary that the court appoint a personal representative for the deceased executrix nor an administrator d. b. n. for the estate of the testator so that they may be made parties to the proceeding. In re Will of Brock, 229 N. C. 482, 50 S. E. (2d) 555.

Waiver of Jury Trial—Nonsuit.—Upon the proper filing of a caveat the cause must be transferred to the civil issue docket where the proceeding is in rem for trial by jury, and neither party may waive jury trial, consent that the court hear the evidence and find the determinative facts or have nonsuit entered at his instance. In re Will of Hine, 228 N. C. 405, 45 S. E. (2d) 526.

§ 31-35. Affidavit of witness as evidence.—Whenever the subscribing witness to any will shall die, or be insane or mentally incompetent, or be absent beyond the state, it shall be competent upon any issue of devisavit vel non to give in evidence the affidavits and proofs taken by the clerk upon admitting the will to probate in common form, and such affidavit and proceedings before the clerk shall be prima facie evidence of the due and legal execution of said will. (Rev., s. 3121; 1899, c. 680, s. 2; 1947, c. 781; C. S. 4160.)

The 1947 amendment inserted after the word "die" in line two the words "or be insane or mentally incompetent."

For brief comment on amendment, see 25 N. C. Law Rev. 478.

§ 31-36. Caveat suspends proceedings under will.

The clerk of a superior court cannot enter an order vacating the probate of a will after a caveat has been filed and the cause transferred to the civil issue docket of the superior court for trial in term. In re Will of Hine, 228 N. C. 405, 45 S. E. (2d) 526. See note to § 31-19.

Where the clerk of the superior court has admitted to probate in common form a purported will and two purported codicils as the last will and testament of a deceased, and caveat has been properly filed as to the second codicil and the cause transferred to the civil issue docket, the clerk may not thereafter upon motion expunge from his records the entire probate proceedings and reprobate the purported will and second codicil on the ground that the second codicil revoked the first. In re Will of Hine, 228 N. C. 405, 45 S. E. (2d) 526.

Error Held Not Cured by Affirmance of Order.—Where a clerk is without jurisdiction to make an order in probate proceedings, by reason of the filing of a caveat and the transfer of the cause to the civil issue docket, the error in making the order is not cured by the order of the resident judge of the superior court who heard the motion on appeal and affirmed the order, for the jurisdiction of the superior court in such a case is derivative, and § 1-276 does not apply. In re Will of Hine, 228 N. C. 405, 45 S. E. (2d) 526.

§ 31-37. Superior court clerks to enter notice of caveat on will book; final judgment also to be entered.

Applied in Lewis v. Furr, 228 N. C. 88, 44 S. E. (2d) 604.

Art. 7. Construction of Will.

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

Section 39-1 pertaining to the construction of deeds is similar in wording and effect to this section, and what has been held in applying the rule of construction as to wills is pertinent in applying the rule of construction as to deeds. Artis v. Artis, 228 N. C. 754, 47 S. E. (2d) 228.

An unrestricted devise of realty, nothing else appearing, constitutes a devise in fee. Elder v. Johnston, 227 N. C. 592, 42 S. E. (2d) 904.

Unless the intent of the testator to devise an estate of less dignity can be gathered from the instrument construed from its four corners, an unrestricted or indefinite devise of real property is a devise in fee simple, and a subsequent clause expressing a wish, desire or even direction for the disposition of what remains at the death of the devisee, will not be allowed to defeat the devise nor limit it to a life estate. Taylor v. Taylor, 228 N. C. 275, 45 S. E. (2d) 368.

The clause "I give, devise and bequeath" to named devisee, described realty, standing alone, constitutes a devise in fee simple. Buckner v. Hawkins, 230 N. C. 99, 52 S. E. (2d) 16.

A devise of real estate to devisees "to do as they like with it", with subsequent provision that after their death whatever property is left should go to testatrix' niece vests the fee simple in the beneficiaries first named. Taylor v. Taylor, 228 N. C. 275, 45 S. E. (2d) 368.

A devise generally to one person with limitation over to another of "whatever is left" at the death of the first taker is regarded as a devise in fee simple. Taylor v. Taylor, 228 N. C. 275, 45 S. E. (2d) 368, citing Patrick v. Morehead, 85 N. C. 62, 39 Am. Rep. 684; Carroll v. Herring, 180 N. C. 369, 104 S. E. 892.

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

Ownership under will is not made dependent upon the certified copy directed to be recorded in the county where the land lies. Whitehurst v. Abbott, 225 N. C. 1, 7, 33 S. E. (2d) 129.

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

Any property acquired after making of will, by reversion or otherwise, is subject to its terms. Ferguson v. Ferguson, 225 N. C. 375, 35 S. E. (2d) 231.

§ 31-42. Lapsed and void devises pass under residuary clause.

Who Are Distributees.—A distributee is a person who has the right under the statute of distribution to a share in the surplus estate of an intestate; one entitled to take a share of an estate of a decedent, under the statute of distribution; one to whom something has to be distributed in the division of an estate; a person upon whom personal property devolves by act of law in cases of intestacy. Those who take by succession the estate of a person who dies intestate are named and defined in § 28-149. Wachovia Bank, etc., Co. v. Shelton, 229 N. C. 150, 48 S. E. (2d) 41.

Must Be Determined as of Date of Death of Testatrix.—Who would have been distributees of the estate had the testatrix died intestate must be determined as of the date of her death and not as of the date of the execution of her will. Wachovia Bank, etc., Co. v. Shelton, 229 N. C. 150, 48 S. E. (2d) 41.

Rights of Collateral Heirs.—

Where a wife dies leaving her surviving a husband but no issue, he is her sole distributee, and her collateral kin are not entitled to share in the estate and are not "distributees." Wachovia Bank, etc., Co. v. Shelton, 229 N. C. 150, 48 S. E. (2d) 41.

If the will expresses an intent that a legacy shall not lapse in the event the legatee predeceases testatrix, the statutory provision for lapse does not apply. This intent need not be stated in exact terms, but is to be ascertained from the four corners of the will. Wachovia Bank, etc., Co. v. Shelton, 229 N. C. 150, 48 S. E. (2d) 41, wherein will showed no intent that legacy should not lapse upon prior death of legatee.

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

Whether a conveyance of property in general terms or by general description constitutes a valid exercise of a power of appointment is governed by this section in respect to the exercise of such power by will. Schaeffer v. Haseltine, 228 N. C. 484, 46 S. E. (2d) 463.

Will held a valid exercise of power of appointment under this section, there being nothing in the will to indicate any contrary intent. Schaeffer v. Haseltine, 228 N. C. 484, 46 S. E. (2d) 463.

§ 31-44. Gifts to children dying before testator pass to their issue.

Applied in Phillips v. Phillips, 227 N. C. 438, 42 S. E. (2d) 604.

Chapter 32. Fiduciaries.

§ 32-4. Registration of transfer of securities held by fiduciaries.

Ground for actionable negligence in the transfer of stocks is greatly narrowed by this section. Carolina Tel., etc., Co. v. Johnson, 168 F. (2d) 489.

Corporation Not Negligent.—In action for negligence in registering transfer of wards' stock, which was registered in guardian's name, this section was a defense where corporation had no "actual knowledge" either of the commission by the fiduciary of a breach of his obligation or of facts revealing bad faith in the transfer. Carolina Tel., etc., Co. v. Johnson, 168 F. (2d) 489.

Insistence by corporation upon a further decree was not a requisite of diligence where decree authorized guardian to partition stock and retain his wards' portion either in shares or money, and the corporation might with reason have believed the guardian was thereby entitled to reduce his wards' shares to cash. Carolina Tel., etc., Co. v. Johnson, 168 F. (2d) 489.

Chapter 33. Guardian and Ward.

Art. 1. Creation and Termination of Guardianship.

Sec.

33-1.1. Absence of natural guardian.

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33-13.1. Clerk may reduce penalty of bond of guardian or trustee.

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33-63. Appointment of conservators for property of certain persons reported missing, etc.

33-64. Surety bond required; powers and duties.

33-65. Clerk may require provision for dependents.

33-66. Termination of conservatorship.

Art. 11. Guardians of Children of Service Men.

33-67. Clerk of superior court to act as temporary guardian to receive and disburse allotments and allowances.

Art. 1. Creation and Termination of Guardianship.

§ 33-1. Jurisdiction in clerk of superior court.—The clerks of the superior court within their respective counties have full power, from time to time, to take cognizance of all matters concerning orphans and their estates and to appoint guardians in all cases of infants, idiots, lunatics, inebriates, and inmates of the Caswell training school: Provided, that guardians shall be appointed by the clerks of the superior courts in the counties in which the infants, idiots, lunatics, or inebriates reside, unless the guardians be the next of kin of such incompetents or a person designated by such next of kin in writing filed with the clerk, in which case, guardians may be appointed by the clerk of the superior court in any county in which is located a substantial part of the estates belonging to such incompetents, or unless an infant resides with an individual who is domiciled in the state of North Carolina and who is guardian of such infant's estate, in which case a guardian of the person of such infant may be appointed by the clerk of the superior court in the county in which the guardian of such infant's estate is domiciled. (Rev., s. 1766; Code, s. 1566; R. C., c. 54, s. 2; 1762, c. 69, ss. 5, 7; 1868-9, c. 201, s. 4; 1917, c. 41, s. 1; 1935, c. 467; 1945, c. 902; C. S. 2150.)

Editor's Note.—

The 1945 amendment added that part of this section beginning with the words "or unless" in line sixteen.

For comment on this amendment, see 23 N. C. Law Rev. 340.

§ 33-1.1. Absence of natural guardian.—Where there is no natural guardian of a minor or where a minor has been abandoned, and in either event the minor requires service from the department of public welfare, until the appointment of a guardian of the person for said minor under this chapter, the superintendent of public welfare of the county in which such minor resides shall be the guardian of the person of said minor: Provided, however, that nothing in this section shall be construed as changing or affecting the appointment or the duties or powers of any next friend of, or any guardian or trustee of the property or estate of, any minor, or any existing laws relative to the handling or disposition of the property of any minor. (1947, c. 413, s. 3.)

Editor's Note.—For brief comment on this section, see 25 N. C. Law Rev. 413.

§ 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 twenty-one 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 willfully 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. (Rev., ss. 1762, 1763, 1764; Code, ss. 1562, 1563, 1564; R. C., c. 54; 1762, c. 69; 1868-9, c. 201; 1881, c. 64; 1911, c. 120; Ex. Sess. 1920, c. 21; 1941, c. 26; 1945, c. 73, s. 20; 1947, c. 413, ss. 1, 2; C. S. 2151.)

Editor's Note.—
The 1945 amendment made changes in the first sentence and the 1947 amendment struck out the former references to deeds.

For brief comment on the 1947 amendment, see 25 N. C. Law Rev. 413.

Cited in The Severance, 152 F. (2d) 916.

Art. 2. Guardian's Bond.

§ 33-13. Terms and conditions of bond; increased on sale of realty.

Surety as a Party in Interest.—When a guardian fails to "faithfully execute the trust reposed in him as such," upon which his bond is conditioned, the surety thereon is subjected to liability, and as a party in interest is entitled to have the wrong remedied. Maryland Cas. Co. v. Lawing, 223 N. C. 8, 13, 25 S. E. (2d) 183.

§ 33-13.1. Clerk may reduce penalty of bond of guardian or trustee.—The clerks of the superior court within their respective counties shall have full power and authority from time to time to order that the penalty of a bond of a guardian or trustee be reduced to a stated sum under the following circumstances:

When a guardian or trustee has disbursed either income or income and principal of the estate according to law, either for the purchase of real estate, or the support and maintenance of the ward or the ward and his dependents, or any lawful cause, and when the personal assets and income of the estate from all sources in the hands of the guardian or trustee have been so diminished, the penalty of the bond of such guardian or trustee may be reduced in the discretion of the clerk to an amount not less than the amount which would be required if the guardian or trustee were first qualifying to administer such personal assets and annual income. (1947, c. 667.)

Art. 3. Powers and Duties of Guardian.

§ 33-20. To take charge of estate.

Cited in The Severance, 152 F. (2d) 916.

§ 33-21. How rentals made.—All rentings by guardians shall be publicly made, between the hours of ten o'clock a. m. and four o'clock p. m., after twenty days' notice posted at the courthouse and four other public places in the county. But, upon petition by the guardian, the clerk of the superior court of the county in which the land of the ward is situated, or of the county wherein the guardian has qualified, may make an order, on satisfactory evidence, upon the oath of at least two disinterested freeholders acquainted with the said land, that the best interests of the said ward will be subserved by a private renting of said land, allowing the guardian to rent the land privately. The terms of all such rentings shall be reported to said clerk of the superior court and be approved by him. The proceeds rentings of real property, except the rentings of lands leased for agricultural purposes, when not for cash, shall be secured by bond and good security. (Rev., s. 1788; Code, s. 1590; 1891, c. 83; 1901, c. 97; R. C., c. 54, s. 26; 1793, c. 391; 1949, c. 719, s. 2; C. S. 2171.)

Editor's Note.—Prior to the 1949 amendment, effective Jan. 1, 1950, this section applied to sales as well as to rentings. The amendment directed the striking out of the words "of all sales of personal estate and" formerly following the word "proceeds" in the first line of the last sentence. The words "of all" in the quoted deletion were apparently directed to be stricken by inadvertence, and it would seem that it was the probable intent of the legislature to retain them between "proceeds" and "rentings" in the first line of the last sentence.

§ 33-24. Guardians' powers enlarged to permit cultivation of ward's lands or continuation of ward's business.

Cited in First Citizens Bank, etc., Co. v. Parker, 225 N. C. 480, 35 S. E. (2d) 489.

Art. 4. Sales of Ward's Estate.

§ 33-31. Special proceedings to sell; judge's approval required.—On application of the guardian by petition, verified upon oath, to the superior court, showing that the interest of the ward would be materially promoted by the sale or mortgage of any part of his estate, real or personal, the proceeding shall be conducted as in other cases of special proceedings; and the truth of the matter alleged in the petition being ascertained by satisfactory proof, a decree may thereupon be made that a sale or mortgage be had by such person, in such way and on such terms as may be most advantageous to the interest of the ward; all petitions filed under the authority of this section wherein an order is sought for the sale or mortgage of the ward's real estate or both real and personal property shall be filed in the superior court of the county in which all or any part of the real estate is situated; if the order of sale demanded in the petition is for the sale or mortgage of the ward's personal estate, the petition may be filed in the superior court of the county in which any or all of such personal estate is situated; no mortgage shall be made until approved by the judge of the court, nor shall the same be valid, nor any conveyance of the title made, unless confirmed and directed by the judge, and the proceeds of the sale or mortgage shall be exclusively applied and secured to such purposes and on such trusts as the judge shall specify. 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. 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. (Rev., s. 1798; Code, s. 1602; R. C., c. 54, ss. 32, 33; 1827, c. 33; 1868-9, c. 201, s. 39; 1917, c. 258, s. 1; 1923, c. 67, s. 1; 1945, c. 426, s. 1; c. 1084, s. 1; 1949, c. 719, s. 2; C. S. 2180.)

Editor's Note.—
The first 1945 amendment, as changed by the second 1945 amendment, added that part of the first sentence beginning with the words "all petitions filed" in line thirteen and ending with the last semi-colon.

The 1949 amendment, effective Jan. 1, 1950, struck out the words "sale or", formerly appearing before the word "mortgage" in line twenty-three, and added the last sentence. For brief comment on the amendment, see 27 N. C. Law Rev. 458.

For act validating proceedings instituted by guardian relating to estate of ward under provisions of this chapter, see Session Laws 1945, c. 426, s. 8.

§ 33-31.1. Procedure when real estate lies in

county in which guardian does not reside.—In all cases where a guardian is appointed under the authority of chapter thirty-three and chapter thirty-five of the General Statutes of North Carolina, and such guardian applies to the court for an order to sell or mortgage all or some part of his ward's real estate, and such real estate is situated in a county other than the county in which the guardian is appointed and qualified, it shall be the duty of the guardian to first apply to the clerk of the court of the county in which he was appointed and qualified for an order showing that the sale or mortgage of his ward's real estate is necessary, or that the interest of his ward would be materially promoted thereby. The clerk of the superior court to whom such application is made shall hear and pass upon the same and enter his findings and order as to whether or not said sale or mortgage of the ward's real estate is necessary, or would materially promote the interest of the ward, and said order and findings shall be certified to the clerk of the superior court of the county in which the ward's land, or some part of same, is located and before whom any petition or application is filed for the sale of said land. Such findings and orders so certified shall be considered by the court or the clerk of the court along with all other evidence and circumstances in passing upon the petition in which an order is sought for the sale of said land. Before such findings and orders shall become effective the same shall be approved by the judge holding the courts of the district or by the resident judge. (1945, c. 426, s. 7; 1949, c. 724, ss. 1-3.)

Editor's Note.—The 1949 amendment inserted the references to the estate of the ward being materially promoted and added the last sentence.

§ 33-33. Sale of ward's estate to make assets.—When a guardian has notice of a debt or demand against the estate of his ward, he may apply by petition, setting forth the facts, to the clerk of the superior court, for an order to sell so much of the personal or real estate as may be sufficient to discharge such debt or demand; and the order of the court shall particularly specify what property is to be sold and the terms of the sale; the procedure shall be as provided by article 29A of chapter 1 of the General Statutes; all petitions filed under the authority of this section wherein an order is sought for the sale of a ward's real estate or 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 estate is situated; if the order of sale demanded in the petition is for the sale of the ward's personal estate, the petition shall be filed in the office of the clerk of superior court of the county in which all or any of said personal estate is situated. The proceeds of sale under this section shall be considered as assets in the hands of the guardian for the benefit of creditors, in like manner as assets in the hands of a personal representative; and the same proceedings may be had against the guardian with respect to such assets as might be taken against an executor, administrator or collector in similar cases. Nothing herein contained shall be construed to divest the court of the power to order private sales as heretofore ordered in proper cases. (Rev., ss. 1800, 1801; Code, ss. 1604, 1605; R. C., c. 54, s. 34; 1789, c. 311, s. 5; 1868-9, c. 201, ss. 41, 42; 1945, c. 426, s. 2; c. 1084, s. 2; 1949, c. 719, s. 2; C. S. 2182.)

Cross Reference.—See § 33-31.1.

Editor's Note.—The first 1945 amendment struck out the words "wherein the guardianship was granted" formerly appearing after the word "court" in line four. And the amendment, as changed by the second 1945 amendment, inserted that part of the first sentence beginning with the word "all" in line ten.

The 1949 amendment, effective Jan. 1, 1950, inserted the words "the procedure shall be as provided by article 29A of chapter 1 of the General Statutes", beginning in line eight. It also struck out the former last clause of the first sentence relating to the revision and confirmation of the order of sale.

§ 33-34. To sell perishable goods on order of clerk.—Every guardian shall sell, by order of the clerk of the superior court, all such goods and chattels of his ward as may be liable to perish or be the worse for keeping. The procedure for the sale shall be as provided by article 29A of chapter 1 of the General Statutes. (Rev., s. 1787; Code, s. 1589; R. C., c. 54, s. 22; 1762, c. 69, s. 10; 1868-9, c. 201, s. 26; 1949, c. 719, s. 2; C. S. 2170.)

Editor's Note.—The 1949 amendment, effective Jan. 1, 1950, rewrote the second sentence.

Art. 4A. Guardians' Deeds Validated When Seal Omitted.

§ 33-35.1. Deeds by guardians omitting seal, prior to Jan. 1st, 1944, validated.—All deeds executed prior to the first day of January, 1944, by any guardian, acting under authority obtained by him from the superior court as required by law, in which the guardian has omitted to affix his seal after his signature and/or has omitted to affix the seal after the signature of his ward shall be good and valid, and shall pass the title to the land which the guardian was authorized to convey: Provided, however, this section shall not apply to any pending litigation. (1947, c. 531.)

Art. 5. Returns and Accounting.

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

Counsel Fees.—

The employment of counsel for legal advice and assistance in connection with the administration of the wards' estate is a proper expense to be charged in the guardian's account, if in reasonable amount, and for the benefit of the wards. Maryland Cas. Co. v. Lawing, 225 N. C. 103, 108, 33 S. E. (2d) 609.

Where the interests of the guardian and wards are antagonistic and the services rendered by the attorney are in the interest of the former rather than the latter the obligation to pay therefor is the individual liability of the guardian. Maryland Cas. Co. v. Lawing, 225 N. C. 103, 108, 33 S. E. (2d) 609, citing Lightner v. Boone, 221 N. C. 78, 88, 19 S. E. (2d) 144.

§ 33-42.1. Guardian required to exhibit statements.—At the time the accounts required by this article or 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 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. (1947, c. 596.)

Art. 7. Foreign Guardians.

§ 33-48. Right to removal of ward's personalty from state.

The petition and proceeding prescribed by this section are

jurisdictional, in order to authorize the transfer of the funds of an infant domiciled in this state to a guardian in another state; and an order, by the judge of the Superior Court or clerk, for its transfer otherwise is void. State v. Sawyer, 223 N. C. 102, 25 S. E. (2d) 443.

§ 33-49. Contents of petition; parties defendant.—The petitioner must show to the court a copy of his appointment as guardian and bond duly authenticated, and must prove to the court that the bond is sufficient, as well in the ability of the sureties as in the sum mentioned therein, to secure all the estate of the ward wherever situated: Provided, that in all cases where a banking institution, resident and doing business in a foreign state, is a guardian of any person or infant, and such banking institution is not required to execute a bond to qualify as guardian under the laws of the state wherein said guardian qualified and was appointed guardian of such infant, or infants, and no sureties are or were required by the state in which said banking institution qualified as guardian, and this fact affirmatively appears to the court, then the personal property and estate of such infant, or other person, may be removed from this state without the finding of a court with reference to any sureties, and the court in which the petition for the removal of the property of the ward is filed may order the transfer and removal of the property of the ward, and the payment and delivery of the same to the nonresident guardian of said ward without regard to whether a nonresident guardian has filed a bond with sureties; and the finding of the court that the said guardian is a banking institution and has duly qualified and been appointed guardian of said ward under the laws of the state where said ward, or wards, is or are residents, shall be sufficient. Any person may be made a party defendant to the proceeding who may be made a party defendant in civil actions under the provisions of the chapter entitled Civil Procedure. (Rev., ss. 1817, 1818; Code, ss. 1599, 1600; R. C., c. 54, s. 30; 1820, c. 1044, s. 2; 1842, c. 38; 1868-9, c. 201, ss. 36, 37; 1949, c. 253; C. S. 2196.)

Editor's Note.—The 1949 amendment added the proviso at the end of the first sentence. For brief account of amendment, see 27 N. C. Law Rev. 458.

§ 33-49.1. Transfer of guardianship.—When any ward, mental defective, or mentally disordered person, for whom a guardian or trustee has been appointed, lives in a county in this state other than the county in which letters were issued to such guardian or in which such trustee was appointed, the trustee or guardian may, by petition filed with the clerk of court of the county in which letters were issued or in which he was appointed, transfer the guardianship or trusteeship to the county of the residence of the ward, mental defective or mentally disordered person. Upon the removal of such guardianship or trusteeship, the clerk of the court of the county to which it is removed shall have the same powers and authority as he would have had if he had originally issued the letters of guardianship or appointed the trustee, and all reports and accounts required by law to be filed by the guardian or trustee shall be filed with the clerk of the court of the county to which such guardianship or trusteeship is removed. (1945, c. 194.)

Art. 9. Guardians of Estates of Missing Persons.

§ 33-56. Appointment.

Purpose of Article.—This article was enacted to provide for the preservation and protection of the estate of a person who has disappeared from the community of his residence and whose whereabouts has been unknown for three months or more and cannot, after diligent inquiry, be ascertained. Carter v. Lilley, 227 N. C. 435, 436, 42 S. E. (2d) 610.

It relates solely to estates of living persons, and where in a proceeding thereunder the court finds that the missing person is dead under the presumption of death arising from seven years' absence, the administration of the estate of such missing person becomes a matter for the probate court and proceedings under the statute are coram non judice. Carter v. Lilley, 227 N. C. 435, 42 S. E. (2d) 610.

Art. 10. Conservators of Estates of Missing Persons.

§ 33-63. Appointment of conservators for property of certain persons reported missing, etc.—Whenever a person, hereinafter referred to as an absentee, has been reported missing, or interned in a neutral country or beleaguered, besieged or captured by an enemy, and he 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, the clerk of the superior court of the county of such absentee's legal domicile or of the county where such property is situated, upon petition alleging the foregoing facts and showing the necessity for providing care of the property of such absentee made by any person who would have an interest in the property of the absentee were such absentee deceased, after notice to, or on receipt of proper waivers from the heirs and next of kin of the absentee as provided by law for the administration of an estate, and upon good cause being shown, may, after finding the facts to be as aforesaid, appoint any suitable person a conservator to take charge of the absentee's estate, under the supervision and subject to the further orders of the court. (1945, c. 469, s. 1.)

§ 33-64. Surety bond required; powers and duties.—The conservator shall post a surety bond in the same amount and under the same conditions as is required of guardians under the general guardianship laws of North Carolina, and shall possess the same powers and authority, and be subject to the same duties and requirements of guardians generally in this state. (1945, c. 469, s. 2.)

§ 33-65. Clerk may require provision for dependents.—The clerk of the superior court, if petitioned for that purpose by any interested person, may, if he finds it proper to do so, require the conservator to make ample and suitable provisions out of the estate in his hands for the support of the wife or husband and infant children of such absentee, as well as any other person dependent upon such absentee for support and maintenance. (1945, c. 469, s. 3.)

§ 33-66. Termination of conservatorship.—At any time upon petition signed by the absentee, or on petition of an attorney in fact acting under an adequate power of attorney granted by the absentee, the court shall direct the termination of the conservatorship and the transfer of all prop-

erty held thereunder to the absentee or to the designated attorney in fact. Likewise, if at any time subsequent to the appointment of a conservator it shall appear that the absentee has died and an executor or administrator has been appointed for his estate, the court shall direct the termination of the conservatorship and the transfer of all property of the deceased absentee held thereunder to such executor or administrator. (1945, c. 469, s. 4.)

Art. 11. Guardians of Children of Service Men.

§ 33-67. Clerk of superior court to act as temporary guardian to receive and disburse allotments and allowances.—In all cases where a citizen of this state is serving in the armed forces of the United States and has made an allotment or allowance to his child, children or other minor dependents as provided by the war time allowances to Service Men's Dependents Act or any other act of Congress, and the mother of said child, children or other minor dependents or other person of lawful age designated in said allowance or allotment to receive such moneys and disburse them for the benefit of said minor dependents shall die or become mentally incompetent, and such person so serving in the armed forces of the United States shall be reported as missing in action or as a prisoner of war and shall be unable to designate another person to receive and disburse said allotment or allowance to said minor dependents; then and in such event the clerk of the superior court of the county of the legal residence of said service man or person serving in the armed forces of the United States, is hereby authorized and empowered to act as temporary guardian of such minor dependents for the purpose of receiving and disbursing such allotments and allowance funds for the benefit of such minor dependents. (1945, c. 735.)

Cross References.—As to veterans' guardianship act, see chapter 34. As to veterans generally, see chapter 165.

Editor's Note.—The act from which this section was codified provides that it shall be retroactive in effect.

Chapter 34. Veterans' Guardianship Act.

Sec.
34-14.1. Payment of pension funds to dependent relatives.

§ 34-2. Definitions.—In this chapter:

The term "person" includes a partnership, corporation or an association.

The term "Bureau" means the United States Veterans' Bureau or its successor.

The terms "estate" and "income" shall include only moneys received by the guardian from the Bureau and all earnings, interests and profits derived therefrom.

The term "benefits" shall mean all moneys payable by the United States through the Bureau.

The term "Director" means the Director of the United States Veterans' Bureau or his successor.

The term "ward" means a beneficiary of the Bureau.

The term "guardian" as used herein shall mean any person acting as a fiduciary for a ward. (1929, c. 33, s. 2; 1945, c. 723, s. 2.)

Editor's Note.—The 1945 amendment changed this section by striking out the following: The term "State Service Officer" means such appointee of the North Carolina Commissioner of Labor as provided by § 95-4.

§ 34-10. Guardian's accounts to be filed; hearing on accounts.

If objections are raised to such an accounting, the court shall fix a time and place for the hearing thereon not less than fifteen days nor more than thirty days from the date of filing such objections, and notice shall be given by the court to the aforesaid bureau office and the North Carolina veterans commission by mail not less than fifteen days prior to the date fixed for the hearing.

(1945, c. 723, s. 2.)

Editor's Note.—

The 1945 amendment substituted in the next to the last sentence of this section the words "the North Carolina veterans commission" for the words "state service officer." As only this sentence was affected by the amendment the rest of the section is not set out.

§ 34-12. Compensation as 5 per cent; additional compensation; premiums on bonds.—Compensation payable to guardians shall not exceed 5 per cent of the income of the ward during any year. In the event of extraordinary services rendered by such guardian the court may, upon petition and after hearing thereon, authorize additional compensation therefor, payable from the estate of the ward. Notice of such petition and hearing shall be given the proper office of the Bureau and the North Carolina Veterans Commission in the manner provided in § 34-10. No compensation shall be allowed on the corpus of an estate received from a preceding guardian. The guardian may be allowed from the estate of his ward reasonable premiums paid by him to any corporate surety upon his bond. (1929, c. 33, s. 12; 1945, c. 723, s. 2.)

Editor's Note.—The 1945 amendment substituted the words "North Carolina Veterans Commission" for the words "State Service Officer."

§ 34-13. Investment of funds.

Applied in First Citizens Bank, etc., Co. v. Parker, 225 N. C. 480, 35 S. E. (2d) 489.

§ 34-14. Application of ward's estate.—A guardian shall not apply any portion of the estate of his ward for the support and maintenance of any person other than his ward, except upon order of the court after a hearing, notice of which has been given the proper officer of the Bureau and the North Carolina Veterans Commission in the manner provided in § 34-10. (1929, c. 33, s. 14; 1945, c. 723, s. 2.)

Editor's Note.—The 1945 amendment substituted the words "North Carolina Veterans Commission" for the words "State Service Officer."

For subsequent statute affecting this section, see § 34-14.1.

§ 34-14.1. Payment of pension funds to dependent relatives.—It shall be lawful for guardians of insane or incompetent persons who receive pensions or other benefits from the government of the United States of America on account of military service to pay to dependent relatives such an amount as shall be approved by the clerk of

the superior court having jurisdiction over said guardian, and when approved by a superior court judge.

The word "relative," as used herein, shall mean father, mother, brother, sister, nephew, niece, uncle, aunt, or any other relative, who, prior to appointment of said guardian, received any part of their maintenance from said ward. (1945, c. 479, ss. 1, 2.)

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

Editor's Note.—The 1945 amendment substituted the words "the North Carolina Veterans Commission" for the words "State Service Officers."

Chapter 35. Persons with Mental Diseases and Incompetents.

Sec.

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Art. 1. Definitions.

§ 35-1. Inebriates defined.

Editor's Note.—Prior to Session Laws 1945, c. 952, s. 1, the title of this chapter was "Insane Persons and Incompetents."

§ 35-1.1. Definitions of mental disease, mental defective, etc.—The words "mental disease," "mental disorder" and "mental illness" shall mean an illness which so lessens the capacity of the person to use his customary self-control, judgment, and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under treatment, care, supervision, guidance, or control. The terms shall be construed to include "lunacy," "unsoundness of mind," and "insanity."

A "mental defective" shall mean a person who is not mentally ill but whose mental development is so retarded that he has not acquired enough self-control, judgment, and discretion to manage himself and his affairs, and for whose own welfare or that of others, supervision, guidance, care, or control is necessary or advisable. The term shall be construed to include "feeble-minded" "idiot," and "imbecile," (1945, c. 952, s. 2.)

Art. 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 twelve 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 term 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 § 35-1, the clerk shall proceed to commit said inebriate to the department for inebriates at the state hospital in 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 appointed shall be subject to the laws now or which hereafter may be enacted for the control and handling of estates by guardians. 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. (Rev., s. 1890; Code, s. 1670; C. C. P., s. 473; 1919, c. 54; 1921, c. 156, s. 1; 1929, c. 203, s. 1; 1933, c. 192; 1945, c. 952, s. 3; C. S. 2285.)

Local Modification.—Guilford: 1945, c. 102.

Editor's Note.—

The 1945 amendment substituted "mental defective" for "idiot" and "mentally disordered" and "mentally disordered person" for "lunatic."

Mental incapacity is only cause for appointment of a guardian under this section. The section does not make physical incapacity alone, however complete, grounds for such appointment. The court is authorized to step in and delegate the power to manage the property of another only when that person has lost his mental capacity to do so in his own behalf. Goodson v. Lehmon, 224 N. C. 616, 31 S. E. (2d) 756.

Review by Superior Court Where Incompetent Judged Competent.—Where a person has been adjudged incompetent, under this section, and a trustee of his property appointed, and thereafter, upon petition before the clerk under § 35-4, by the person so adjudged incompetent, after his trustee or guardian has been made a party as required, he is found competent by a jury and is so adjudged by the clerk, the Superior Court has power to review the matter, on application of the trustee or guardian, and it would seem that the procedure provided in this section on appeal might appropriately be followed, although certiorari would ordinarily be proper. In re Jeffress, 223 N. C. 273, 25 S. E. (2d) 845.

Cited in McNeill v. McNeill, 223 N. C. 178, 25 S. E. (2d) 615.

§ 35-2.1. Guardian appointed when issues answered by jury in any case.—When a jury in the trial of any civil or criminal case shall find, in answer to appropriate issues, that a person is insane or without sufficient mental capacity to conduct business, it shall have the same effect as an adjudication before the clerk of the superior court and the clerk may forthwith appoint a guardian or trustee for the person so adjudged insane or incompetent. (1945, c. 96.)

§ 35-3.1. Ancillary guardian for insane or incompetent nonresident having real property in state.—Whenever it shall appear by petition, application, and due proof to the satisfaction of any clerk of the superior court of North Carolina that:

(1) There is real property situate in the county of said clerk in which a nonresident of the state of North Carolina has an interest or estate;

(2) That said nonresident is insane or incompetent and that a guardian has been appointed and is still serving for him or her in the state of his or her residence; and

(3) That such incompetent or insane non-resident has no guardian in the state of North Carolina;

Such clerk of the superior court before whom such petition, application and satisfactory proof is made shall thereupon be fully authorized and empowered to appoint in his county an ancillary guardian, which guardian shall have all the powers, duties and responsibilities with respect to the estate of said insane person, or incompetent, in the state of North Carolina as guardians otherwise appointed now have; and such ancillary guardian shall annually make an accounting to the court in this state and remit to the guardian in the state of the ward's residence any net rents of said real estate, or any proceeds of sale, to the guardian of the state of residence of said insane person, or incompetent.

A transcript of the record of any court of record appointing a guardian of a nonresident in the state of his residence shall be conclusive proof of the fact of incompetency or insanity and of the appointment of such guardian of the residence of the insane person or incompetent. Provided, that such transcript shall show that such guardianship is still in effect in the state of the ward's residence, and that the incompetency of the ward still exists.

Upon the appointment of an ancillary guardian in this state under this article, the clerk of the superior court shall forthwith notify the clerk of the superior court of the county of the ward's residence, and shall also notify the guardian in the state of the ward's residence. (1949, c. 986.)

Editor's Note.—For brief comment on this section, see 27 N. C. Law Rev. 457.

§ 35-4. Restoration to sanity or sobriety; effect; how determined; appeal.

The petitioner may appeal from the finding of said jury to the next term of the superior court, when the matters at issue shall be regularly tried de novo before a jury. (Rev., s. 1893; Code, s. 1672; 1901, c. 191; 1903, c. 80; 1879, c. 324, s. 4; 1937, c. 311; 1941, c. 145; 1949, c. 124; C. S. 2287.)

Local Modification.—Guilford: 1945, c. 102.

Editor's Note.—The 1949 amendment added the above sen-

tence at the end of the section. As the rest of the section was not affected by the amendment it is not set out.

Appeal.—

On petition before the clerk under § 35-2, to declare a person incompetent from want of understanding to manage his affairs, which may be filed by any person in behalf of the one deemed incompetent, either petitioner or respondent is permitted to appeal from the finding of the jury to the next term of the Superior Court, when the matters at issue are to be regularly tried de novo before a jury. Conversely, no such right of appeal is provided by this section, when the preceding is for restoration to competency. In re Jeffress, 223 N. C. 273, 274, 25 S. E. (2d) 845.

§ 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 feeble-minded 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 term 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.)

Editor's Note.—The 1949 amendment rewrote the second paragraph.

§ 35-4.2. Restoration of rights of mentally disordered persons where no guardian had been appointed.—When any person who shall have been committed to a state hospital or state school for the feeble-minded or to a private hospital for mental cases and for whom no guardian has been appointed shall have been discharged from that commitment, he may petition or in his behalf any interested person may petition the clerk of the superior court of the county in which such person has residence for the restoration of any rights of which he may have been deprived by his commitment.

The clerk shall then 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. On the basis of evidence presented by the person and the medical affidavit or affidavits the clerk shall determine the competency of the person and may if it is deemed proper issue an order restoring any rights of which the person may have been deprived by his commitment. (1947, c. 537, s. 23.)

Art. 3. Sales of Estates.

§ 35-10. Clerk may order sale, renting or mortgage.—When it appears to any clerk of the superior court by report of the guardian of any mental defective, inebriate or mentally disordered person, that his personal estate has been exhausted, or is insufficient for his support, and that he is likely to become chargeable on the county, the clerk may make an order for the sale, mortgage or renting of his personal or real estate, or any part thereof, in such manner and upon such terms as he may deem advisable. The procedure for any sale made pursuant to this section shall be as provided by article 29A of chapter 1 of the General Statutes. Any order made under the authority of this section for the sale, mortgage or renting of real estate, or both real and personal property, shall be made by and all proceedings shall be had before the clerk of the superior court of the county in which all or any part of the real estate is situated; if the order applied for is for the sale, mortgage or renting of personal property, then said order may be made and the proceedings may be had before the clerk of the superior court of the county in which all or any part of the personal property is situated; such order shall specify particularly the property thus to be disposed of, with the terms of renting or sale or mortgage, and shall be entered at length on the records of the court and all sales and rentings and conveyances by mortgages or deeds in trust made under this section shall be valid to convey the interest and estate directed to be sold or conveyed by mortgage or deed in trust, and the title thereof shall be conveyed by a commissioner to be appointed by the clerk; or the clerk may direct the guardian to file his petition for such purpose. Nothing herein contained shall be construed to divest the court of the power to order private sales as heretofore ordered in proper cases. (Rev., s. 1896; Code, s. 1674; R. C., c. 57, s. 4; 1801, c. 589; 1931, c. 184, s. 1; 1945, c. 426, s. 3; c. 952, s. 4; c. 1084, s. 3; 1949, c. 719, s. 2; C. S. 2291.)

Editor's Note.—

The first 1945 amendment inserted that part of the third sentence ending with the second semi-colon, and substituted near the end of the sentence the words "a commissioner to be appointed by the clerk" for the words "such person as the clerk may appoint on confirming the sale." The second 1945 amendment substituted, in the first sentence, "mental defective" for "idiot" and "mentally disordered person" for "lunatic." The third 1945 amendment added the last sentence.

The 1949 amendment, effective Jan. 1, 1950, inserted the second sentence.

See § 33-31.1.

For act validating proceedings instituted by guardian relating to estate of ward under provisions of this chapter see Session Laws 1945, c. 426, s. 8.

§ 35-11. Purposes for which estate sold or mortgaged; parties; disposition of proceeds.—When it appears to the clerk, upon the petition of the guard

ian of any mental defective, inebriate or mentally disordered person, that a sale or mortgage of any part of his real or personal estate is necessary for his maintenance, or for the discharge of debts unavoidably incurred for his maintenance, or when the clerk is satisfied that the interest of the mental defective, inebriate or mentally disordered person would be materially and essentially promoted by the sale or mortgage of any part of such estate; or when any part of his real estate is required for public purposes, the clerk may order a sale thereof to be made by such person, in such way and on such terms as he shall adjudge. The clerk, if it be deemed proper, may direct to be made parties to such petition the next of kin or presumptive heirs of such person with mental disorder or inebriate. And if on the hearing the clerk orders such sale or mortgage, the same shall be made and the proceeds applied and secured, and shall descend and be distributed in like manner as is provided for the sale of infants' estates decreed in like cases to be sold on application of their guardians, as directed in the chapter entitled Guardian and Ward. The word "mortgage" whenever used herein shall be construed to include deeds in trust. All petitions filed under the authority of this section wherein an order is sought for the sale or mortgage of real estate, 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 estate is situated; if the order of sale sought in the petition is for the sale or mortgage of personal property, the petition shall be filed in the office of the clerk of the superior court of the county in which any or all of such personal property is situated. The procedure for any sale made pursuant to this section shall be provided by article 29A of chapter 1 of the General Statutes. (Rev., s. 1897; Code, s. 1675; R. C., c. 57, s. 5; 1931, c. 184, s. 2; 1945, c. 426, s. 4; c. 952, s. 5; c. 1084, s. 4; 1949, c. 719, s. 2; C. S. 2292.)

Editor's Note.—The first 1945 amendment, as changed by the third 1945 amendment, added the next to last sentence. The second 1945 amendment substituted, in the first sentence, "mental defective" for "idiot" and "mentally disordered person" for "lunatic." And it substituted "person with mental disorder" for "nonsane person" in the second sentence.

The 1949 amendment, effective Jan. 1, 1950, added the last sentence.

§ 35-12. Sale of land of wife of lunatic upon petition.—Where the wife of a lunatic owns real estate in her own right the sale of which will promote her interest, a sale of the same may be made upon the order of the clerk of the superior court of the county where the land lies, upon the petition of the wife of said lunatic and the guardian of the lunatic husband, and the proceeds of said sale shall be paid to the wife of said lunatic. The procedure for any sale made pursuant to this section shall be as provided by article 29A of chapter 1 of the General Statutes. (Rev., s. 1898; Code, s. 1687; 1881, c. 361; 1949, c. 719, s. 2; C. S. 2293.)

Editor's Note.—The 1949 amendment, effective Jan. 1, 1950, added the second sentence.

Art. 4. Mortgage or Sale of Estates Held by the Entireties.

§ 35-14. Where one spouse or both incompetent; special proceeding before clerk.—All petitions filed under the authority of this section shall be filed in the office of the clerk of the superior court of the county where the real estate or any part of same is situated. (1935, c. 59, s. 1; 1945, c. 426, s. 5; c. 1084, s. 5.)

Editor's Note.—

The first 1945 amendment, as changed by the second 1945 amendment, added the above sentence at the end of this section. As the rest of the section was not affected by the amendments it is not set out.

§ 35-15. General law applicable; approved by judge.—The proceedings herein provided for shall be conducted under and shall be governed by laws pertaining to special proceedings, and it shall be necessary for any sale or mortgage or other conveyance herein authorized to be approved by the resident judge or the judge holding the courts in the judicial district wherein the property or any part of same is located. (1935, c. 59, s. 2; 1945, c. 426, s. 6.)

Editor's Note.—The 1945 amendment inserted the words "or any part of same" near the end of this section.

Art. 5. Surplus Income and Advancements.

§ 35-20. Advancement of surplus income to certain relatives.

As to payment of pension funds to dependent relatives of incompetent veterans, see § 34-14.1.

Art. 6. Detention, Treatment, and Cure of Inebriates.

§ 35-31. Petition for examination; warrant for hearing; action without petition; evidence; confinement; time and notice of hearing.

If the petition or supplemental affidavit, filed pursuant to this section, states that the alleged inebriate's condition is such as to endanger either himself or others, or if the sheriff or other person serving the warrant, or the clerk who issued the warrant, believes that the alleged inebriate's condition is such as to endanger either himself or others, the clerk may order that such inebriate be confined in the county jail, or in a place specifically designed for the care and confinement of such persons, until he is judicially declared to be or not to be an inebriate and, if found to be an inebriate, until he (or she) is accepted as a patient in the proper state institution or until he is otherwise discharged according to law.

The hearing before the clerk of the superior court shall be held at the courthouse at such time and upon such notice to the alleged inebriate, as the clerk may determine. (1921, c. 156, s. 3; 1941, c. 226; 1949, c. 980; C. S. 2304(b).)

Editor's Note.—The 1949 amendment added the above two paragraphs at the end of this section. As the original section was not changed it is not set out.

§ 35-35.1. Commitment of inebriates for mental disorders.—Whenever an inebriate under a commitment to the state hospital at Raleigh is found to be suffering from a mental disorder he may be committed as a mentally disordered person by having two physicians not connected with the state hospital at Raleigh examine him at the request of the superintendent of the state hospital at Raleigh, without removing said inebriate and alleged mentally disordered person from the state hospital. If these said two physicians find that the inebriate is mentally disordered, they shall sign the usual affidavit for commitment of an individual as mentally disordered and forward same

to the clerk of the superior court of the county in which the inebriate is settled: whereupon the said clerk of court may declare the said person committed to the proper hospital as a mentally disordered person as provided in this chapter. Upon adjudication the superintendent shall notify the sheriff of the county in which the alleged mentally disordered person is settled, and it shall be said sheriff's duty to convey the mentally disordered person to the proper hospital. (1945, c. 952, s. 6.)

Art. 7. Sterilization of Persons Mentally Defective.

§ 35-40.1. Eugenics board authorized to accept gifts.—The eugenics board of North Carolina is hereby authorized and empowered to accept gifts from any source to be used by the board for the furtherance of the purposes for which said board was created. (1945, c. 784.)

§ 35-44. Copy of petition served on patient.—(a) A copy of said petition, duly certified by the secretary of the said board to be correct, must be served upon the inmate, patient or individual resident, together with a notice in writing signed by the secretary of the said board designating the time and place not less than twenty days before the presentation of such petition to said board when and where said board 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 term 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 proceedings under this article, to defend the rights and interests of the said inmate, patient or individual resident. And such guardian ad litem shall be served likewise with a copy of the aforesaid petition and notice, and shall under all circumstances be given at least twenty 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 term 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 twenty-one 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 twenty 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 non-institutional individual shall submit to the superintendent of the institution of which the subject is a patient or inmate, or to the superintendent of public welfare 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 non-institutional 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 board. (1933, c. 224, s. 9; 1935, c. 463, ss. 3, 6; 1947, c. 93.)

Editor's Note.—The 1947 amendment rewrote this section.

Art. 8. Temporary Care and Restraint of Inebriates, Drug Addicts and Persons Insane.

§ 35-58. Hospitals and sanatoriums may restrain and treat alcohol and drug addicts.

Action for Abuse of Void Process.—Plaintiff alleged that she had been received in defendant's institution on the authority of a letter from one who claimed to have been appointed her guardian and that she was detained for a longer period than 20 days. It was also alleged that the entire proceeding "was totally null and void" and later was so determined by the courts. It was held that plaintiff could not be permitted to maintain, as against demurrer, a cause of action for abuse of process upon allegation that the process was totally null and void. McCartney v. Appalachian Hall, Inc., 230 N. C. 60, 51 S. E. (2d) 886.

Art. 9. Mental Health Council.

§ 35-61. Creation of council; membership; chairman.—There is hereby created a mental health council to be composed of the following persons: The superintendent of mental hygiene, the chairman of the North Carolina hospitals board of control, the commissioner of public welfare, the director of the division of psychiatric and psychological services of the state board of public welfare, the general business manager for institutions, the state public health officer, a representative of the North Carolina clerks of court association, the superintendent of the North Carolina state board of public instruction, the commissioner of correctional institutions, the psychiatric advisor on the advisory panel of medical specialists for the physical restoration program of the division of vocational rehabilitation of the North Carolina state board of public instruction, a representative of the medical society of the state of North Carolina, a representative of the North Carolina neuropsychiatric association, a representative of the North Carolina mental hygiene society, a representative of the department of psychiatry of each of the four-year medical schools in the state.

The mental health council shall choose its own chairman. (1945, c. 952, s. 61.)

§ 35-62. Functions; meetings; annual report.—The function of the mental health council shall be to consider ways and means to promote mental health in North Carolina and to study needs for new legislation pertaining to mental health of the

citizens of the state. The council shall meet at least twice a year and shall file an annual report with the governor. (1945, c. 952, s. 61.)

§ 35-63. Members not state officers. — The members of the mental health council shall not be considered as state officers within the meaning of article XIV, section seven of the North Carolina constitution. (1945, c. 952, s. 61.)

Chapter 36. Trusts and Trustees.

Art. 1. Investment and Deposit of Trust Funds.

Sec.
36-5.1. Employee trusts.

Art. 4. Charitable Trusts.

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

Art. 5. Uniform Trusts Act.

36-32. Banks holding stock or bonds in name of nominee.

Art. 1. Investment and Deposit of Trust Funds.

§ 36-1. Certain investments deemed cash.

Local Modification.—Forsyth: 1945, c. 876, s. 4.

§ 36-2. Investment of trust funds in county, city, town, or school district bonds.

Local Modification.—Forsyth: 1945, c. 876, s. 4.

§ 36-3. Investment in building and loan and federal savings and loan associations.

Local Modification.—Forsyth: 1945, c. 876, s. 4.

§ 36-4. Investment in registered securities.— Any guardian or trustee having in hand surplus funds belonging to a minor ward, incompetent person, or persons non compos mentis, may, if he so elects, invest the same in registered securities within the classes designated by §§ 36-1 and 36-2, the registration of said securities as to principal only to be in the name of said minor ward, incompetent person, or persons non compos mentis.

Upon delivery of such registered securities to the clerk of the superior court of the county in which the estate of said minor ward, incompetent person, or persons non compos mentis, is being administered, said clerk of the superior court shall give said guardian or trustee a receipt for the same and said clerk of the superior court shall thereafter hold said securities for said ward, incompetent person, or person non compos mentis, subject only to final disposition thereof to be approved by the resident judge or presiding judge of the superior court: Provided, however, all income accruing therefrom shall be paid to said guardian or trustee in the same manner and for the same purposes as any other income of said estate derived from other sources.

Whenever any guardian or trustee shall have delivered to the clerk of the superior court registered securities as hereinbefore provided, he shall be entitled to credit in his account as guardian or trustee for the amount actually expended for such securities, and his bond as such guardian or trustee shall thereupon be reduced in an amount equal in proportion to the total amount of the bond as the funds expended for the securities are to the total amount of the estate covered by such bond. (1935, c. 449; 1943, c. 96; 1945, c. 713.)

Editor's Note.—
The 1945 amendment made this section applicable to trustees and incompetent persons.

§ 36-5.1. Employee trusts.—Pension, profit sharing, stock bonus, annuity or other employee trusts established by employers for the purpose of distributing the income and principal thereof to some or all of their employees, or the beneficiaries of such employees, shall not be invalid as violating any laws or rules against perpetuities or restraints on the power of alienation of title to property; but such trusts may continue for such period of time as may be required by the provisions thereof to accomplish the purposes for which they are established. (1945, c. 8.)

Art. 4. Charitable Trusts.

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

The rule against perpetuities does not apply to charitable trusts. American Trust Co. v. Williamson, 228 N. C. 458, 46 S. E. (2d) 104.

Devise Giving Trustees Power to Convey.—A devise of property in trust subject to an intervening life estate, with direction to the trustees to keep the principal invested and use the proceeds for purposes designated, gives the trustees the power to convey the real estate in fee, since the right to invest and use the proceeds necessarily implies the power to convert into proceeds by sale. Hall v. Wardwell, 228 N. C. 562, 46 S. E. (2d) 556.

§ 36-23.1. Gifts, etc., for religious, educational, charitable or benevolent uses or purposes.—1. Declaration of Policy.—It is hereby declared to be the policy of the state of North Carolina that gifts, transfers, grants, bequests, and devises for religious, educational, charitable, or benevolent uses or purposes, or for some or all of such uses or purposes, are and shall be valid, notwithstanding the fact that any such gift, transfer, grant, bequest, or devise shall be in general terms, and this section shall be construed liberally to effect the policy herein declared.

2. No Gift, Transfer, etc., Invalid for Indefiniteness.—No gift, transfer, grant, bequest, or devise of property or income, or both, in trust or otherwise, for religious, educational, charitable, or benevolent purposes, or for some or all of such purposes, is or shall be void or invalid because such gift, transfer, grant, bequest, or devise is in general terms, or is uncertain as to the specific purposes, objects, or beneficiaries thereof, or because the trustee, donee, transferee, grantee, legatee, or devisee, or some or all of them, is given no specific instructions, powers, or duties as to the manner or means of effecting such purposes. When any such gift, transfer, grant, bequest, or devise has been or shall be made in general terms the trustee, donee, transferee, grantee, legatee, or devisee, or other person, corporation, association, or entity charged with carrying such purposes into effect, shall have the right and power: to prescribe or to select from time to time one or more specific objects or purposes for which any trust

or any property or income shall be held and administered; to select or to create the machinery for the accomplishment of such objects and purposes, selected as hereinabove provided, or as provided by the donor, transferor, grantor, or testator, including, by way of illustration but not of limitation, the accomplishment of such objects and purposes by the acts of such trustee or trustees, donee, transferee, grantee, legatee, or devisee, or their agents or servants, or by the creation of corporations or associations or other legal entities for such purpose, or by making grants to corporations, associations, or other organizations then existing, or to be organized, through and by which such purposes can or may be accomplished, or by some or all of the said means of accomplishment, or any other means of accomplishment not prohibited by law.

3. Enforcement.—Any gift, transfer, grant, bequest, or devise for religious, educational, charitable, or benevolent uses or purposes which is or shall be valid under the provisions of this section may be enforced in a suit for a writ of mandamus by the attorney general of the state of North Carolina in any court of the state having original jurisdiction in equity, and such court shall have the power to enter judgment requiring the trustee, donee, transferee, grantee, legatee, or devisee, as the case may be, to make such selection as may be required of the purposes for which the property or income, or both, shall be applied, and the means, method, and manner of applying the same. The remedy for enforcement as herein provided is in addition to any other means of enforcement now in existence or which may be hereafter provided for by act of the general assembly.

4. Construction with Other Acts.—This section is in addition to any prior act or acts of the general assembly adopted for the purpose of preserving and sustaining any gift, transfer, grant, bequest, or devise for religious, educational, charitable, or benevolent uses or purposes, and any such prior act or acts or any part thereof which will aid the provisions of this section in sustaining and preserving any such gift, transfer, grant, bequest, or devise shall be read and construed in conjunction herewith. (1947, c. 630, ss. 1-4.)

Editor's Note.—For discussion of this section, see 25 N. C. Law Rev. 476. As to the doctrine of cy pres in North Carolina, see 27 N. C. Law Rev. 591.

Art. 5. Uniform Trusts Act.

§ 36-29. Trustee selling from one trust to another trust.—No trustee shall as trustee of one trust sell property to itself as trustee of another trust: Provided, assets of trust held by any bank or trust company under the supervision of the state banking commission may be sold or transferred from one trust to another trust if such transfer is expressly authorized by the instrument creating the trust to which the transfer is made, or if such transfer is approved by the board of directors by unanimous vote at a regular meeting, such action being recorded in the minutes. (1939, c. 197, s. 6; 1945, c. 127, s. 3; c. 743 s. 3.)

Editor's Note.—The first 1945 amendment added the proviso. The second 1945 amendment substituted "to" for "from" in line eight.

§ 36-32. Banks holding stock or bonds in name of nominee.—A bank holding stock or bonds as fiduciary may hold it in the name of a nominee, without mention of the trust in the stock or bonds certificate or stock or bonds registration book. Provided, that (1) the trust records and all reports or accounts rendered by the fiduciary clearly show the ownership of the stock or bonds by the fiduciary and the facts regarding its holdings; (2) the nominee shall not have possession of the stock or bonds certificate or access thereto except under the immediate supervision of the fiduciary. The fiduciary shall personally be liable for any loss to the trust resulting from any act of such nominee in connection with such stock or bonds so held. (1939, c. 197, s. 9; 1945, c. 292.)

Editor's Note.—The 1945 amendment inserted the word "or bonds" after the word "stock" wherever it appeared in this section.

Chapter 38. Boundaries.

§ 38-1. Special proceeding to establish.

Call for Named Corner Is Binding.—Plaintiffs in a processioning proceeding, under this chapter, are bound by the call in their deed for a named corner whether it be marked or unmarked. Cornelison v. Hammond, 224 N. C. 757, 32 S. E. (2d) 326.

Procedure.—In a processioning proceeding under this chapter, where the only issue is the true boundary line, plaintiffs, as a matter of right, are entitled to have that issue answered by jury so that controversy may be ended by judicial decree, as the statute is expressly designed to provide a means of settlement by an orderly proceeding in court. Cornelison v. Hammond, 225 N. C. 535, 35 S. E. (2d) 633.

Applied in Tice v. Winchester, 225 N. C. 673, 36 S. E. (2d) 257.

Cited in Kelly v. King, 225 N. C. 709, 36 S. E. (2d) 220.

§ 38-3. Procedure.

A defense bond is not required in a special proceeding to establish boundaries. Roberts v. Sawyer, 229 N. C. 279, 49 S. E. (2d) 468.

Issue Is Location of Dividing Line.—In processioning proceeding under this chapter, when cause is heard on appeal, unless pleadings are complicated by other allegations, the only issue is, where is the true location of dividing line. Cornelison v. Hammond, 225 N. C. 535, 35 S. E. (2d) 633.

Proceeding Assimilated to Action to Quiet Title.—If tit becomes involved in a processioning proceeding, the proceeding becomes in effect an action to quiet title under § 41-1 Roberts v. Sawyer, 229 N. C. 279, 49 S. E. (2d) 468.

Same—Transfer to Civil Issue Docket.—Where in a speci proceeding under this chapter to establish a boundary lir the defendant denies by answer the petitioner's title a pleads twenty years' adverse possession (§ 1-40) as a d fense, the proceeding is assimilated to an action to qu title (§ 41-10) and the clerk, as directed by § 1-399, shou "transfer the cause to the civil issue docket for trial du ing term upon all issues raised by pleadings," in accordar with rules of practice applicable to such actions originally instituted. Simmons v. Lee, 230 N. C. 216, S. E. (2d) 79.

Same—Issues Raised—Waiver of Jury Trial.—Where a s cial proceeding to establish a boundary line is assi lated to an action to quiet title by the defendant's answ the issues raised by the pleadings are (1) whether petitior own the land described in his petition, and (2) as to location of the land so described. In such case if defe ant does not tender issues pertinent to the issues ab stated he waives his right to a trial by jury. Simmons Lee, 230 N. C. 216, 53 S. E. (2d) 79.

Same—Compulsory Reference—Exceptions Not Giving R to Jury Trial.—Where compulsory reference is ordered i special proceeding to establish a boundary line, upon fendant's denial of petitioners' title and plea of title

twenty years adverse possession, defendant's exception to the order of reference and exceptions to findings of fact made by the referee do not entitle him to a jury trial when he tenders issues which relate only to questions of fact based upon his exceptions and fails to tender issues of fact which arise upon the pleadings and to relate such issues to his exceptions and to the findings by their respective numbers. Simmons v. Lee, 230 N. C. 216, 53 S. E. (2d) 79.

§ 38-4. Surveys in disputed boundaries.

Cited in Roberts v. Sawyer, 229 N. C. 279, 49 S. E. (2d) 468.

Chapter 39. Conveyances.

Art. 1. Construction and Sufficiency.

Art. 2. Conveyances by Husband and Wife.

Art. 5A. Control Corners in Real Estate Developments.

Art. 1. Construction and Sufficiency.

§ 39-1. Fee presumed, though word "heirs" omitted.

Same Rule as for Construction of Devises.— Decisions construing § 31-38, pertaining to the construction of wills, are pertinent in construing this section, since the statutes are similar in wording and effect. Artis v. Artis, 228 N. C. 754, 47 S. E. (2d) 228.

A devise generally or indefinitely with power of disposition creates a fee. Hardee v. Rivers, 228 N. C. 66, 67, 44 S. E. (2d) 476.

Rejection of Repugnant Clause Where Granting Clause and Habendum Convey Fee.— Where the granting clause and the habendum convey the entire estate in fee simple, and the warranty is in harmony therewith, a clause in any other part of the instrument which undertakes to divest or limit the fee simple title will be rejected as repugnant to the estate and interest conveyed. Artis v. Artis, 228 N. C. 754, 47 S. E. (2d) 228; Pilley v. Smith, 230 N. C. 62, 51 S. E. (2d) 923.

Applied in Jackson v. Powell, 225 N. C. 599, 35 S. E. (2d) 892.

§ 39-2. Vagueness of description not to invalidate.

Application.— When land is described as adjoining or bounded by certain other tracts, and (1) there are certain other identifying terms such as "known as the A tract;" or (2) there are references to an identifiable muniment or source of title, such as the same land conveyed by B to C; or (3) the land is designated by such a term as the home place of D; or (4) adjoining landowners are named and it is shown that grantor has no other land in the vicinity which may be embraced within such bounds, the description is not void for vagueness and it may be aided by parol evidence. Peel v. Calais, 224 N. C. 421, 31 S. E. (2d) 440.

§ 39-6. Revocation of deeds of future interest made to persons not in esse.

Editor's Note.— For comment on the 1943 amendment, see 21 N. C. Law Rev. 359.

1943 Amendment Is Constitutional.— Even though the statutory power of revocation of a voluntary conveyance of future interests in lands limited to persons not in esse be regarded as a vested right, the 1943 amendment to this section, giving the grantor six months after its effective date to exercise the right of revocation or to file notice of intention to do so, is a reasonable limitation, and therefore the application of the limitation of the amendment to deeds executed prior to its effective date is constitutional. Pinkham v. Unborn Children of Pinkham, 227 N. C. 72, 40 S. E. (2d) 690.

Power of Revocation Is Not a Vested Right.— The right to revoke a voluntary conveyance of future interests in lands limited to persons not in esse is a personal power and privilege created by this section and not a vested right within constitutional protection. Pinkham v. Unborn Children of Pinkham, 227 N. C. 72, 40 S. E. (2d) 690.

Power Rests Solely in the Grantor.— The power to revoke future interests conveyed by voluntary deeds to persons not in esse under the provisions of this section, rests solely in the grantor conveying such interests, and where deeds are executed by owner of lands to each of his children for the purpose of dividing his lands among them, the fact that each of the children joins in the deeds to the others gives them no right upon the death of the grantor to revoke the contingent limitation over to unborn children of one of them, since they cannot succeed the grantor in the power of revocation and are strangers to that power. Pinkham v. Unborn Children of Pinkham, 227 N. C. 72, 40 S. E. (2d) 690.

Equity Jurisdiction over Trusts Is Not Involved.— In determining the validity of a deed revoking a voluntary conveyance of future interests limited to persons not in esse, the equitable jurisdiction of the court over trust estates is not involved. Pinkham v. Unborn Children of Pinkham, 227 N. C. 72, 40 S. E. (2d) 690.

When Child "in Being".— Grantor executed deed to his son for life and then to his son's children in fee. Thereafter the grantor and the grantee undertook to revoke the restrictive provision in the deed and joined in conveying the title to a third person. A child was born of the marriage of the grantee in the original deed less than 280 days after the attempted revocation. It was held that the child was in esse at the time of the attempted revocation and therefore the revocation was ineffectual. For the purpose of capacity to take under a deed and for the purpose of inheritance, it will be presumed, in the absence of evidence to the contrary that a child is in esse 280 days prior to its birth. Mackie v. Mackie, 230 N. C. 152, 52 S. E. (2d) 352.

A child born June 9, 1898, was "in being" within the meaning of this section on January 15, 1898. Id.

Applied, as to revocation within six months after effective date of 1943 amendment, in Kirkland v. Deck, 228 N. C. 439, 45 S. E. (2d) 538.

§ 39-6.1. Validation of deeds of revocation of conveyances of future interests to persons not in esse.

—All deeds or instruments heretofore executed, revoking any conveyance of future interest made to persons not in esse, are hereby validated insofar as any such deed of revocation may be in conflict with the provisions of General Statutes § 39-6.

All such deeds of revocation heretofore executed are hereby validated and no such deed of revocation shall be held to be invalid by reason of not having been executed within the six-month period prescribed in the third proviso of General Statutes § 39-6. (1947, c. 62.)

Editor's Note.— The act from which this section was codi-

fied became effective on February 11, 1947, and provided that its provisions shall not affect pending litigation.

Art. 2. Conveyances by Husband and Wife.

§ 39-7. Instruments affecting married woman's title; husband to execute. — Every conveyance, power of attorney, or other instrument affecting the estate, right or title of any married woman in lands, tenements or hereditaments must be executed by such married woman and her husband, and due proof or acknowledgment thereof must be made as to the husband and due proof or acknowledgment thereof must be made as to the wife, and such acknowledgment or proof as to the execution by the husband and such acknowledgment or proof as to the execution by the wife shall be taken and certified as provided by law. Any conveyance, power of attorney, contract to convey, mortgage, deed of trust or other instrument executed by any married woman in the manner by this chapter provided, and executed by her husband also, shall be valid in law to pass, bind or charge the estate, right, title and interest of such married woman in and to all such lands, tenements and hereditaments or other estate, real or personal, as shall constitute the subject matter or be embraced within the terms and conditions of such instrument or purport to be passed, bound, charged or conveyed thereby. (Rev., s. 952; Code, s. 1256; 1899, c. 235, s. 9; C. C. P., s. 429, subsec. 6; 1868-9, c. 277, s. 15; 1945, c. 73, s. 4; C. S. 997.)

Editor's Note.—
The 1945 amendment omitted provisions relating to the private examination of the wife.

For repeal of laws requiring private examination of married women, see § 47-116.

§ 39-8. Acknowledgment at different times and places; before different officers; order immaterial. —In all cases of deeds, or other instruments executed by husband and wife and requiring registration, the probate of such instruments as to the husband and due proof or acknowledgment of the wife may be taken before different officers authorized by law to take probate of deeds, and at different times and places, whether both of said officials reside in this state or only one in this state and the other in another state or country. And in taking the probate of such instruments executed by husband and wife, it is immaterial whether the execution of the instrument was proven as to or acknowledged by the husband before or after due proof as to or acknowledgment of the wife. (Rev., s. 953; 1899, c. 235, s. 9; 1895, c. 136; 1945, c. 73, s. 5; C. S. 998.)

Editor's Note.—
The 1945 amendment omitted provisions relating to the private examination of the wife.

For repeal of laws requiring private examination of married women, see § 47-116.

This section has no application to parol trusts, and does not prohibit their establishment by parol evidence. Thompson v. Davis, 223 N. C. 792, 794, 28 S. E. (2d) 556.

§ 39-9. Absence of wife's acknowledgment does not affect deed as to husband.—When an instrument purports to be signed by a husband and wife the instrument may be ordered registered, if the acknowledgment of the husband is duly taken, but no such instrument shall be the act or deed of the wife unless proven or acknowledged by her according to law. (Rev., s. 954; 1899, c. 235, s. 8; 1901, c. 637; 1945, c. 73, s. 6; C. S. 999.)

Editor's Note.—The 1945 amendment omitted provisions relating to the private examination of the wife.

For repeal of laws requiring private examination of married women, see § 47-116.

§ 39-11. Certain conveyances not affected by fraud if acknowledgment or privy examination regular.—No deed conveying lands nor any instrument required or allowed by law to be registered, executed by husband and wife since the eleventh of March, one thousand eight hundred and eighty-nine, if the acknowledgment or private examination of the wife is thereto certified as prescribed by law, shall be invalid because its execution or acknowledgment was procured by fraud, duress or undue influence, unless it is shown that the grantee or person to whom the instrument was made participated in the fraud, duress or undue influence, or had notice thereof before the delivery of the instrument. Where such participation or notice is shown, an innocent purchaser for value under the grantee or person to whom the instrument was made shall not be affected by such fraud, duress or undue influence. (Rev., s. 956; 1889, c. 389; 1899, c. 235, s. 10; 1945, c. 73, s. 7; C. S. 1001.)

Editor's Note.—The 1945 amendment inserted the words "acknowledgment or" in line five.

For repeal of laws requiring private examination of married women, see § 47-116.

Applied, as to married woman's attack upon certificate of acknowledgment and privy examination, in Lee v. Rhodes, 230 N. C. 190, 52 S. E. (2d) 674.

§ 39-13.1. Validation of certain deeds, etc., executed by married women without private examination.—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. (1945, c. 73, s. 21½.)

Art. 3. Fraudulent Conveyances.

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

III. RIGHTS AND LIABILITIES OF PARTIES AND PURCHASERS.

Conveyance Is Valid between the Parties.—The power of the court to set aside a fraudulent conveyance at the instance of creditors is derived from this section, which has not penalized such a transaction by declaring the deed utterly void as against all persons and for all purposes, but has expressly limited the remedy to the aggrieved creditor and has left the deed as it stands between the parties. Lane v. Becton, 225 N. C. 457, 35 S. E. (2d) 334.

§ 39-23. Sales in bulk presumed fraudulent.—The sale in bulk of a large part or the whole of a stock of merchandise, otherwise than in the ordinary course of trade and in regular and usual prosecution of the seller's business, shall be void against the creditors of the seller, unless the seller at least seven days before the sale, makes an inventory showing the quantity and, so far as possible, the cost price to the seller of such articles included in the sale, and shall seven days before the proposed sale notify the creditors of the proposed sale, and the price, terms and conditions thereof. Such sale, even though the above requirements as to inventory and notice are fully complied with, renders the transaction prima facie fraudulent, and open to attack on such grounds by creditors of the seller. If the owner of said stock

of goods shall at any time before the sale execute a good and sufficient bond, to a trustee therein named, in an amount equal to the actual cash value of the stock of goods, and conditioned that the seller will apply the proceeds of the sale, subject to the right of the owner or owners to retain therefrom the personal property exemption or exemptions as are allowed by law, so far as they will go in payment of debts actually owing by the owner or owners, then the provisions of this section shall not apply. Such sale of merchandise in bulk shall not be presumed to be a fraud as against any creditor or creditors who shall not present his or their claim or make demand upon the purchaser in good faith of such stock of goods and merchandise, or to the trustee named in any bond given as provided herein, within twelve months from the date of maturity of his claim, and any creditor who does not present his claim or make demand either upon the purchaser in good faith or on the trustee named in a bond within twelve months from the date of its maturity shall be barred from recovering on his claim on such bond, or as against the purchaser, in good faith, of such stock of goods in bulk. Nothing in this section shall prevent voluntary assignments or deeds of trust for the benefit of creditors as now allowed by law, or apply to sales by executors, administrators, receivers or assignees under a voluntary assignment for the benefit of creditors, trustees in bankruptcy, or by any public officers under judicial process. (1907, c. 623; 1913, c. 30, s. 1; Ex. Sess. 1913, c. 66, s. 1; 1933, c. 190; 1945, c. 635; C. S. 1013.)

Editor's Note.—
The 1945 amendment struck out the words "prima facie evidence of fraud, and" formerly appearing after the word "be" in line four, and inserted the second sentence.

Art. 5A. Control Corners in Real Estate Developments.

§ 39-32.1. Requirement of permanent markers as "control corners."—Whenever any person, firm or corporation shall hereafter divide any parcel of real estate into lots and lay off streets through such real estate development and sell or offer for sale any lot or lots in such real estate development, it shall be the duty of such person, firm or corporation to cause one or more corners of such development to be designated as "control corner" and to affix or place at such control corner or corners permanent markers which shall be of such material and affixed to the earth in such a manner as to insure as great a degree of permanence as is reasonably practical. (1947, c. 816, s. 1.)

As to maps of streets and sidewalks in subdivisions, see § 160-226.

§ 39-32.2. Control corners fixed at time of recording plat or prior to sale.—Such control corner or corners, as described in § 39-32.1, and such permanent marker or markers, as described in § 39-32.1, must be designated and affixed at the time of recording the plat of said land or prior to the first sale of any lot or lots constituting a part of the real estate development which said person, firm or corporation has caused to be laid off in lots with designated streets. (1947, c. 816, s. 2.)

§ 39-32.3. Recordation of plat showing control corners.—Upon designating a control corner and affixing a permanent marker, said person, firm or corporation shall cause to be filed in the office of the register of deeds of the county in which the real estate development is located a map or plat showing the location of the control corner or corners and permanent marker or markers with adequate and sufficient description to enable a surveyor to locate such control corner or marker. The register of deeds shall not accept for registration or record any map or plat of a real estate subdivision or development made after the effective date of this article, unless the location of such control corner or corners is shown thereon. (1947, c. 816, s. 3.)

Editor's Note.—Section 6 of the act from which this article was codified made it effective on July 1st, 1947.

§ 39-32.4. Description of land by reference to control corner; use of control corner to fix distances and boundaries prima facie evidence of correct method.—Any lot or lots sold or otherwise transferred at the time of or subsequent to the establishment of a control corner may be described in any conveyance so as to include a reference to the location of said lot or lots which are being conveyed with respect to the control corner. Thereafter the use of the control corner in ascertaining distances so as to establish boundary lines of lots within or originally within such real estate development may be admissible as evidence in any court and shall be prima facie evidence of the correct method of determining the boundaries of any lot or lots within any such real estate development. (1947, c. 816, s. 4.)

Chapter 40. Eminent Domain.

Sec.
40-43. Hearing of objections by clerk of superior court.

Art. 1. Right of Eminent Domain.

§ 40-1. Corporation in this chapter defined.

Cited in Carolina Power, etc., Co. v. Bowman, 229 N. C. 682, 51 S. E. (2d) 191.

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

9. The state highway and public works commission, 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. (Rev., s. 2575; Code, s. 1698; R. C. c. 61, s. 9; 1852, c. 92, s. 1; 1874-5, c. 83; 1907, cc. 39, 458, 783; 1911, c. 62, ss. 25, 26, 27; 1917, cc. 51, 132; 1923, c. 205; Ex. Sess. 1924, c. 118; 1937, c. 108, s. 1; 1939, c. 228, s. 4; 1941, c. 97, s. 1; 1941, c. 254; 1947, c. 806; C. S. 1706.)

Editor's Note.—
The 1947 amendment added paragraph 9 at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

§ 40-10. Dwelling-houses and burial grounds cannot be condemned.

Local Modification.—City of Hickory: 1949, c. 310.

Cited in Turner v. Reidsville, 224 N. C. 42, 29 S. E. (2d) 211.

Art. 2. Condemnation Proceedings.

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

The special proceeding, provided by this section and § 136-19, is to furnish a procedure to condemn land for a public purpose and to fix compensation for the taking thereof and does not in any way authorize an action for breach of contract. Dalton v. State Highway, etc., Comm., 223 N. C. 406, 27 S. E. (2d) 1.

Cited in Lewis v. North Carolina State Highway, etc., Comm., 228 N. C. 618, 46 S. E. (2d) 705; Bailey v. State Highway, etc., Comm., 230 N. C. 116, 52 S. E. (2d) 276.

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

Provision as to Registration Superseded.—The provision of this section that a copy of the judgment in eminent domain proceedings be registered in the county where the land lies is superseded by § 47-27. Carolina Power, etc., Co. v. Bowman, 228 N. C. 319, 45 S. E. (2d) 531.

Cited in Reidsville v. Slade, 224 N. C. 48, 29 S. E. (2d) 215.

§ 40-20. Provisions for jury trial on exceptions to report.

Cited in Moody v. Wickard, 136 F. (2d) 801.

§ 40-23. Rights of claimants of fund determined.

Applied in Meadows v. United States, 144 F. (2d) 751.

§ 40-29. Quantity which may be condemned for certain purposes.

Cited in Carolina, etc., Ry. Co. v. Piedmont Wagon, etc., Co., 229 N. C. 695, 51 S. E. (2d) 301.

Art. 3. Public Works Eminent Domain Law.

§ 40-33. Filing of petition; jurisdiction of court; entry upon land by petitioner.

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.

(1947, c. 781.)

Editor's Note.—The 1947 amendment rewrote the second sentence of the second paragraph. As the first and third paragraphs were not affected by the amendment they are not set out.

§ 40-43. Hearing of objections by clerk of superior court.—If no objections are filed to the special master's report, the clerk of the superior court (but only on motion of the petitioner unless title to the property has vested in the petitioner) shall enter a final judgment fixing the compensation to be paid for the property and the persons entitled to such compensation. If any objections are filed to the special master's report, the clerk of the superior court on the date specified in the aforesaid order shall hear and determine such questions of law and fact as are raised by such exceptions and may approve, disapprove or modify the special master's findings or may reject the special master's report in toto. In the event the special master's report is rejected in toto, the clerk of the superior court shall at once appoint another special master in the same manner that the first special master was appointed, and such special master shall have the same powers and duties as the special master first appointed, except that notice of the time for filing claims and of the hearing of the special master may be given by registered mail to all persons who have appeared in the proceedings or their attorneys of record at their last known addresses, and no other notice shall be necessary. If the clerk of the superior court shall approve the special master's report, with or without modification, the clerk of the superior court (but only on motion of the petitioner unless title to the property has previously vested in the petitioner) shall enter a final judgment, fixing the compensation to be paid for such property and the persons entitled to such compensation.

If title to said property has not previously been vested in the petitioner, the title and right to possession of said property shall vest in the petitioner immediately upon the entry of such final judgment and upon the deposit in court by the petitioner of the amount of the judgment fixed by the clerk of the superior court as the compensation for such property. Upon the entry of such judgment and the vesting of title aforesaid, the clerk of the superior court shall designate the day (not exceeding thirty days thereafter, except upon good cause shown) on which the parties in possession of said property shall be required to surrender possession to the petitioner. (1935, c. 470, s. 1; 1947, c. 781.)

Editor's Note.—The 1947 amendment substituted "clerk of the superior court" for "court" at seven places in the section.

Chapter 41. Estates.

Sec.

41-11.1. Sale, lease or mortgage of property held by a "class", where membership may be increased by persons not in esse.

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

III. APPLICATION AND ILLUSTRATIVE CASES.

Same—Life Estate with Limitation over to Bodily Heirs.—

A devise to one and his "bodily heirs," if testatrix intended to use the term in its strict technical sense, would violate the rule against perpetuities, or might create a fee tail, and in either case a fee simple would vest in the first taker. Elledge v. Parrish, 224 N. C. 397, 30 S. E. (2d) 314.

The use of the word "children" following the life estate does not create a fee simple estate or a fee tail estate which would be converted by this section into a fee simple est where a will devises real estate to the three daughters testator, naming them, "during the time of their natu lives" and provides that "the share of each one of my s daughters shall upon her death go to her children and th heirs absolutely," in that the word "children" is a word purchase. Moore v. Baker, 224 N. C. 133, 136, 29 S. (2d) 452.

Word "Heirs" Not Used in Technical Sense.—The rule Shelley's case does not apply to a devise to testator's gra children during the term of their natural lives, then their bodily heirs, or issue surviving them," with lim tion over of the share of any grandchild who should without issue to his next of kin, since it is apparent the word "heirs" was not used in its technical sense, the grandchildren take only a life estate. Williams Johnson, 228 N. C. 732, 47 S. E. (2d) 24.

Conveyance to Husband and Wife for Life Then to H of the Body of Feme Grantee.—A deed conveyed to husb

and wife a life estate and expressed grantor's intent to convey only a lifetime right to said grantees, with provision that said grantees should have and hold said tract of land during their natural lives and then to the heirs of the body of the feme grantee. It was held that the husband took only a life estate, and the conveyance being to the wife and then to the heirs of her body, the rule in Shelley's case applies, and the estate in fee tail conveyed to the wife is converted by this section into a fee simple absolute. Edgerton v. Harrison, 230 N. C. 158, 52 S. E. (2d) 357.

Illustrative Cases.—

A conveyance to one for "his lifetime, and at his death to his heirs, if any, his heirs," invokes the application of the rule in Shelley's case and vests a fee in the first taker. The use of the phrase "if any" does not prevent the application of the rule, since there is no limitation over. Glover v. Glover, 224 N. C. 152, 29 S. E. (2d) 350.

§ 41-2. Survivorship in joint tenancy abolished; proviso as to partnership.—In all estates, real or personal, held in joint tenancy, the part or share of any tenant dying shall not descend or go to the surviving tenant, but shall descend or be vested in the heirs, executors, or administrators, respectively, of the tenant so dying, in the same manner as estates held by tenancy in common: Provided, that estates held in joint tenancy for the purpose of carrying on and promoting trade and commerce, or any useful work or manufacture, established and pursued with a view of profit to the parties therein concerned, are vested in the surviving partner, in order to enable him to settle and adjust the partnership business, or pay off the debts which may have been contracted in pursuit of the joint business; but as soon as the same is effected, the survivor shall account with, and pay, and deliver to the heirs, executors and administrators respectively of such deceased partner all such part, share, and sums of money as he may be entitled to by virtue of the original agreement, if any, or according to his share or part in the joint concern, in the same manner as partnership stock is usually settled between joint merchants and the representatives of their deceased partners. (Rev., s. 1579; Code, s. 1326; R. C., c. 43, s. 2; 1784, c. 204, s. 6; 1945, c. 635; C. S. 1735.)

Editor's Note.—

Prior to the 1945 amendment this section also applied to "assigns."

Survivorship Must Be Pursuant to Contract.—Since the abolition of survivorship in joint tenancy, the right of survivorship in personalty, if such right exists, must be pursuant to contract and not by operation of law or statutory provision. Wilson v. Ervin, 227 N. C. 396, 399, 42 S. E. (2d) 468.

Instrument Ineffective to Provide for Survivorship.—While this section may not preclude tenants in common from providing for survivorship by adequate contract inter sese, an instrument executed by them which merely expresses a general intent that the survivor should take the fee, without any words of conveyance, is ineffective. The execution by the administrator of the deceased tenant in common of a deed to the surviving tenant, made under the supposed authority of the contract, is without effect. Pope v. Burgess, 230 N. C. 323, 53 S. E. (2d) 159.

Section 59-74 is to be read in connection with this section respecting the settlement of partnership affairs by surviving partners. Coppersmith v. Upton, 228 N. C. 545, 46 S. E. (2d) 565.

The fact that the surviving partner instituting action on a partnership asset has not filed a bond as required by § 59-74, is not ground for nonsuit, since the requirement of a bond is for the protection of the estate of the deceased partner, and the objection is not available to one who is merely a debtor of the partnership. This conclusion is consonant with § 59-75, which provides that upon failure of the surviving partner to file bond, the clerk of the superior court shall appoint a collector of the partnership upon application of any person interested in the estate of the deceased partner. Coppersmith v. Upton, 228 N. C. 545, 46 S. E. (2d) 565.

Cited in Buffaloe v. Barnes, 226 N. C. 313, 38 S. E. (2d) 222.

§ 41-4. Limitations on failure of issue.

Roll Must Be Called as of Death of First Taker.—To determine the effectiveness of a limitation over the roll must be called as of the date of the death of the first taker. Turpin v. Jarrett, 226 N. C. 135, 37 S. E. (2d) 124.

Where a will sets up a trust with provision that the income therefrom be divided among named beneficiaries for life and the corpus proportionately to their issue upon their deaths, with further provision that if a beneficiary should die without issue, his share of the corpus should become a part of, and be distributed in accordance with, the residuary clause, held, the person entitled to each share of the corpus is contingent upon whether each of the life beneficiaries dies with or without issue surviving, and therefore the will sets up a contingent and not a vested limitation, and the roll must be called as to each share of the corpus as of the death of its life beneficiary. Van Winkle v. Berger, 228 N. C. 473, 46 S. E. (2d) 305.

Applied in Conrad v. Goss, 227 N. C. 470, 42 S. E. (2d) 609.

§ 41-5. Unborn infant may take by deed or writing.

Unborn Infant Takes from Time of Conception.—This section gives the same capacity to an unborn infant to take property as such infant has under the law governing its right to take by inheritance or devise, which is from the time of conception. Mackie v. Mackie, 230 N. C. 152, 52 S. E. (2d) 352.

For the purpose of capacity to take under a deed, it will be presumed in the absence of contrary evidence that a child is in esse 280 days prior to its birth. Id.

§ 41-7. Possession transferred to use in certain conveyances.

Passive Trust for Husband and Wife.—Where a husband purchases realty and has the deed made to a trustee of a passive trust for the benefit of himself and wife, nothing else appearing, the instrument creates an estate by entirety. Akin v. First Nat. Bank, 227 N. C. 453, 42 S. E. (2d) 518.

§ 41-10. Titles quieted.

I. GENERAL CONSIDERATION.

If title becomes involved in a processioning proceeding under §§ 38-1 to 38-4, the proceeding becomes in effect an action to quiet title under this section. Roberts v. Sawyer, 229 N. C. 279, 49 S. E. (2d) 468. See note to § 38-3.

II. NATURE AND SCOPE.

C. What Constitutes Cloud.

Invalid Judgment.—

An action to quiet title or to remove a cloud from the title is equitable in its nature, and may now be maintained to remove from the title a cloud created by the apparent lien of an invalid judgment docketed in the county where the land lies. Holden v. Totten, 224 N. C. 547, 551, 31 S. E. (2d) 635.

III. ACTIONS.

A. In General.

No defense bond is required in an action to quiet title under this section. Roberts v. Sawyer, 229 N. C. 279, 49 S. E. (2d) 468.

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

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 in term or at chambers. All orders of approval under said statute by judges resident in the district heretofore made either in term or at chambers are hereby ratified and validated.

(1947, c. 377.)

I. GENERAL CONSIDERATION.

Editor's Note.—The 1947 amendment added the last two sentences of the third paragraph. As the rest of the section was not affected by the amendment it is not set out.

For brief discussion of amendment, see 25 N. C. Law Rev. 390.

Cited in Cole v. Cole, 229 N. C. 757, 51 S. E. (2d) 491.

II. ACTIONS IN SUPERIOR COURT FOR SALE.

Where Guardian Appointed after Sale.—In a proceeding under this section to sell all the contingent interest in certain lands of minors and unborn children, where petitioners were represented by a guardian, judgment of sale signed on the day before the guardian's appointment was void. Butler v. Winston, 223 N. C. 421, 27 S. E. (2d) 124.

Plaintiff Must Have Vested Interest.—In a proceeding under this section to sell real property in which there is a contingent interest, plaintiff must be a person having a vested interest in the property to be sold and the sale must be passed upon by the judge of the Superior Court at term. The contingent interest alone cannot be sold. Butler v. Winston, 223 N. C. 421, 27 S. E. (2d) 124.

Section Does Not Limit Power of Court over Trusts.—This section, authorizing those who have a vested interest in land with contingent remainders over to persons not in being to petition for and procure the sale thereof for reinvestment, does not limit the power of the court to supervise the administration of trust estates and to enter such orders and decrees in respect thereto as circumstances may require, so that interest of contingent remaindermen and other beneficial owners may be sold to preserve trust estate from destruction. First-Citizens Bank, etc., Co. v. Rasberry, 226 N. C. 586, 39 S. E. (2d) 601, 603.

Effect of Omission of Persons Having Contingent Interests.—An order of sale and judgment of confirmation will not be vacated on the ground that certain contingent remaindermen were not made parties to the proceedings to sell, where the interest of the contingent remaindermen has, since the sale, been extinguished by failure of the contingency. Beam v. Gilkey, 225 N. C. 520, 35 S. E. (2d) 641.

Judgment against Person Having No Interest.—Irregularity of entering a consent judgment against testator's minor grandson without investigation and approval of the court may be disregarded where the minor had no interest. Beam v. Gilkey, 225 N. C. 520, 35 S. E. (2d) 641.

§ 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, 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.

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, no 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 the 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 the effective date of this section. (1949, c. 811, s. 1.)

Editor's Note.—Section 3 of the act inserting this section made it effective upon its ratification on April 5, 1949. For discussion of this section, see 27 N. C. Law Rev. 415.

Chapter 42. Landlord and Tenant.

Art. 2. Agricultural Tenancies.

Art. 1. General Provisions.

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

Necessity for Demand.—Where lease contains no forfeiture clause for failure to pay rent, and lessee, after lessor's death, pays rent to lessor's personal representative to the knowledge of lessor's heir, the heir, who made no demand for the rent, may not declare the lease forfeited, since in the absence of a forfeiture clause, this section applies, and forfeiture under it is not effective until the expiration of ten days after demand. First-Citizens Bank, etc., Co. v. Frazelle, 226 N. C. 724, 40 S. E. (2d) 367.

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

Cited in Rountree v. Thompson, 226 N. C. 553, 39 S. E. (2d) 523.

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

Insufficient Notice.—In an action in summary ejectment under § 42-26 proof of notice given the 14th of the month to quit the premises on or before the first of the following month is insufficient to show the statutory notice terminating the term, when it appears that the original occupancy was taken on the 18th of the month and plaintiff offers no evidence as to the date of the month the term began or when the monthly rentals became due. Stafford v. Yale, 228 N. C. 220, 44 S. E. (2d) 872.

Art. 2. Agricultural Tenancies.

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

Editor's Note.—For article on agricultural tenancies in the southeastern states, see 26 N. C. Law Rev. 274.

§ 42-22.1. Failure of tenant to account for sales under tobacco marketing cards.

—Any tenant or share cropper having possession of a tobacco marketing card issued by any agency of the state or federal government who sells tobacco authorized to be sold thereby and fails to account to his landlord, to the extent of the net proceeds of such sale or sales, for all liens, rents, advances, or other claims held by his landlord against the tobacco or the proceeds of the sale of such tobacco, shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine or imprisonment in the discretion of the court. (1949, c. 193.)

Editor's Note.—For brief comment on this section, see 27 N. C. Law Rev. 466.

§ 42-23. Terms of agricultural tenancies in certain counties. — All agricultural leases and contracts hereafter made between landlord and tenant for a period of one year or from year to year, whether such tenant pay a specified rental or share in the crops grown, such year shall be from December first to December first, and such period of time shall constitute a year for agricultural tenancies in lieu of the law and custom heretofore prevailing, namely from January first to January first. In all cases of such tenancies a notice to quit of one month as provided in § 42-14 shall be applicable. If on account of illness or any other good cause, the tenant is unable to harvest all the crops grown on lands leased by him for any year prior to the termination of his lease contract on December first, he shall have a right to return to the premises vacated by him at any time prior to December thirty-first of said year, for the purpose only of harvesting and dividing the remaining crops so ungathered. But he shall have no right to use the houses or outbuildings or that part of the lands from which the crops have been harvested prior to the termination of the tenant year, as defined in this section.

This section shall only apply to the counties of Anson, Ashe, Bladen, Brunswick, Columbus, Craven, Cumberland, Duplin, Edgecombe, Gaston, Greene, Halifax, Hoke, Jones, Lenoir, Lincoln, Montgomery, Onslow, Pender, Pitt, Robeson, Sampson, and Yadkin. (Pub. Loc. 1929, c. 40; Pub. Loc. 1935, c. 288; Pub. Loc. 1937, cc. 96, 600; Pub. Loc. 1941, c. 41; 1943, c. 68; 1945, c. 700; 1949, c. 136.)

Local Modification.—Columbus: 1947, c. 783.

Editor's Note.—The 1945 amendment made this section applicable to Craven, Edgecombe, Greene, Halifax, Jones, Lenoir, Onslow and Pitt counties.

The 1949 amendment made this section applicable to Montgomery county.

Art. 3. Summary Ejectment.

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

I. APPLICATION AND SCOPE.

Jurisdiction Is Statutory.—Jurisdiction of a justice of the peace in summary ejectment proceedings is purely statutory, and may be exercised only in cases where the relationship of landlord and tenant exists, and the tenant holds over after the expiration of his term, or has otherwise violated the provisions of his lease. Howell v. Branson, 226 N. C. 264, 37 S. E. (2d) 687; Goins v. McLoud, 228 N. C. 655, 46 S. E. (2d) 712, holding that the remedy does not extend to a tenant at sufferance or at will.

Remedy Is Restricted to Cases Enumerated.—The remedy by summary proceedings in ejectment is restricted to those cases expressly provided by this section. Howell v. Branson, 226 N. C. 264, 37 S. E. (2d) 687, 688, citing Hauser v. Morrison, 146 N. C. 248, 59 S. E. 693.

As to insufficient notice to quit in action under this section, see Stafford v. Yale, 228 N. C. 220, 44 S. E. (2d) 872, treated in note under § 42-14.

Cited in Seligson v. Klyman, 227 N. C. 347, 42 S. E. (2d) 220.

V. THE ACTION.

Cross Reference.—As to concurrent jurisdiction of justices of the peace and superior courts in actions of summary ejectment, see note to § 42-23.

Appeal Where Defendant Has Surrendered Possession.—In a summary ejectment proceeding, under this and the following sections of this article, where the subject of the litigation, the right of plaintiffs to immediate possession of premises, had been disposed of by the surrender of same by defendants to plaintiffs and no other question was raised in the court below, appeal was dismissed. Cochran v. Rowe, 225 N. C. 645, 36 S. E. (2d) 75.

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

The "oath in writing" required by this section must allege facts essential to confer jurisdiction. Howell v. Branson, 226 N. C. 264, 37 S. E. (2d) 687, 688.

Jurisdiction Is Not Exclusive.—Courts of justices of the peace do not have exclusive original jurisdiction of actions in summary ejectment under § 42-26 but the superior courts have concurrent jurisdiction of such actions as provided by § 7-63. Stonestreet v. Means, 228 N. C. 113, 44 S. E. (2d) 600.

Applied in Rogers v. Hall, 227 N. C. 363, 42 S. E. (2d) 347.

Cited in Seligson v. Klyman, 227 N. C. 347, 42 S. E. (2d) 220.

§ 42-30. Judgment by default or confession.

Cited in Seligson v. Klyman, 227 N. C. 347, 42 S. E. (2d) 220.

§ 42-32. Damages assessed to trial.—On appeal to the superior 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 superior court. Judgment for the rent in arrears and for the damages assessed may, on motion, be rendered against the sureties to the appeal. (Rev., s. 2006; Code, s. 1775; 1868-9, c. 156, s. 28; 1945, c. 796; C. S 2371.)

Editor's Note.—The 1945 amendment inserted the provision allowing plaintiff to recover double amount of delinquent rent when detention of leased property is wrongful.

Effect of Emergency Price Control Act.—Where rental value of premises was fixed by rent control office, local statutes authorizing collection of double rents or other damages did not entitle plaintiff to collect an amount exceeding maximum rent fixed by O. P. A. McGuinn v. McLain, 225 N. C. 750, 36 S. E. (2d) 377.

The fact that landlord obtained permission from rent control office of O. P. A. to institute action under local law for the possession of his property, did not release property from the provisions of the emergency price control act of 1942. Id.

Cited in Seligson v. Klyman, 227 N. C. 347, 42 S. E. (2d) 220.

§ 42-33. Rent and costs tendered by tenant.

Section Does Not Apply to Actions under § 42-26.—This section applies to actions to recover possession of demised premises "upon a forfeiture for the nonpayment of rent" and not to actions to recover possession of property for one of the causes enumerated in § 42-26. Seligson v. Klyman, 227 N. C. 347, 42 S. E. (2d) 220.

§ 42-34. Undertaking on appeal; when to be increased.—Either party may appeal from the judgment of the justice, as is prescribed in other cases of appeal from the judgment of a justice; upon appeal to the superior court either plaintiff or defendant may demand that the same shall be tried at the first term of said court after said appeal is docketed in said court, and said trial shall have precedence in the trial of all other cases, except in cases of exceptions to homesteads: Provided, that said appeal shall have been docketed at least ten days prior to the convening of said court: Provided further, that in the event the trial before the justice of the peace takes place at least fifteen days prior to the convening of said superior court, said appeal shall upon the demand of either plaintiff or defendant, be docketed in time to be tried at said first term of said superior court after said trial before the justice of the peace: Provided, further, that the presiding judge

in his discretion, may make up for trial in advance any pending case in which the rights of the parties or the public require it; but no execution commanding the removal of a defendant from the possession of the demised premises shall be suspended until the defendant gives an undertaking in an amount not less than one year's rent of the premises, with sufficient surety, who shall justify and be approved by the justice, to be void if the defendant pays any judgment which in that or any other action the plaintiff may recover for rent, and for damages for the detention of the land. At any term of the superior court of the county in which such appeal is docketed after the lapse of one year from the date of the filing of the undertaking above mentioned, the tenant, after legal notice to that end has been duly executed on him, may be required to show cause why said undertaking should not be increased to an amount sufficient to cover rents and damages for such period as to the court may seem proper, and if such tenant fails to show proper cause and does not file such bond for rents and damages as the court may direct, or make affidavit that he is unable so to do and show merits, his appeal shall be dismissed and the judgment of the justice of the peace shall be affirmed. (Rev., s. 2008; Code, s. 1772; 1868-9, c. 156, s. 25; 1883, c. 316; 1921, c. 90; Ex. Sess., 1921, c. 17; 1933, c. 154; 1937, c. 294; 1949, c. 1159; C. S. 2373.)

Editor's Note.—The 1949 amendment inserted the second proviso to the first sentence.

Chapter 43. Land Registration.

Sec. **Art. 4. Registration and Effect.**

43-17.1. Issuance of certificate upon death of registered owner; petition and contents; dissolution of corporation; certificate lost or not received by grantee.

Art. 1. Nature of Proceeding.

§ 43-1. Jurisdiction in superior court.

Proceeding Is in Rem.—A proceeding under the Torrens Law is a proceeding in rem. Davis v. Morgan, 228 N. C. 78, 44 S. E. (2d) 593.

Improvements.—There is nothing in this chapter, known as the Torrens Laws, which prevents the courts from proceeding to determine the value of improvements claimed by defendants, who have been evicted under plaintiff's superior title, in accordance with the terms of an unassailed judgment to which plaintiff was a party and ascertained by a consent reference. Harrison v. Darden, 223 N. C. 364, 26 S. E. (2d) 860.

§ 43-3. Rules of practice prescribed by attorney-general.

Except as otherwise specially provided in this chapter, registered land is subject to the jurisdiction of the courts in the same manner as if not so registered. Harrison v. Darden, 223 N. C. 364, 367, 26 S. E. (2d) 860.

Art. 4. Registration and Effect.

§ 43-17.1. Issuance of certificate upon death of registered owner; petition and contents; dissolution of corporation; certificate lost or not received by grantee.

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 § 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 § 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 § 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 ten 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 in term time, 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 in term time an appeal may be taken to the supreme court in the manner provided by law. (1943, c. 466, s. 1; 1945, c. 44.)

Editor's Note.—The 1945 amendment added the above four paragraphs at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

§ 43-18. Registered owner's estate free from adverse claims; exceptions.

This section modifies the common law rule of lis pendens. Its purpose is to stabilize titles by requiring recordation of all deeds, mortgages, or other paper writings which transfer or encumber the title to land. Whitehurst v. Abbott, 225 N. C. 1, 5, 33 S. E. (2d) 129.

Art. 6. Method of Transfer.

§ 43-39. Certified copy of order of court noted.

Applied in Harrison v. Darden, 223 N. C. 364, 26 S. E. (2d) 860.

Chapter 44. Liens.

Art. 8. Perfecting, Recording, Enforcing and Discharging Liens.

Art. 13. Factors' Liens.

Art. 14. Assignment of Accounts Receivable and Liens Thereon.

Art. 1. Mechanics', Laborers' and Materialmen's Liens.

§ 44-2. On personal property repaired.

Provided, that in selling any motor vehicle under the provisions of this section, a twenty day notice in advance of such sale shall be given the commissioner of motor vehicles. (Rev., s. 2017; Code, s. 1783; 1869-70, c. 206, s. 3; 1945, c. 224; C. S. 2435.)

Editor's Note.—The 1945 amendment added the above proviso at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

Art. 2. Subcontractors', etc., Liens and Rights against Owners.

§ 44-14. Contractor on municipal building to give bond; action on bond.

This section was intended to provide protection for laborers and materialmen furnishing labor or material for the construction of public works commensurate with that afforded them while engaged in private construction. Owsley v. Henderson, 228 N. C. 224, 45 S. E. (2d) 263.

Parties May Contract for Protection in Addition to Statutory Minimum.—This section prescribes the minimum protection that must be furnished, but does not undertake to stipulate the maximum. The indemnity company will not be permitted to afford protection less than that required by law. On the other hand it may assume any additional liability and provide any additional protection it and the assured may agree upon. Owsley v. Henderson, 228 N. C. 224, 45 S. E. (2d) 263.

Provisions of Section Incorporated in Contract. — The insurance contract must provide the protection required by law. To that end the provisions of this section, if not actually included in the written agreement, are incorporated therein by operation of law. Owsley v. Henderson, 228 N. C. 224, 45 S. E. (2d) 263.

Liability for Rental Charges for Equipment.—A bond for public construction conditioned upon the satisfaction of all claims and demands incurred in the performance of the contract and payment for labor and material, is held to include rental cost of pneumatic machinery or equipment hired to do mechanical work in furtherance of the contract. And the liability for rental charges is not limited to the time such equipment was in actual operation. Owsley v. Henderson, 228 N. C. 224, 45 S. E. (2d) 263.

Art. 8. Perfecting, Recording, Enforcing and Discharging Liens.

§ 44-38.1. Liens on personal property created in another state.—No mortgage, deed of trust, or other encumbrance created upon personal property while such property is located in another state is or shall be a valid encumbrance upon said property which has been, or may be, removed into this state as to purchasers for valuable consideration without notice to creditors, unless and until such mortgage, deed of trust, or other encumbrance is or was actually registered or filed for registration in the proper office in the state from which same was removed. (1949, c. 1129.)

Editor's Note.—This section is apparently designed to get away from the rule laid down by the supreme court in 194 in General Finance, etc., Corp. v. Guthrie, 227 N. C. 431 42 S. E. (2d) 601. See 27 N. C. Law Rev. 440.

Art. 9. Liens upon Recoveries for Personal Injuries to Secure Sums Due for Medical Attention, etc.

§ 44-49. Lien created; applicable to person non sui juris.

Notwithstanding the provisions of paragraph one of this section, no lien therein provided fo shall be valid with respect to any claims arisin with respect to any future actions unless the per son or corporation entitled to the lien therein pro vided for shall file a claim with the clerk of th court in which said civil action is instituted with in 30 days after the institution of such action.

No liens of the character provided for in th first paragraph of this section shall hereafter b valid with respect to money that may be recovere in any pending civil actions in this state unles claims based on such liens are filed with the cler of the court in which the action is pending with in 90 days after the ratification of the 194 amendment.

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

Editor's Note.—The 1947 amendment, ratified and eff tive April 5, 1947, added the three paragraphs above at end of this section. As the first paragraph was not chan by the amendment it is not set out.

Section 2 of the amendatory act provides that noth in the act shall be construed as affecting §§ 44-50 and 4

of the General Statutes, except to fix the time within which such claims must be filed.

For discussion of the 1947 amendment, see 25 N. C. Law Rev. 450.

Art. 10. Agricultural Liens for Advances.

§ 44-54. Price to be charged for articles advanced limited.

Editor's Note.—

Session Laws 1945, c. 694, by repealing Public Laws 1929, c. 262, made §§ 44-54 to 44-59 fully applicable to Lenoir county.

Art. 13. Factors' Liens.

§ 44-70. Definitions. — The terms "factor" and "factors" wherever used in this article means persons, firms, banks, and corporations, and their successors in interest, who advance money to manufacturers or processors on the security of materials, goods in process, or merchandise, whether or not they are employed to sell such materials, goods in process, or merchandise. (1945, c. 182, s. 1.)

§ 44-71. Factors' liens; filing notice of lien.— If so provided by any written agreement, all factors shall have a continuing general lien upon all materials, goods in process, and merchandise from time to time consigned to or pledged with them, whether in their constructive, actual or exclusive occupancy or possession or not, for all their loans and advances to or for the account of the person creating the lien (hereinafter called the borrower), together with interest thereon and also for the commissions, obligations, indebtedness, charges, and expenses properly chargeable against or due from said borrower and for the amounts due or owing upon any notes or other obligations given to or received by them for or upon account of any such loans or advances, interest, commissions, obligations, indebtedness, charges, and expenses, and such lien shall be valid from the time of filing the notice hereinafter referred to, whether such materials, goods in process, or merchandise shall be in existence at the time of the agreement creating the lien or at the time of filing such notice or shall come into existence subsequently thereto or shall subsequently thereto be acquired by the borrower; provided there shall be placed and maintained on the door of, or in a conspicuous place at, one of the principal entrances of the place of business or other premises in or at which such materials, goods in process, and merchandise, shall be located, kept or stored, the name of the factor in legible lettering and a designation of said factor as factor; and provided further, that a notice of the lien is filed stating:

1. The name of the factor, the name under which the factor does business, if an assumed name; the principal place of business of the factor within the state, or if he has no place of business within the state, his principal place of business outside of the state; and if the factor is a partnership or association, the name of the partners, and if a corporation, the state under whose laws it was organized.

2. The name of the borrower, and the interest of such person in the materials, goods in process, and merchandise, as far as known to the factor.

3. The general character of materials, goods in process, and merchandise subject to the lien, or which may become subject thereto, the date of the agreement and the period of time during which such loans or advances may be made under the terms of the agreement providing for such loans or advances and for such lien. Amendments of the notice may be filed from time to time to record any changes in the information contained in the original, subsequent or amended notices. (1945, c. 182, s. 2.)

§ 44-72. Registration.—Such notice shall be acknowledged or proven by the factor or his duly authorized representative in the form of acknowledgments to deeds. The notice so acknowledged shall be filed for registration in the office of the register of deeds in the county wherein the property referred to in the notice is located and shall be recorded and cross indexed in the same manner as chattel mortgages. The fees for acknowledging and recording shall be the same as those provided for by law for acknowledging and recording chattel mortgages. (1945, c. 182, s. 3.)

§ 44-73. Effect of registration. — Such notice may be filed at any time after the making of the agreement and shall be effectual from the time of the filing thereof as against all claims of unsecured creditors of the borrower and as against subsequent liens of creditors, except that if, pursuant to the laws of this state, a lien should subsequently attach to the materials, goods in process, or merchandise in favor of a processor, dyer, mechanic, or other artisan, or in favor of a landlord, then the lien of the factor on such materials, goods in process, or merchandise shall be subject to such subsequent lien. When materials, goods in process, or merchandise subject to the lien provided for by this article are sold in the ordinary course of the business of the borrower, such lien, whether or not the purchaser has knowledge of the existence thereof, shall terminate as to the materials, goods in process or merchandise. (1945, c. 182, s. 4.)

§ 44-74. Satisfaction and discharge.—Upon payment or satisfaction of the indebtedness secured by any lien specified in this article the factor, his assignee or duly authorized representative, attorney or attorney in fact, may in the presence of the register of deeds or his deputy acknowledge the satisfaction of the provisions of such lien, whereupon the register of deeds or his deputy shall forthwith make upon the margin of the record of such lien an entry of such acknowledgment of satisfaction, which shall be signed by the factor, his assignee or duly authorized representative, attorney or attorney in fact and witnessed by the register of deeds or his deputy, who shall affix his name thereto.

Upon the exhibition of the original notice to the register of deeds or his deputy, where the same is registered, with the endorsement of payment and satisfaction appearing thereon by the factor, his duly authorized representative, attorney or attorney in fact, the register of deeds or his deputy shall cancel the lien by entry of "satisfaction" on the margin of the record.

Such satisfaction as herein above set forth shall operate as a release of all claims of the factor set forth in the said notice. All notices of liens filed pursuant to this article and not satisfied as herein above set forth shall be and remain in full force

and effect under this article without further or other filing. (1945, c. 182, s. 5.)

§ 44-75. Common-law lien. — When any factor, or any third party for the account of any such factor, shall have possession of materials, goods in process, or merchandise, such factor shall have a continuing general lien, as set forth in § 44-71, without filing the notice and posting the sign provided for in this article. (1945, c. 182, s. 6.)

§ 44-76. Construction.—This article is to be construed liberally to secure the beneficial interest and purpose thereof. A substantial compliance with its several provisions shall be sufficient for the validity of a lien and to give jurisdiction to the courts to enforce the same. Nothing in this article shall be construed as affecting or limiting any existing or future lien at common law or any rights at common law, or any right given by any other statute, and as to any transaction falling within the provisions both of this article and of any other statute of this state requiring or permitting filing, registering, consent, publication, notices, or formalities of execution, the factor shall not be required to comply with the provisions of any such other statute. (1945, c. 182, s. 7.)

Art. 14. Assignment of Accounts Receivable and Liens Thereon.

§ 44-77. Definitions.—In this article, unless otherwise clearly indicated by the context:

(1) "Account" or "account receivable" means a presently subsisting right to the present or future payment of money—

(a) under an existing contract,

(b) not including a building or construction contract,

(c) the assignment of which right is not subject to special statutory provisions not contained in this article,

(d) which right to payment is not secured under a chattel mortgage, deed of trust, conditional sale, or other instrument, which is required to be recorded in order that no assignee from the assignor and no creditor of the assignor can after such recordation acquire any rights in the account assigned, or in the proceeds thereof in any form, superior to the rights of the beneficiary of such recorded instrument, and,

(e) which right to payment is not represented by a judgment, negotiable instrument, or other instrument, the surrender, presentation, possession or indorsement of which customarily gives to the owner, holder or indorsee the right to payment thereon.

(2) "Assignee," "assignment," "assignor," and "debtor" are limited respectively to assignee, assignment, and assignor of, and a debtor on, an account receivable.

(3) "Assignment" includes an assignment for value as security and the creation by agreement of a lien on an account.

(4) "Assignee" and "assignor" shall include persons, firms, partnerships, associations and corporations. "Assignee" and "assignor" in § 44-78 shall include prospective assignees and assignors.

(5) "Filing assignee" or "filing assignor" means a person, firm, partnership, association or corporation designated as assignee or assignor in a recorded notice of assignment.

(6) "Value" means any consideration, other than a seal, sufficient to support a simple contract. An antecedent claim of any kind against any person, firm, partnership, association or corporation constitutes value when an account or other property is taken in satisfaction thereof or as security therefor. (1945, c. 196, s. 1.)

Editor's Note.—The act from which this article was codified expressly provides in § 9 that it shall not apply to assignments made prior to its effective date, May 1, 1945.

§ 44-78. Filing of notice of assignment; cancellation.—(1) The assignment of accounts receivable may be protected by the filing of a statement to be known as a "notice of assignment" which shall be signed by the assignor and the assignee and acknowledged by the assignor before an officer authorized to take acknowledgments, and probated as other instruments are now probated, which shall contain:

(a) The name and mailing address within this state of both assignor and assignee, or if either the assignor or the assignee has no mailing address within the state, the mailing address outside the state,

(b) A statement that the assignor has assigned or intends to assign, or has assigned and intends to assign one or more accounts to the named assignee.

(2) It shall not be necessary to describe the account or accounts in any manner in the notice of assignment.

(3) The place for filing the notice of assignment shall be the office of the register of deeds of the county wherein the assignor, if an individual, resides; or if a domestic or domesticated corporation, in the county wherein said corporation has its statutory principal place of business in this state. If the assignor is a resident or nonresident firm, partnership, association or a nonresident individual or a foreign undomesticated corporation, then the notice of assignment shall be filed in the office of the register of deeds of any county wherein the assignor has a place of business.

(4) The notice of assignment shall be for a definite period of time stated therein, but may be extended for a definite period of time by a statement containing the book and page where the original notice of assignment is recorded, and signed, probated and recorded in the same manner as the notice of assignment. Any such extension statement must be filed within the period of time prescribed in the original notice of assignment or last extension thereof and when filed shall be effective as of the time of the filing of the original notice of assignment.

(5) An account shall be deemed located in this state:

(a) if the transaction out of which the account arose occurred in this state, or if payment is to be made in this state, or

(b) if the account has been transferred to this state so that the place of payment of the account is in this state, or

(c) in all other cases where an account is deemed located in this state under general rule of law.

(6) The register of deeds shall index and record

each notice or assignment, or extension statement, in the same manner as chattel mortgages; and for indexing and recording the same the register of deeds shall receive the same fee as is provided by law for the recording and indexing of short form chattel mortgages.

(7) The notice of assignment may be cancelled of record at any time by the assignee or by his duly authorized attorney in fact, or upon presentation by the assignor or the assignee of the original notice of assignment marked satisfied in full by the assignee, but such cancellation shall not affect the protection afforded to accounts already assigned under a protected assignment. The cancellation of the original notice of assignment shall operate as a cancellation of all extension statements. (1945, c. 196, s. 2.)

§ 44-79. Filing of notices of discontinuance of assignment.—(1) A filing assignor may at any time file a "notice of discontinuance of assignment," signed by him and designating the book and page where the original notice of assignment to be discontinued is recorded, stating that he will not make any further assignments to the designated assignee after a specified date. Such notice, to be effective, shall be receipted for by the assignee or accompanied by an affidavit that a copy has been forwarded to the assignee by registered mail and such affidavit shall state the registration number. The filing of such notice of discontinuance shall not affect the protection afforded to accounts already assigned under a protected assignment.

(2) The register of deeds shall record such notices of discontinuance and index same as required for chattel mortgages, and shall make an entry of the filing thereof upon the recorded notice of assignment to which it relates. For recording a notice of discontinuance of assignment and making the entry, the register of deeds shall receive the fee allowed by law for the recording and indexing of short form chattel mortgages. (1945, c. 196, s. 3.)

§ 44-80. Protected assignments. — (1) An assignment becomes protected:

(a) at the time of the filing of a notice of assignment contemporaneously with, or subsequently to, such assignment, or

(b) at the time of the filing of the notice of assignment, as to an assignment made after the filing of the notice of assignment, if the assignment is taken within the period specified in the notice of assignment or in any extension statement or on or before the date specified in the notice of discontinuance of assignment, or

(c) if no notice of assignment is on file in accordance with the provisions of § 44-78, then upon the giving of written notice to the debtor that the account has been assigned to the named assignee.

(2) When an assignment becomes protected, it shall be deemed to have been fully perfected at that time, and no bona fide purchaser from the assignor, no creditor of any kind of the assignor, and no other assignee or transferee of the assignor, in any event shall have, or be deemed to have, acquired any right in the account so transferred or in the proceeds thereof, or in any obligation substituted therefor, superior to the rights of the protected assignee therein.

(3) As between protected assignees the one who first protects his assignment has the superior right. (1945, c. 196, s. 4.)

§ 44-81. Statement of accounts assigned or of balance due.—The assignee shall, upon written demand of the assignor, furnish the assignor with a statement in writing of the balance due by the assignor to the assignee and a list of all accounts assigned as security thereof. Any third person who in good faith acts upon said information and furnishes valuable consideration in reliance thereon shall be protected. (1945, c. 196, s. 5.)

§ 44-82. Rights between debtor and assignee.—In any case where, acting without actual knowledge of an assignment of an account to a protected assignee, the debtor in good faith pays all or part of the account to the assignor, or to a creditor, subsequent purchaser, or other assignee or transferee, or other person holding a lien upon, or interest or right in or to such account, such payment shall be an acquittance and release to the debtor to the extent of such payment, and such person so receiving payment shall be a trustee of any sums so paid and shall be accountable and liable therefor to the assignee who, under the provisions of this article, has superior rights and is entitled to such sums so paid by the debtor. (1945, c. 196, s. 6.)

§ 44-83. Validity as to third person; acts of assignor; dominion and control. — The validity, effect, and relative priority or lien of a protected assignment of an account as to third persons shall not be affected by failure to notify the debtor thereof or by any act or omission of the assignor with respect to the assigned account or the proceeds thereof.

Any permission by the assignee to the assignor to exercise dominion and control over a protected assigned account or the proceeds thereof shall not invalidate the assignment as to third persons. (1945, c. 196, s. 7.)

§ 44-84. Returned goods. — (1) Where the assignor has possession of goods which gave rise to an assigned account, the interest of a protected assignee therein shall be superior to those of the general or judgment creditors of the assignor but subject to the rights of purchasers and lienees, who, in good faith, acquired their interest in the specific goods for value and without actual notice of the assignee's interest.

(2) The assignor shall hold in trust for the assignee:

(a) the proceeds of an assigned account in any form.

(b) goods which gave rise to the account in the assignor's possession, and

(c) the proceeds of the sale or lien referred to in (1) above.

(3) The assignment of an account includes the assignment of an account arising from a resale of the goods which gave rise to the assigned account. (1945, c. 196, s. 8.)

§ 44-85. Short title.—This article may be cited as the Assignment of Accounts Receivable Act. (1945, c. 196, s. 10.)

Chapter 45. Mortgages and Deeds of Trust.

Art. 2A. Sales under Power of Sale.

Part 1. General Provisions.

Part 2. Procedure for Sale.

Art. 2B. Injunctions; Deficiency Judgments.

Art. 2C. Validating Sections; Limitation of Time for Attacking Certain Foreclosures.

Art. 3. Mortgage Sales.

Art. 4. Discharge and Release.

Art. 1. Chattel Mortgages: Form and Sufficiency.

§ 45-1. Form of chattel mortgage.

Local Modification.—New Hanover: 1945, c. 859.

§ 45-2. Registration.

Cited in State v. Smith, 230 N. C. 198, 52 S. E. (2d) 34

§ 45-3. Mortgage of household and kitche furniture. — All conveyances of household an kitchen furniture by a married man, made to se cure the payment of money or other things c value, are void, unless the wife joins therein an her acknowledgment is taken in the manner pre scribed by law in conveyances of real estate, ex cept when said mortgage or conveyance is exe cuted for the purchase money thereof. (Rev., 1041; 1891, c. 91; 1931, 211; 1945, c. 73, s. 8; C. 2577.)

Editor's Note.—
The 1945 amendment substituted "acknowledgment" "privy examination" in line five.

Art. 2. Right to Foreclose or Sell under Power.

§ 45-9. Clerk appoints successor to incompete trustee.

"All persons interested" include, in a proceeding for removal of a trustee and the appointment of a substitu trustee under this section, only the trustor, trustee, trustees and all of the cestuis que trustent, whose intere

are secured by the deed of trust in which the trustee or trustees are sought to be removed and another substituted. Thompson v. State, 223 N. C. 340, 26 S. E. (2d) 902.

Where a trustee is substituted in accordance with the method expressed in a deed of trust, no proceedings are necessary under this section; and a deed made by the substitute trustee passes the title to the purchaser at a foreclosure sale. Thompson v. State, 223 N. C. 340, 26 S. E. (2d) 902.

§ 45-10. Substitution of trustees in mortgages and deeds of trust.

Cited in Thompson v. State, 223 N. C. 340, 26 S. E. (2d) 902.

Art. 2A. Sales under Power of Sale.

Part 1. General Provisions.

§ 45-21.1. Definitions.—As used in this article, "sale" means only a sale of real or personal property pursuant to—

(1) An express power of sale contained in a mortgage, deed of trust, or conditional sale contract, or

(2) A power of sale provided by statute with respect to a mortgage or deed of trust of personal property, or conditional sale contract, which does not contain an express power of sale. (1949, c. 720, s. 1.)

Editor's Note.—The act inserting this and the two following articles, and transferring and repealing certain sections under article 3, is effective as of Jan. 1, 1950. See Session Laws 1949, c. 720, s. 7. Section 6 of the act provides that it does not apply to any sale commenced prior to such effective date, and that a sale has been commenced if a notice of sale has been posted or published. And § 5 provides: "The present law shall remain in effect for the completion of sales under power of sale to which this act, under section 6, does not apply."

For a brief discussion of this article, see 27 N. C. Law Rev. 479.

§ 45-21.2. Article not applicable to foreclosure by court action.—This article does not affect any right to foreclosure by action in court, and is not applicable to any such action. (1949, c. 720, s. 1.)

§ 45-21.3. Days on which sale may be held.—A sale may be held on any day except Sunday. (1949, c. 720, s. 1.)

§ 45-21.4. Place of sale of real property.—(a) Every sale of real property shall be held in the county where the property is situated unless the property consists of a single tract situated in two or more counties.

(b) A sale of a single tract of real property situated in two or more counties may be held in any one of the counties in which any part of the tract is situated. As used in this section, a "single tract" means any tract which has a continuous boundary, regardless of whether parts thereof may have been acquired at different times or from different persons, or whether it may have been subdivided into other units or lots, or whether it is sold as a whole or in parts.

(c) When a mortgage or deed of trust with power of sale of real property designates the place of sale within the county, the sale shall be held at the place so designated.

(d) When a mortgage or deed of trust with power of sale of real property confers upon the mortgagee or trustee the right to designate the place of sale, the sale shall be held at the place within the county designated by the mortgagee or trustee in the notice of sale.

(e) When a mortgage or deed of trust with power of sale of real property does not designate, or confer upon the mortgagee or trustee the right to designate, the place of sale, or when it designates as the place of sale some county in which no part of the property is situated, such real property shall be sold as follows:

(1) Property situated wholly within a single county shall be sold at the courthouse door of the county in which the land is situated.

(2) A single tract of property situated in two or more counties may be sold at the courthouse door of any one of the counties in which some part of the real property is situated. (1949, c. 720, s. 1.)

§ 45-21.5. Place of sale of personal property.—(a) When a mortgage, deed of trust or conditional sale contract designates the county in which a sale of personal property shall be held or the place of sale within the county, the terms of the instrument shall be complied with.

(b) When the instrument does not designate the county in which a sale of personal property shall be held, the sale may be held in any county—

(1) When such instrument is recorded, if it has been recorded as provided by G. S. § 47-20 or G. S. § 47-23; or

(2) Where the property, or any part thereof, is located when the mortgagee, trustee or vendor takes possession of, or repossesses, it.

(c) When the instrument does not designate the particular place of sale within the county, the sale shall be held at such place therein as is designated in the notice of sale by the mortgagee, trustee or vendor. (1949, c. 720, s. 1.)

§ 45-21.6. Presence of personal property at sale required.—The person holding a sale of personal property shall have the property present at the place of sale unless—

(1) The instrument containing the power of sale specifically provides otherwise, or

(2) Prior to the sale, the clerk of the superior court in his discretion, upon application of any interested party, and upon notice being given, as provided by article 48 of chapter 1, to all parties in interest, issues an order authorizing the sale to be held without the property being present because the nature, condition or use of the property is such that the clerk deems it impractical or inadvisable to require the presence of the property at the sale. In such event, the order shall provide that reasonable opportunity be afforded prospective bidders to inspect the property prior to the sale, and that notice as to the time and place for inspection be set out in the notice of sale. (1949, c. 720, s. 1.)

§ 45-21.7. Sale of separate tracts in different counties.—(a) When the property to be sold consists of separate tracts of real property situated in different counties, there shall be a separate advertisement, sale and report of sale of the property in each county. The report of sale for the property in any one county shall be filed with the clerk of the superior court of the county in which such property is situated. The sale, and each subsequent resale, of each such tract shall be subject to a separate upset bid. The clerk of the superior court of the county where the property is situated has jurisdiction with respect to

resale of property situated within his county. To the extent the clerk deems necessary, the sale of each separate tract within his county, with respect to which an upset bid is received, shall be treated as a separate sale for the purpose of determining the procedure applicable thereto.

(b) The exercise of the power of sale with respect to a separate tract of property in one county does not extinguish or otherwise affect the right to exercise the power of sale with respect to tracts of property in another county to satisfy the obligation secured by the mortgage or deed of trust. (1949, c. 720, s. 1.)

§ 45-21.8. Sale as a whole or in parts.—(a) When the instrument pursuant to which a sale is to be held contains provisions with respect to whether the property therein described is to be sold as a whole or in parts, the terms of the instrument shall be complied with.

(b) When the instrument contains no provisions with respect to whether the property therein described is to be sold as a whole or in parts, the person exercising the power of sale may, in his discretion, subject to the provisions of G. S. § 45-21.9, sell the property as a whole or in such parts or parcels thereof as are separately described in the instrument, or he may offer the property for sale by each method and sell the property by the method which produces the highest price.

(c) This section does not affect the equitable principle of marshaling assets. (1949, c. 720, s. 1.)

§ 45-21.9. Amount to be sold when property sold in parts; sale of remainder if necessary.—(a) When a person exercising a power of sale sells property in parts pursuant to G. S. § 45-21.8 he shall sell as many of such separately described units and parcels as in his judgment seems necessary to satisfy the obligation secured by the instrument pursuant to which the sale is being made, and the costs and expenses of the sale.

(b) If the proceeds of a sale of only a part of the property are insufficient to satisfy the obligation secured by the instrument pursuant to which the sale is made and the costs and expenses of the sale, the person authorized to exercise the power of sale may readvertise the unsold property and may sell as many additional units or parcels thereof as in his judgment seems necessary to satisfy the remainder of the secured obligation, and the costs and expenses of the sale. The readvertisement of such sale shall be made as provided by G. S. § 45-21.17 in the case of real property or G. S. § 45-21.18 in the case of personal property.

(c) When the entire obligation has been satisfied by a sale of only a part of the property with respect to which a power of sale exists, the lien on the part of the property not so sold is discharged.

(d) The fact that more property is sold than is necessary to satisfy the obligation secured by the instrument pursuant to which the power of sale is exercised does not affect the validity of the title of any purchaser of property at any such sale. (1949, c. 720, s. 1.)

§ 45-21.10. Requirement of cash deposit at sale.—(a) If a mortgage or deed of trust contains provisions with respect to a cash deposit at the sale, the terms of the instrument shall be complied with.

(b) If the instrument contains no provision with respect to a cash deposit at the sale, the mortgagee or trustee holding the sale of real property may require the highest bidder immediately to make a cash deposit not to exceed ten per cent (10%) of the amount of the bid up to and including $1,000, plus five per cent (5%) of any excess over $1,000.

(c) If the highest bidder fails to make the required deposit, the person holding the sale may at the same time and place immediately reoffer the property for sale. (1949, c. 720, s. 1.)

§ 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, deed of trust or conditional sale contract 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.)

§ 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, deed of trust or conditional sale contract, or provided by statute, when an action to foreclose the mortgage or deed of trust, or to enforce the conditional sale contract, is barred by the statute of limitations.

(b) If a sale pursuant to a power of sale contained in a mortgage, deed of trust or conditional sale contract, or provided by statute, is commenced within the time allowed by the statute of limitations to foreclose such mortgage or deed of trust, or to enforce such conditional sale contract, the sale may be completed although such completion is effected after the time when commencement of an action to foreclose would be barred by the statute. For the purpose of this section, a sale is commenced when the notice of the sale is first posted or published as provided by this article or by the terms of the instrument pursuant to which the power of sale is being exercised. (1949, c. 720, s. 1.)

§ 45-21.13. Conditional sale contract; mortgage or deed of trust of personal property; statutory power of sale.—When a conditional sale contract or mortgage or deed of trust of personal property, does not contain an express power of sale a power of sale is hereby conferred upon the vendor, mortgagee or trustee, which power may be exercised in the same manner as an express power of sale, except as provided by G. S. § 45-21.18. (1949, c. 720, s. 1.)

§ 45-21.14. Clerk's authority to compel report or accounting; contempt proceeding.—Whenever any person fails to file any report or account, provided by this article, or files an incorrect or incomplete report or account, the clerk of the superior court having jurisdiction on his own motion or the motion of any interested party, may issue an order directing such person to file a correct and complete report or account within twenty days after service of the order on him. If such person fails to comply with the order, the

clerk may issue an attachment against him for contempt, and may commit him to jail until he files such correct and complete report or account. (1949, c. 720, s. 1.)

§ 45-21.15. Trustee's fees.—(a) When a sale has been held, the trustee is entitled to such compensation, if any, as is stipulated in the instrument.

(b) When no sale has actually been held, compensation for a trustee's services is determined as follows:

(1) If no compensation for the trustee's services in holding a sale is provided for in the instrument, the trustee is not entitled to any compensation;

(2) If compensation is specifically provided for the trustee's services when no sale is actually held, the trustee is entitled to such compensation;

(3) If the instrument provides for compensation for the trustee's services in actually holding a sale, but does not provide compensation for the trustee's services when no sale is actually held, the trustee is entitled to such compensation as the parties agree upon;

(4) If the instrument provides for compensation for the trustee's services in actually holding a sale, but does not provide compensation for the trustee's services when no sale is actually held, and the parties are not able to agree as to the trustee's compensation, then five per cent (5%) of the amount of the obligation secured by the instrument, not exceeding the amount stipulated in the instrument as compensation for the trustee's services in actually holding a sale, shall be deposited with the clerk of the superior court. Such sum shall be held by the clerk until the trustee's compensation is fixed by the clerk, upon petition by the trustee, after notice to the person who deposited such sum. (1949, c. 720, s. 1.)

Part 2. Procedure for Sale.

§ 45-21.16. Contents of notice of sale.—The notice of sale shall—

(1) Refer to the instrument pursuant to which the sale is held;

(2) Designate the date, hour and place of sale consistent with the provisions of the instrument and this article;

(3) Describe real property to be sold substantially as it is described in the instrument containing the power of sale, and may add such further description as will acquaint bidders with the nature and location of the property;

(4) Describe personal property to be sold substantially as it is described in the instrument pursuant to which the power of sale is being exercised, and may add such further description as will acquaint bidders with the nature of the property;

(5) State the terms of the sale provided for by the instrument pursuant to which the sale is held, including the amount of the cash deposit, if any, to be made by the highest bidder at the sale; and

(6) Include any other provisions required by the instrument to be included therein. (1949, c. 720, s. 1.)

§ 45-21.17. Posting and publishing notice of sale of real property.—(a) When the instrument pursuant to which a sale of real property is to be held contains provisions with respect to posting or publishing notice of sale of the real property, such provisions shall be complied with, and compliance therewith is sufficient notice.

(b) When the instrument pursuant to which a sale of real property is to be held contains no provision with respect to posting or publishing notice of the sale of real property, the notice shall—

(1) Be posted, at the courthouse door in the county in which the property is situated, for thirty days immediately preceding the sale.

(2) And in addition thereto,

a. If a newspaper qualified for legal advertising is published in the county, the notice shall be published in such a newspaper once a week for at least four successive weeks; but

b. If no such newspaper is published in the county, the notice shall be posted at three other public places in the county for thirty days immediately preceding the sale.

(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 not be more than seven days preceding the date of sale.

(d) When the real property to be sold is situated in more than one county, the provisions of subsections (a) or (b) whichever is applicable, and subsection (c) shall be complied with in each county in which any part of the property is situated. (1949, c. 720, s. 1.)

Effect of Notice to Discontinue Publication of Notice of Sale.—A notice, from the trustee in a mortgage or deed of trust to a person authorized by him to advertise a sale of the property thereunder, to withhold or discontinue publication of the notice of sale, withdraws from such person any authority to advertise or sell the property and breaks the continuity of publication of notice required by former § 1-325, and no subsequent renewal of authority can bridge the gap or restore the publication to its original status. Smith v. Bank of Pinehurst, 223 N. C. 249, 25 S. E. (2d) 859.

§ 45-21.18. Posting notice of sale of personal property; mailing notice when statutory power of sale exercised.—(a) When an instrument containing an express power of sale of personal property contains provisions with respect to posting or publishing a notice of sale of the property, such provisions shall be complied with, and compliance therewith is sufficient notice.

(b) When the instrument pursuant to which a sale of personal property is to be held contains no provision with respect to posting or publishing notice of the sale, the notice of sale, except in the case of perishable property as described in G. S. § 45-21.19, shall be posted, at the courthouse door in the county in which the sale is to be held, for ten days immediately preceding the sale.

(c) When a mortgage or deed of trust of personal property, or a conditional sale contract, contains no express power of sale, any person exercising the statutory power of sale provided therefor, in addition to the posting of notice required

by subsection (b), shall, at least ten days before the date of sale, mail by registered mail a copy of the notice of sale to the mortgagor or grantor in case of a mortgage or deed of trust of personal property, or the vendee in case of a conditional sale contract—

(1) At the actual address of the mortgagor, grantor or vendee, if such address is known to the mortgagee, trustee or vendor, or

(2) At the address, if any, furnished the mortgagee, trustee or vendor by the mortgagor, grantor or vendee, when the actual address is not known to the mortgagee, trustee or vendor.

(d) If the actual address of the mortgagor, grantor or vendee is not known to the mortgagee, trustee or vendor, and if no address of the mortgagor, grantor or vendee has been furnished to the mortgagee, trustee or vendor, no mailing of a copy of the notice of sale pursuant to subsection (c) is required. (1949, c. 720, s. 1.)

§ 45-21.19. Exception; perishable property.—If, in the opinion of a person who is about to exercise a power of sale of personal property, the property is perishable because subject to rapid deterioration, such person may report such fact together with a description of the property to the clerk of the superior court of the county in which the property is to be sold, and apply for authority to sell the property at an earlier date than this article would otherwise permit. If the clerk determines that the property is such perishable property, he shall order a sale thereof to be held at such time and place and upon such notice to be given in such manner and for such length of time as he deems advisable. If the clerk makes no such order, the person authorized to hold the sale shall proceed as if the matter had not been presented to the clerk. (1949, c. 720, s. 1.)

§ 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, deed of trust or conditional sale contract, 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.)

§ 45-21.21. Postponement of sale.—(a) Any person exercising a power of sale may postpone the sale to a day certain not later than six days, exclusive of Sunday, after the original date for the sale—

(1) When there are no bidders, or

(2) When, in his judgment, the number of prospective bidders at the sale is substantially decreased by inclement weather or by any casualty, or

(3) When there are so many other sales advertised to be held at the same time and place as to make it inexpedient and impracticable in his judgment, to hold the sale on that day, or

(4) When he is unable to hold the sale because of illness or for other good reason, or

(5) When other good cause exists.

(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 in the case of real property or G. S. § 45-21.18 in the case of personal property, a notice of the postponement.

(c) The posted notice of postponement shall—

(1) State that the sale is postponed,

(2) State the hour and date to which the sale is postponed,

(3) State the reason for the postponement, and

(4) Be signed by the person authorized to hold the sale, or by his agent or attorney.

(d) If a sale is not held at the time fixed therefor and is not postponed as provided by this section, or if a postponed sale is not held at the time fixed therefor, the person authorized to hold the sale may readvertise the property in the same manner as he was required to advertise the sale which was not held, and may hold a sale at such later date as is fixed in the new notice of sale. (1949, c. 720, s. 1.)

§ 45-21.22. Procedure upon dissolution of order restraining or enjoining sale.—(a) When, before the date fixed for a sale, a judge dissolves an order restraining or enjoining the sale, he may, if the required notice of sale has been given, provide by order that the sale shall be held without additional notice at the time and place originally fixed therefor, or he may, in his discretion, make an order with respect thereto as provided in subsection (b).

(b) When, after the date fixed for a sale, a judge dissolves an order restraining or enjoining the sale, he shall by order fix the time and place for the sale to be held upon notice to be given in such manner and for such length of time as he deems advisable. (1949, c. 720, s. 1.)

§ 45-21.23. Time of sale.—(a) A sale shall begin at the time designated in the notice of sale or as soon thereafter as practicable, but not later than one hour after the time fixed therefor unless it is delayed by other sales held at the same place.

(b) No sale shall commence before 10:00 o'clock A. M. or after 4:00 o'clock P. M.

(c) No sale shall continue after 4:00 o'clock P. M., except that in cities or towns of more than five thousand inhabitants, as shown by the most recent federal census, sales of personal property may continue until 10:00 o'clock P. M. (1949, c. 720, s. 1.)

§ 45-21.24. Continuance of uncompleted sale.—A sale commenced but not completed within the time allowed by G. S. § 45-21.23 shall be continued by the person holding the sale to a designated time between 10:00 o'clock A. M. and 4:00 o'clock P. M. the next following day, other than Sunday. In case such continuance becomes ne

essary, the person holding the sale shall publicly announce the time to which the sale is continued. (1949, c. 720, s. 1.)

§ 45-21.25. Delivery of personal property; bill of sale.—The person holding a sale of personal property shall deliver the property to the purchaser immediately upon receipt of the purchase price. The person holding the sale may also execute and deliver a bill of sale or other muniment of title for any personal property sold, and upon application of the purchaser, shall do so when required by the clerk of the superior court of the county where the property is sold. No report of such sale is necessary. (1949, c. 720, s. 1.)

§ 45-21.26. Preliminary report of sale of real property.—(a) The person exercising a power of sale of real property, shall, within five days after the date of the sale, file a report thereof with the clerk of the superior court of the county in which the sale was had.

(b) The report shall be signed by the person authorized to hold the sale, or by his agent or attorney, and shall show—

(1) The authority under which the person making the sale acted;

(2) The name of the mortgagor or grantor;

(3) The name of the mortgagee or trustee;

(4) The date of the sale;

(5) A reference to the book and page in the office of the register of deeds, where the instrument is recorded or, if not recorded, a description of the property sold, sufficient to identify it, and, if sold in parts, a description of each part so sold;

(6) The name or names of the person or persons to whom the property was sold;

(7) The price at which the property, or each part thereof, was sold, and that such price was the highest bid therefor;

(8) The name of the person making the report; and

(9) The date of the report. (1949, c. 720, s. 1.)

§ 45-21.27. Upset bid on real property; compliance bond.—(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 per cent (10%) of the first $1000 thereof plus five per cent (5%) of any excess above $1000, but in any event with a minimum increase of $25, such increase being deposited in cash 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. 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 sale 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.)

Mortgagor or Trustor May Make Advanced Bid.—Under former § 45-28, of similar import to this and the two following sections, the mortgagor or trustor was entitled to procure resales through advanced bids made in conformity with the statute. In re Sale of Land of Sharpe, 230 N. C. 412, 53 S. E. (2d) 302.

And Repeatedly Procure Resales Thereby.—The fact that the trustor repeatedly procured resales through the making of advanced bids in compliance with former § 45-28 worked no legal wrong upon the cestui and was within the trustor's right, even though he procured such upset bids for the purpose of delaying foreclosure and the recovery by the cestui of the indebtedness. In re Sale of Land of Sharpe, 230 N. C. 412, 53 S. E. (2d) 302.

Clerk Cannot Require Larger Deposit than That Required by Statute. — Under former § 45-28, it was held that the clerk had no authority to require a cash deposit for an upset bid in excess of that prescribed by the statute, or to require a person desirous of making an advance bid to deposit 15% of such bid in cash or certified or cashier's check. In re Sale of Land of Sharpe, 230 N. C. 412, 53 S. E. (2d) 302

Applied, as to former § 45-28, in McCullen v. Durham, 229 N. C. 418, 50 S. E. (2d) 511.

§ 45-21.28. Separate upset bids when real property sold in parts; subsequent procedure.—When real property is sold in parts, as provided by G. S. § 45-21.8, the sale and each subsequent resale, of any such part is subject to a separate upset bid; and, to the extent the clerk of the superior court having jurisdiction deems advisable, the sale of each such part shall thereafter be treated as a separate sale for the purpose of determining the procedure applicable thereto. (1949, c. 720, s. 1.)

§ 45-21.29. Resale of real property; jurisdiction; procedure.—(a) When an upset bid on real property is submitted to the clerk of the superior court, together with a compliance bond if one is required, the clerk shall order a resale.

(b) Notice of any resale to be held because of an upset bid shall—

(1) Be posted, at the courthouse door in the county in which the property is situated, for fifteen days immediately preceding the sale.

(2) And in addition thereto,

a. If a newspaper qualified for legal advertising is published in the county, the notice shall be published in such a newspaper once a week for at least two successive weeks; but

b. If no such newspaper is published in the county, the notice shall be posted at three other public places in the county for fifteen days immediately preceding the sale.

(c) When the notice of resale 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 eight days, including Sunday, and

(2) The date of the last publication shall not

be more than seven days preceding the date of sale.

(d) When the real property to be resold is situated in more than one county, the provisions of subsections (b) and (c) shall be complied with in each county in which any part of the property is situated.

(e) The person holding the resale shall report the resale in the same manner as required by G. S. § 45-21.26.

(f) When there is no bid at a resale other than the upset bid resulting in such resale, the person who made the upset bid is deemed the highest bidder at the resale. Such resale remains subject to other upset bids and resales pursuant to this article.

(g) Resales may be had as often as upset bids are submitted in compliance with this article.

(h) Except as otherwise provided in this section, all the provisions of this article applicable to an original sale are applicable to resales.

(i) The clerk of the superior court shall make all such orders as may be just and necessary to safeguard the interests of all parties, and shall have authority to fix and determine all necessary procedural details with respect to resales in all instances in which this article fails to make definite provision as to such procedure. (1949, c. 720, s. 1.)

Clerk Must Order Resale Each Time Upset Bid Is Placed. —Under former § 45-28 it was held that the clerk of the superior court was required to order a resale of property foreclosed under power contained in a deed of trust each time an advance bid was made in accordance with the statute, regardless of how often an upset bid may be placed. In re Sale of Land of Sharpe, 230 N. C. 412, 53 S. E. (2d) 302. See notes to § 45-21.27.

He May Not Make Orders Abrogating Rights Conferred by Statute. — The provision of former § 45-28 that the clerk should make such orders as may be just and necessary to safeguard the interests of all parties did not authorize him to enter orders abrogating rights conferred by the statute. In re Sale of Land of Sharpe, 230 N. C. 412, 53 S. E. (2d) 302.

§ 45-21.30. Failure of bidder to make cash deposit or to comply with bid; resale.—(a) If the terms of a sale of real or personal property require the highest bidder to make a cash deposit at the sale, and he fails to make such required deposit, the person holding the sale shall at the same time and place again offer the property for sale.

(b) When the highest bidder at a sale of personal property for cash fails to pay the amount of his bid, the person holding the sale shall at the same time and place again offer the property for sale. In the event no other bid is received, a new sale may be advertised in the regular manner provided by this article for an original sale.

(c) When the highest bidder at a sale or resale of real property fails to comply with his bid upon tender to him of a deed for the property or after a bona fide attempt to tender such deed, the person authorized to sell the property may hold a resale. The procedure for such resale is the same in every respect as is provided by this article in the case of an original sale of real property except that the provisions of G. S. § 45-21.29 (b), (c) and (d) apply with respect to the posting and publishing of the notice of such resale.

(d) A defaulting bidder at any sale or resale is liable on his bid, and in case a resale is had because of such default, he shall remain liable to the extent that the final sale price is less than his bid plus all costs of such resale or resales.

(e) Nothing in this section deprives any person of any other remedy against the defaulting bidder. (1949, c. 720, s. 1.)

§ 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, if the property sold is real property;

(3) Special assessments, or any installments thereof, against the property sold, which are due and unpaid, as provided by G. S. § 105-408, if the property sold is real property;

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

(b) Any surplus remaining after the application of the proceeds of the sale as set out in subsection (a) shall be paid to the person or persons entitled thereto, if the person who made the sale knows who is entitled thereto. Otherwise, the surplus shall be paid to the clerk of the superior court of the county where the sale was had—

(1) In all cases when the owner of the property sold is dead and there is no qualified and acting personal representative of his estate, and

(2) In all cases when he is unable to locate the persons entitled thereto, and

(3) In all cases when the mortgagee, trustee or vendor is, for any cause, in doubt as to who is entitled to such surplus money, and

(4) In all cases when adverse claims thereto are asserted.

(c) Such payment to the clerk discharges the mortgagee, trustee or vendor from liability to the extent of the amount so paid.

(d) The clerk shall receive such money from the mortgagee, trustee or vendor and shall execute a receipt therefor.

(e) The clerk is liable on his official bond for the safekeeping of money so received until it is paid to the party or parties entitled thereto, or until it is paid out under the order of a court of competent jurisdiction. (1949, c. 720, s. 1.)

§ 45-21.32. Special proceeding to determine ownership of surplus.—(a) A special proceeding may be instituted before the clerk of the superior court by any person claiming any money, or part thereof, paid into the clerk's office under G. S. § 45-21.31, to determine who is entitled thereto.

(b) All other persons who have filed with the clerk notice of their claim to the money or any part thereof, or who, as far as the petitioner or petitioners know, assert any claim to the money or any part thereof, shall be made defendants in the proceeding.

(c) If any answer is filed raising issues of fact as to the ownership of the money, the proceeding shall be transferred to the civil issue docket of the superior court for trial. When a proceeding

is so transferred, the clerk may require any party to the proceeding who asserts a claim to the fund by petition or answer to furnish a bond for costs in the amount of $200.00 or otherwise comply with the provisions of G. S. § 1-109.

(d) The court may, in its discretion, allow a reasonable attorney's fee for any attorney appearing in behalf of the party or parties who prevail, to be paid out of the funds in controversy, and shall tax all costs against the losing party or parties who asserted a claim to the fund by petition or answer. (1949, c. 720, s. 1.)

§ 45-21.33. Final report of sale of real property.—(a) A person who holds a sale of real property pursuant to a power of sale shall file with the clerk of the superior court of the county where the sale is held a final report and account of his receipts and disbursements within thirty days after the receipt of the proceeds of such sale. Such report shall show whether the property was sold as a whole or in parts and whether all of the property was sold. The report shall also show whether all or only a part of the obligation was satisfied with respect to which the power of sale of property was exercised.

(b) The clerk shall audit the account and record it.

(c) The person who holds the sale shall also file with the clerk—

(1) A copy of the notices of sale and resale, if any, which were posted, and

(2) A copy of the notices of sale and resale, if any, which were published in a newspaper, together with an affidavit of publication thereof, if the notices were so published.

(d) The clerk's fee for auditing and recording the final account is a part of the expenses of the sale, and the person holding the sale shall pay the clerk's fee as part of such expenses. (1949, c. 720, s. 1.)

Art. 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 supreme court from any such order or injunction. (1933, c. 275, s. 1; 1949, c. 720, s. 3.)

Cross Reference.—As to effective date and application of act inserting this article, see note under § 45-21.1.

Editor's Note.—Prior to the 1949 amendment, effective as of Jan. 1, 1950, this section appeared as § 45-32.

§ 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 supreme court in all cases. (1933, c. 275, s. 2; 1949, c. 720, s. 3.)

Editor's Note.—Prior to the 1949 amendment, effective as of Jan. 1, 1950, this section appeared as § 45-33.

§ 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 or personal property 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 off-set, but not by way of counter-claim, 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 off-set 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.)

Editor's Note.—Prior to the 1949 amendment, effective as of Jan. 1, 1950, this section appeared as § 45-34.

§ 45-21.37. Certain sections not applicable to tax suits.—Sections 45-21.34 through 45-21.36 do not apply to tax foreclosure suits or tax sales. (1933, c. 275, s. 4; 1949, c. 720, s. 3.)

Editor's Note.—The 1949 amendment, effective as of Jan. 1, 1950, rewrote § 45-35 to appear as this section.

§ 45-21.38. Deficiency judgments abolished where mortgage represents part of purchase price; deficiency judgment under conditional sale contract. —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 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 provision as herein set out.

Whenever a power of sale contained in a conditional sale contract, or granted by statute with respect thereto, is exercised, and the proceeds of such sale are not sufficient to defray the expenses thereof, and also the expenses of retaking, keeping and storing the goods and the balance due upon the purchase price, the seller may recover the deficiency from the buyer, or from anyone who has succeeded to the obligations of the buyer. (1933, c. 36; 1949, c. 720, s. 3; c. 856.)

Editor's Note.—Prior to the first 1949 amendment, effective as of Jan. 1, 1950, the first paragraph of this section appeared as § 45-36. The second paragraph was derived from the second 1949 act cited to the section and became effective April 8, 1949.

Foreign Executed Mortgage on Foreign Realty.—This section does not limit the jurisdiction of the federal district court in an action by a nonresident for a deficiency judgment amounting to $3,000 where the land mortgaged was in Virginia and the deed of trust signed by defendant was a Virginia contract securing notes signed by defendant and made payable at a bank in Roanoke, Virginia. Bullington v. Angel, 56 F. Supp. 372, affirmed in Angel v. Bullington, 150 F. (2d) 679, holding that this section did not bar action in federal district court in North Carolina for deficiency judgment under a contract executed in Virginia and valid there. But see Angel v. Bullington, 330 U. S. 183, 67 S. Ct. 657, 91 L. Ed. 557, reversing such case on the ground that the decision of the North Carolina supreme court denying a deficiency judgment in a previous suit on the same contract was res judicata.

For a leading article criticizing the decision in Angel v. Bullington, 330 U. S. 183, 67 S. Ct. 657, 91 L. Ed. 557, see 26 N. C. Law Rev. 29. For further comment on this case, see 26 N. C. Law Rev. 60.

Art. 2C. Validating Sections; Limitation of Time for Attacking Certain Foreclosures.

§ 45-21.39. Limitation of time for attacking certain foreclosures on ground trustee was agent, etc., of owner of debt.—1. No action or proceeding shall be brought or defense or counterclaim pleaded later than one year after March 14, 1941 in which a foreclosure sale which occurred prior to January 1, 1941, under a deed of trust conveying real estate as security for a debt is attacked or otherwise questioned upon the ground that the trustee was an officer, director, attorney, agent or employee of the owner of the whole or any part of the debt secured thereby, or upon the ground that the trustee and the owner of the debt or any part thereof have common officers, directors, attorneys, agents or employees.

2. This section shall not be construed to give or create any cause of action where none existed before March 14, 1941, nor shall the limitation provided in subsection one hereof have the effect of barring any cause of action based upon grounds other than those mentioned in said section, unless the grounds set out in subsection one are an essential part thereof.

3. This section shall not be construed to enlarge the time in which to bring any action or proceeding or to plead any defense or counterclaim; and the limitation hereby created is in addition to all other limitations now existing. (1941, c. 202; 1949, c. 720, s. 4.)

Cross Reference.—As to effective date and application of act inserting this article, see note to § 45-21.1.

Editor's Note.—Prior to the 1949 amendment, effective Jan. 1, 1950, this section appeared as § 45-22.

§ 45-21.40. Real property; validation of deeds made after expiration of statute of limitations where sales made prior thereto.—In all cases where sales of real property have been made under powers of sale contained in mortgages or deeds of trust and such sales have been made within the times which would have been allowed by the statute of limitations for the commencement of actions to foreclose such mortgages or deed of trust, and the execution and delivery of deeds in consummation of such sales have been delayed until after the expiration of the period which would have been allowed by the statute of limitations for the commencement of actions to foreclose such mortgages or deeds of trust as a result of the filing of raised or increased bids, such deeds in the exercise of the power of sale are hereby validated and are declared to have the same effect as if they had been executed and delivered within the period allowed by the statute of limitations for the commencement of actions to foreclose such mortgages or deeds of trust. (1943, c. 16, s. 2; 1949, c. 720, s. 4.)

Editor's Note.—Prior to the 1949 amendment, effective Jan. 1, 1950, this section appeared as § 45-26.1.

§ 45-21.41. Orders signed on days other than first and third Mondays validated; force and effect of deeds.—In all actions for the foreclosure of any mortgage or deed of trust which has heretofore been instituted and prosecuted before the clerk of the superior court of any county in North Carolina, wherein the judgment confirming the sale made by the commissioner appointed in said action, and ordering the said commissioner to execute a deed to the purchaser, was signed by such clerk on a day other than the first or third Monday of a month, such judgment of confirmation shall be and is hereby declared to be valid and of the same force and effect as though signed and docketed on the first or third Monday of any month, and any deed made by any commissioner or commissioners in any such action where the confirmation of sale was made on a day other than a first or third Monday of the month shall be and is hereby declared to have the same force and effect as if the same were executed and delivered pursuant to a judgment of confirmation properly signed and docketed by the clerk of the superior court on a first or third

Monday of the month. (1923, c. 53, s. 1; 1949, c. 720, s. 4; C. S. 2593(a).)

Editor's Note.—Prior to the 1949 amendment, effective Jan. 1, 1950, this section appeared as § 45-31.

§ 45-21.42. Validation of deeds where no order or record of confirmation can be found.—In all cases prior to the first day of March, one thousand nine hundred and forty-five where sales of property have been made under the power of sale contained in any deed of trust, mortgage or other instrument conveying property to secure a debt or other obligation, or where such sales have been made pursuant to an order of court in foreclosure proceedings and deeds have been executed by any trustee, mortgagee, commissioner, or person appointed by the court, conveying the property, or security, described therein, and said deed, or other instrument so executed, containing the property described therein, to the highest bidder or purchaser of said sale and such deed, or other instrument, contains recitals to the effect that said sale was reported to the clerk of the superior court, or to the court, and/or such sale was duly confirmed by the clerk of the superior court, or court, then and in that event all such deeds, conveyances, or other instruments, containing such recitals are declared to be lawful, valid and binding upon all parties to the proceedings, or parties named in such deeds of trust, mortgages, or other orders or instruments, and are hereby declared to be effective and valid to pass title for the purpose of transferring title to the purchasers at such sales with the same force and effect as if an order of confirmation had been filed in the office of the clerk of superior court, or with the court, together with all necessary reports and other decrees and to the same effect as if a record had been made in the minutes of the court of such orders, decrees and confirmations, provided that nothing contained in this section shall be construed as applicable to or affecting pending litigation. (1945, c. 984; 1949, c. 720, s. 4.)

Editor's Note.—Prior to the 1949 amendment, effective Jan. 1, 1950, this section appeared as § 45-36.1.

Art. 3. Mortgage Sales.

§ 45-22: Transferred to § 45-21.39 by Session Laws 1949, c. 720, s. 4.

Editor's Note.—The transferring act is effective as of Jan. 1, 1950.

§§ 45-23 to 45-26: Repealed by Session Laws 1949, c. 720, s. 5.

Editor's Note.—The repealing act provides that "the present law shall remain in effect for the completion of sales under power of sale to which this act, under section 6, does not apply." Section 6 of the act provides: "This act does not apply to any sale commenced prior to the effective date of this act. For the purposes of this section, a sale has been commenced if a notice of sale has been posted or published." And section 7 provides: "This act shall become effective Jan. 1, 1950."

§ 45-26.1: Transferred to § 45-21.40 by Session Laws 1949, c. 720, s. 4.

Editor's Note.—The transferring act is effective as of Jan. 1, 1950.

§§ 45-27 to 45-30: Repealed by Session Laws 1949, c. 720, s. 5.

Editor's Note.—The repealing act is effective as of Jan. 1, 1950. See note under §§ 45-23 to 45-26.

§ 45-31: Transferred to § 45-21.41 by Session Laws 1949, c. 720, s. 4.

Editor's Note.—The transferring act is effective as of Jan. 1, 1950.

§ 45-32: Transferred to § 45-21.34 by Session Laws 1949, c. 720, s. 3.

Editor's Note.—The transferring act is effective as of Jan. 1, 1950.

§ 45-33: Transferred to § 45-21.35 by Session Laws 1949, c. 720, s. 3.

Editor's Note.—The transferring act is effective as of Jan. 1, 1950.

§ 45-34: Transferred to § 45-21.36 by Session Laws 1949, c. 720, s. 3.

Editor's Note.—The transferring act is effective as of Jan. 1, 1950.

§ 45-35: Transferred to § 45-21.37 by Session Laws 1949, c. 720, s. 3.

Editor's Note.—The transferring act is effective as of Jan. 1, 1950.

§ 45-36: Transferred to § 45-21.38 by Session Laws 1949, c. 720, s. 3.

Editor's Note.—The transferring act is effective as of Jan. 1, 1950.

§ 45-36.1: Transferred to § 45-21.42 by Session Laws 1949, c. 720, s. 4.

Editor's Note.—The transferring act is effective as of Jan. 1, 1950.

Art. 4. Discharge and Release.

§ 45-37. Discharge of record of mortgages and deeds of trust.

This subsection shall be applicable from and after one year from the date of the ratification of this act to all instruments executed prior to the enactment of chapter one hundred and ninety-two of the Public Laws of one thousand nine hundred and twenty-three, and any person affected hereby shall have until said date to file the affidavit with the register of deeds referred to herein or make the entry on the margin of the record as herein provided for; provided, also, that this subsection shall be applicable from and after July 1st, 1947, to all instruments executed subsequent to March 6th, 1923, and prior to January 2nd, 1924, and any person affected by this proviso shall have until July 1st, 1947, to file the affidavit with the register of deeds referred to herein or make the entry on the margin of the record as herein provided for. (Rev., s. 1046; Code, s. 1271, 1870-1, c. 217; 1891, c. 180; 1893, c. 36; 1901, c. 46; 1917, c. 49, s. 1; 1917, c. 50, s. 1; 1923, c. 192, s. 1; 1923, c. 195; 1935, c. 47; 1945, c. 988; 1947, c. 880; C. S. 2594.)

Editor's Note.—

The 1945 amendment, ratified March 20, 1945, added the first part of the above sentence at the end of subsection 5; and the 1947 amendment added the proviso. As the rest of the section was not affected by the amendments only this sentence is set out.

For brief comment on the 1947 amendment, see 25 N. C. Law Rev. 407.

Not Retroactive.—

It has been uniformly held [before the 1945 and 1947 amendments] that subsection 5 of this section is prospective and does not apply to mortgages, deeds of trust or other instruments securing the payment of money which were executed prior to the enactment of the statute. Thomas v. Myers, 229 N. C. 234, 49 S. E. (2d) 478. But see amendments of 1945 and 1947.

The primary purpose sought to be accomplished by the fifth clause of this section was to promote freer marketability in cases where old and unsatisfied mortgages and deeds of trust, securing debts, were hampering real estate transaction, and this economic purpose is adequately ac-

complished by furnishing protection to parties who extend credit or purchase for a valuable consideration "from and after" the expiration of the fifteen year period. Smith v. Davis, 228 N. C. 172, 45 S. E. (2d) 51, 174 A. L. R. 643.

The first clause of the caption or title of the act from which the fifth clause of this section is derived indicates the primary purpose of the act, that is, to facilitate the examination of titles. Id.

Subsection 5 Does Not Protect Persons Purchasing or Extending Credit within Fifteen Year Period.—Subsection 5 of this section was not enacted for the purpose of protecting parties who extend credit or purchase for a valuable consideration within the fifteen year period fixed by the statute, but only "from and after" its expiration. Thomas v. Myers, 229 N. C. 234, 49 S. E. (2d) 478.

The presumption of payment of a mortgage or deed of trust provided for in the fifth clause of this section arises in favor of creditors or purchasers for valuable consideration from the mortgagor or trustor who extend credit or purchase after the expiration of the fifteen year period, and does not arise in favor of those who become creditors or purchasers for valuable consideration prior thereto. Smith v. Davis, 228 N. C. 172, 45 S. E. (2d) 51, 174 A. L. R. 643.

Removal of Deed of Trust as Cloud on Title.—Where a deed of trust is executed subsequent to the effective date of subsection 5 of this section, and the note thereby secured falls due more than fifteen years prior to plaintiffs' purchase of the property, and no affidavit is filed or marginal entry is made on the record by the register of deeds as required by the statute, plaintiffs are entitled to have the deed of trust removed in so far as it constitutes a cloud on their title. Thomas v. Myers, 229 N. C. 234, 49 S. E. (2d) 478.

§ 45-37.1. Validation of certain entries of cancellation made by beneficiary or assignee instead of trustee.—In all cases where, prior to January first, one thousand nine hundred and thirty, it appears from the margin or face of the record in the office of the register of deeds of any county in this state that the original beneficiary named in any deed of trust, trust indenture, or other instrument intended to secure the payment of money and constituting a lien on real estate, or his assignee of record, shall have made an entry purporting to fully satisfy and discharge the lien of such instrument, and such entry has been signed by the original payee and beneficiary in said deed of trust, or other security instrument, or by his assignee of record, or by his or their properly constituted officer, agent, attorney, or legal representatives, and has been duly witnessed by the register of deeds or his deputy, all such entries of cancellation and satisfaction are hereby validated and made full, sufficient and complete to release, satisfy and discharge the lien of such instrument, and shall have the same effect as if such entry had been made and signed by the trustee named in said deed of trust, or other security instrument, or by his duly appointed successor or substitute. (1945, c. 986.)

§ 45-38. Entry 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 of 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. (1923, c. 192, s. 2; 1949, c. 720, s. 2; C. S. 2594(a).)

Editor's Note.—The 1949 amendment, effective Jan. 1, 1950, added the second sentence. Section 6 of the amendatory act provides that it shall not apply to any sale commenced prior to said effective date. For brief comment on the amendment, see 27 N. C. Law Rev. 479.

§ 45-39: Repealed by Session Laws 1949, c. 720, s. 5.

Editor's Note.—The repealing act is effective as of Jan. 1, 1950. See note under §§ 45-23 to 45-26.

§ 45-42.1. Corporate cancellation of lost mortgages by register of deeds.—Upon affidavit of the secretary and treasurer of a corporation showing that the records of such corporation show that such corporation has fully paid and satisfied all of the notes secured by a mortgage or deed of trust executed by such corporation and such payment and satisfaction was made more than twenty-five years ago, and that such mortgage or deed of trust was made to a corporation which ceased to exist more than twenty-five years ago, and such affidavit shall further state that the records of such corporation show that no payments have been made on such mortgage by the corporation executing such mortgage or deed of trust for twenty-five years, the register of deeds of the county in which such mortgage or deed of trust is recorded is authorized and empowered to file such affidavit and record the same in his office and make reference thereto on the margin of the record in which the said mortgage or deed of trust is recorded, and, upon making such entry, the said mortgage or deed of trust shall be deemed to be cancelled and satisfied and the said register of deeds is hereby authorized to cancel the same of record: Provided, that this section shall not apply to any mortgagor corporation except those in which the state of North Carolina owns more than a majority of the capital stock and shall not apply to any mortgage or deed of trust in which the principal amount secured thereby exceeds the sum of fifteen thousand dollars: Provided, such cancellation shall not bar any action to foreclose such mortgage or deed of trust instituted within ninety days after the same is cancelled. (1945, c. 1090.)

Chapter 46. Partition.

Art. 1. Partition of Real Property.

Art. 2. Partition Sales of Real Property.

Art. 4. Partition of Personal Property.

Art. 1. Partition of Real Property.

§ 46-3. Petition by cotenant.

I. IN GENERAL.

Applied in Moore v. Baker, 224 N. C. 133, 29 S. E. (2d) 452.

III. PLEA OF SOLE SEIZIN.

Burden of Proof.—

Where defendants in partition deny co-tenancy and plead sole seizin, the burden is upon plaintiffs to show title in the parties by tenancy in common. Johnson v. Johnson, 229 N. C. 541, 50 S. E. (2d) 569.

§ 46-4. Surface and minerals in separate owners; partitions distinct.

Applied in Buffaloe v. Barnes, 226 N. C. 313, 38 S. E. (2d) 222.

§ 46-7.1. Compensation of commissioners.—The clerk of the superior court is hereby authorized to fix the compensation of commissioners for the partition or division of lands at a sum not in excess of six dollars ($6.00) per day each for the time devoted to the performance of their duties as such commissioners. (1949, c. 975.)

§ 46-8. Oath of commissioners. — The commissioners shall be sworn by a justice of the peace, 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. (Rev., s. 2492; Code, s. 1893; 1868-9, c. 122, s. 2; 1945, c. 472; C. S. 3220.)

Editor's Note.—The 1945 amendment authorized sheriffs and deputies to administer the oath.

§ 46-10. Commissioners to meet and make partition; equalizing shares.

Equality in value must be afforded by the assessment of an owelty charge. Moore v. Baker, 224 N. C. 498, 502, 31 S. E. (2d) 526.

§ 46-17. Report of commissioners; contents; filing.—The commissioners, within a reasonable time, not exceeding sixty days after the notification of their appointment, shall make a full and ample report of their proceedings, under the hands of any two of them, specifying therein the manner of executing their trust and describing particularly the land or parcels of land divided, and the share allotted to each tenant in severalty, with the sum or sums charged on the more valuable dividends to be paid to those of inferior value. The report shall be filed in the office of the superior court clerk: Provided, that the clerk of the superior court may, in his discretion, for good cause shown, extend the time for the filing of the report of said commissioners for an additional period not exceeding sixty days. This proviso shall be applicable to proceedings now pending for the partition of real property. (Rev., s. 2494; Code, s. 1896; 1868-9, c. 122, s. 5; 1949, c. 16; C. S. 3228.)

Editor's Note.—The 1949 amendment added the proviso.

§ 46-19. Confirmation and impeachment of report.—If no exception to the report of the commissioners is filed within ten days, the same shall be confirmed. Any party after confirmation may impeach the proceedings and decrees for mistake, fraud or collusion by petition in the cause: Provided, innocent purchasers for full value and without notice shall not be affected thereby. (Rev., s. 2494; Code, s. 1896; 1868-9, c. 122, s. 5; 1947, c. 484, s. 2; C. S. 3230.)

The 1947 amendment substituted "ten" for "twenty" in line two. Section 5 of the amendatory act provides that estates, proceedings and actions pending on June 30th, 1947, shall not be affected by its provisions.

Art. 2. Partition Sales of Real Property.

§ 46-25. Sale of standing timber on partition; valuation of life estate.—When two or more persons own, as tenants in common, joint tenants or co-partners, a tract of land, either in possession, or in remainder or reversion, subject to a life estate, or where one or more persons own a remainder or reversionary interest in a tract of land, subject to a life estate, then in any such case in which there is standing timber upon any such land, a sale of said timber trees, separate from the land, may be had upon the petition of one or more of said owners, or the life tenant, for partition among the owners thereof, including the life tenant, upon such terms as the court may order, and under like proceedings as are now prescribed by law for the sale of land for partition: Provided, that when the land is subject to a life estate, the life tenant shall be made a party to the proceedings, and shall be entitled to receive his portion of the net proceeds of sales, to be ascertained under the mortuary tables established by law. (Rev., s. 2510; 1895, c. 187; 1949, c. 34; C. S. 3236.)

Editor's Note.—The 1949 amendment rewrote this section. For brief comment on the amendment, see 27 N. C. Law Rev. 475.

Section Is Permissive.—The statute authorizing partition sale of standing timber is permissive rather than mandatory. Chandler v. Cameron, 229 N. C. 62, 47 S. E. (2d) 528, 3 A. L. R. (2d) 571.

Provision in Judgment Requiring Actual Partition of Timber.—A tenant in common, without the knowledge or authorization of his co-tenants, contracted to sell the timber on the entire tract. Thereafter he joined his co-tenants in a timber deed to another person. In an action brought by the grantee in the deed against the vendee in the contract to sell, a provision of the judgment that if the vendee elected to purchase the timber covered by the contract, there should be actual partition of the timber between the vendee and the grantee, was upheld. Chandler v. Cameron, 229 N. C. 62, 47 S. E. (2d) 528, 3 A. L. R. (2d) 571.

§ 46-27. Sale of land required for public use on cotenant's petition.—When the lands of joint tenants or tenants in common are required for public purposes, one or more of such tenants, or their guardian for them, may file a petition verified by oath, in the superior court of the county where the lands or any part of them lie, setting forth therein that the lands are required for pub-

lic purposes, and that their interests would be promoted by a sale thereof. Whereupon the court, all proper parties being before it, and the facts alleged in the petition being ascertained to be true, shall order a sale of such lands, or so much thereof as may be necessary. The expenses, fees and costs of this proceeding shall be paid in the discretion of the court. (Rev., s. 2518; Code, s. 1907; 1868-9, c. 122, s. 16; 1949, c. 719, s. 2; C. S. 3238.)

Editor's Note.—The 1949 amendment, effective Jan. 1, 1950, struck out the words "in the manner and on the terms it deems expedient" formerly ending the second sentence.

§ 46-28. Sale procedure.—The procedure for a partition sale shall be the same as is provided in article 29A of chapter 1 of the General Statutes. (Rev., s. 2512; Code, ss. 1904, 1921; 1868-9, c. 122, ss. 13, 31; 1949, c. 719, s. 2; C. S. 3239.)

Editor's Note.—The 1949 amendment, effective Jan. 1, 1950, rewrote this section.

§ 46-29: Repealed by Session Laws 1949, c. 719, s. 2.

Editor's Note.—Section 6 of the repealing act makes it effective Jan. 1, 1950.

§ 46-30. Deed to purchaser; effect of deed.—The deed of the officer or person designated to make such sale shall convey to the purchaser such title and estate in the property as the tenants in common, or joint tenants, and all other parties to the proceeding had therein. (Rev., s. 2512; Code, ss. 1904, 1921; 1868-9, c. 122, ss. 13, 31; 1949, c. 719, s. 2; C. S. 3241.)

Editor's Note.—The 1949 amendment, effective Jan. 1, 1950, rewrote this section.

§ 46-31. Clerk not to appoint self, assistant or deputy to sell real property.—No clerk of the superior court shall appoint himself or his assistant or deputy to make sale of any property in any proceeding before him. (Rev., s. 2513; Code, s. 1906; 1868-9, c. 122, s. 15; 1899, c. 161; 1949, c. 719, s. 2; C. S. 3242.)

Editor's Note.—The 1949 amendment, effective Jan. 1, 1950, rewrote this section.

§ 46-32: Repealed by Session Laws 1949, c. 719, s. 2.

Editor's Note.—Section 6 of the repealing act makes it effective Jan. 1, 1950.

Art. 4. Partition of Personal Property.

§ 46-44. Sale of personal property on partition.—If a division of personal property owned by any persons as tenants in common, or joint tenants, cannot be had without injury to some of the parties interested, and a sale thereof is deemed necessary, the court shall order a sale to be made as provided in article 29A of chapter 1 of the General Statutes. (Rev., s. 2519; Code, s. 1919; 1868-9, c. 122, s. 29; 1949, c. 719, s. 2; C. S. 3255.)

Editor's Note.—The 1949 amendment, effective Jan. 1, 1950, rewrote the latter part of the section and omitted the former provision relating to filing report.

§§ 46-45, 46-46: Repealed by Session Laws 1949, c. 719, s. 2.

Editor's Note.—Section 6 of the repealing act makes it effective Jan. 1, 1950.

Chapter 47. Probate and Registration.

Art. 1. Probate.

§ 47-1. Officials of state authorized to take probate.

A contract to sell and convey timber, in order to be enforceable against creditors and purchasers for value, must be probated and registered as provided by this chapter. Winston v. Williams, etc., Lbr. Co., 227 N. C. 339, S. E. (2d) 218.

§ 47-2. Officials of the United States, foreign countries, and sister states. — The execution of all such instruments and writings as are permi

ted 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 of the United States or United States marine corps having the rank of second lieutenant or higher, any officer of the United States navy or coast guard having the rank of ensign, or higher, or any officer of the United States merchant marine having the rank of ensign, 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 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 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. (Rev., s. 990; 1899, c. 235, s. 5; 1905, c. 451; 1913, c. 39, s. 1; Ex. Sess. 1913, c. 72, s. 1; 1943, c. 159, s. 1; 1943, c. 471, s. 1; 1945, c. 6, s. 1; C. S. 3294.)

Editor's Note.—
The 1945 amendment substituted "second lieutenant" for "captain" formerly appearing in line nineteen. It also substituted "ensign" for "lieutenant, senior grade" in lines twenty-one and twenty-two.

For comment on the 1943 amendment, see 21 N. C. Law Rev. 323.

§ 47-2.1. Validation of instruments proved before officers of certain ranks.—Any instrument or writing, required by law to be proved or acknowledged before an officer, which prior to the ratification of this section was proved or acknowledged before an officer of the United States army or United States marine corps having the rank of second lieutenant or higher, or any officer of the United States navy, United States coast guard, or United States merchant marine, having the rank of ensign or higher, is hereby validated and declared sufficient for all purposes. (1945, c. 6, s. 2.)

§ 47-3. Commissioner appointed by clerk for nonresident maker.—When it appears to the clerk of the superior court of any county that any person nonresident of this state desires to acknowledge a power of attorney, deed or other conveyance touching any real estate situated in the county of said clerk, he may issue a commission to a commissioner for receiving such acknowledgment, or taking such proof, and said commissioner may likewise take the acknowledgment and take such proof as to a married woman. The commissioner shall make certificate of acknowledgment or proof and shall return the same to the clerk of the superior court, whereupon he shall adjudge that such conveyance, power of attorney or other instrument is duly acknowledged or proved and shall order the same to be registered. (Rev., s. 991; Code, s. 1258; 1869-70, c. 185; 1945, c. 73, s. 9; C. S. 3295.)

Editor's Note.—The 1945 amendment omitted provisions relating to the private examination of the wife.

§ 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 justice of the peace 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 judge of the superior court or justice of the supreme court, 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 justice of the peace or notary public. All probates, adjudications and orders of registration made prior to January first, one thousand nine hundred and thirty, 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. (Rev., s. 995; 1891, c. 102; 1893, c. 3; 1913, c. 148. s. 1; 1921, c. 92; 1921, c. 106, s. 2; 1939, c. 210, s. 1; 1945, c. 73, s. 10; C. S. 3299.)

Editor's Note.—
The 1945 amendment substituted "acknowledgment" for "privy examination."

§ 47-12. Proof of attested writing.—In all instruments required or permitted by law to be registered including deeds and mortgages on real estate executed by a married woman, where her husband is not the grantee, and attested by subscribing witness, the said instruments may be proven and probated by the oath and examination of such subscribing witness before any official authorized by law to take proof, probate or acknowledgments of such instruments, and if such witness is dead or out of the state, or of unsound mind, the execution of the same may be proven before any official authorized to take the proof and acknowledgment of such instrument by proof of the handwriting of such subscribing witness or of the handwriting of the maker, and this shall likewise apply to the execution of instruments by married women: Provided, that no instrument required or permitted by law to be registered shall be proven, probated or ordered to be registered upon the oath and examination of a subscribing witness who is also the grantee named in said instrument, and the registration of any instrument which has been proven and admitted to probate upon the oath and examination of a subscribing witness who is the grantee in said instrument shall be void: Provided, further, that nothing herein shall invalidate the registration of any instrument registered prior to the ninth day of April, A. D. one thousand nine hundred and thirty-five. (Rev., s. 997; 1899, c. 235, s. 12; 1935, c. 168; 1937, c. 7; 1945, c. 73, s. 11; 1947, c. 991, s. 1; 1949, c. 815, ss. 1, 2; C. S. 3303.)

Editor's Note.—

The 1945 amendment made this section applicable to proof of execution of instruments by married women.

The 1947 amendment rewrote the first sentence.

For brief comment on the 1947 amendment, see 25 N. C. Law Rev. 406.

The 1949 amendment struck out the comma formerly preceding the word "including" in line three and also the comma formerly preceding the word "executed" in line four.

§ 47-13. Proof of unattested writing.—If an instrument required or permitted by law to be registered has no subscribing witness, the execution of the same may be proven before any official authorized to take the proof and acknowledgment of such instrument by proof of the handwriting of the maker and this shall likewise apply to proof of execution of instruments by married women. (Rev., s. 998; 1899, c. 235, s. 11; 1945, c. 73, s. 12; C. S. 3304.)

Editor's Note.—The 1945 amendment made this section applicable to proof of execution of instruments by married women.

Art. 2. Registration.

§ 47-17. Probate and registration sufficient without livery.

Formal Deed Regarded as Feoffment in Enforcing Parol Trust.—In properly constituted cases indicating the propriety of equitable relief in declaring and enforcing a parol trust, the formal deed by which the legal title is held is regarded as a feoffment not inconsistent with the trust sought to be established. Thompson v. Davis, 223 N. C. 792, 795, 28 S. E. (2d) 556.

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

I. IN GENERAL.

Editor's Note.—As to priority by recordation, see 27 N. C. Law Rev. 376. As to effect of recordation on title by estoppel, see 27 N. C. Law Rev. 376.

The Object of Probate and Registration.—

This section was enacted for the purpose of providing a plan and a method by which an intending purchaser or encumbrancer can safely determine just what kind of a title he is in fact obtaining. Chandler v. Cameron, 229 N. C. 62, 47 S. E. (2d) 528, 3 A. L. R. (2d) 571.

Cited in Ricks v. Batchelor, 225 N. C. 8, 33 S. E. (2d) 68; Carolina Power, etc., Co. v. Bowman, 228 N. C. 319, 45 S. E. (2d) 531.

II. REGISTRATION AS BETWEEN THE PARTIES.

Contract Specifically Enforceable between Parties.—A written contract to convey standing timber is specifically enforceable as between the parties without registration, and after registration is specifically enforceable even against subsequent purchasers for value. Chandler v. Cameron, 229 N. C. 62, 47 S. E. (2d) 528, 3 A. L. R. (2d) 571.

III. WHAT INSTRUMENTS AFFECTED.

Exclusive Right to Sell Given by Owner of Property to Broker.—Where an exclusive right to sell property given by the owner to a real estate broker is not registered as required by this section, third parties may deal with the locus as if there were no contract, since no notice, however full and formal, will take the place of registration. Eller v. Arnold, 230 N. C. 418, 53 S. E. (2d) 266.

Plaintiff broker alleged that he had been given exclusive contract to sell certain property, that he secured a prospect, and that thereafter the prospect and another real estate broker entered into an agreement under which the prospect, after the expiration of plaintiff's option, purchased the property through the other broker upon such other broker's agreement to split commission. Held: In the absence of allegation that plaintiff's option was registered the complaint fails to state a cause of action. Id.

A contract to convey standing timber constitutes a contract to convey land within the meaning of this section. Chandler v. Cameron, 229 N. C. 62, 47 S. E. (2d) 528, 3 A. L. R. (2d) 571.

Section Neither Requires Nor Authorizes Registration of Mere Personal Contract.—This section requires recordation of all deeds, contracts to convey, and leases for more than three years affecting the title to real property. But it neither requires nor authorizes the registration of a mere personal contract. Chandler v. Cameron, 229 N. C. 62, 47 S. E. (2d) 528, 3 A. L. R. (2d) 571.

IV. RIGHTS OF PERSONS PROTECTED.

This section protects purchasers for value against an unregistered contract to convey land, that is, where an owner of land contracts to convey land, such contract, until registered in the county where the land lies, is ineffective as against any who purchases for value from him. Eller v. Arnold, 230 N. C. 418, 53 S. E. (2d) 266.

Allegations that third persons conspired to deprive plaintiff of his rights under an unregistered option does not state a cause of action against such third persons, since in the absence of registration such third persons have a legal right to deal with the property as if there were no option and an agreement to do a lawful act cannot constitute a wrongful conspiracy. Eller v. Arnold, 230, N. C. 418, 53 S. E. (2d) 266.

V. NOTICE.

No Notice Will Supply Want of Registration.—

In accord with 1st paragraph in original. See State Trust Co. v. Braznell, 227 N. C. 211, 41 S. E. (2d) 744; Turner v. Glenn, 220 N. C. 620, 18 S. E. (2d) 197; Chandler v. Cameron, 229 N. C. 62, 47 S. E. (2d) 528, 3 A. L. R. (2d) 571.

Record of Instrument Not Required to Be Recorded Does Not Constitute Notice.—The record of an instrument does not constitute constructive notice, if it is not of a class which is authorized or required by law to be recorded. Chandler v. Cameron, 229 N. C. 62, 47 S. E. (2d) 528, 3 A. L. R. (2d) 571.

The registration of an instrument operates as constructive notice only when the statute authorizes its registration and then only to the extent of those provisions which are within the registration statutes. Id.

Registration Is Not Notice as to After-Acquired Interest.—A written contract executed by a tenant in common, without the knowledge or authorization of his cotenants, to sell the timber on the entire tract, was recorded. The tenant in common later acquired an additional interest in the land. It was held that registration was constructive notice to all subsequent purchasers as to the tenant's original interest but the vendee's right to demand conveyance of the timber as to the after-acquired interest rested upon the personal contract of the vendor, which was not required to be recorded by this section, and therefore registration was not notice to subsequent purchasers as to such after-acquired title. Chandler v. Cameron, 229 N. C. 62, 47 S. E. (2d) 528, 3 A. L. R. (2d) 571.

§ 47-20. Deeds of trust and mortgages, real and personal.

I. IN GENERAL.

Editor's Note.—As to effect of recordation statutes on mortgages and sales of automobiles on credit, see 26 N. C. Law Rev. 173. As to mortgages, deeds of trust and other encumbrances created on personal property while such property is located in another state, see § 44-38.1, discussed in 27 N. C. Law Rev. 440.

Cited in Universal Finance Co. v. Clary, 227 N. C. 247, 41 S. E. (2d) 760; General Finance, etc., Corp. v. Guthrie, 227 N. C. 431, 42 S. E. (2d) 601.

III. INSTRUMENTS AFFECTED.

Section Makes No Exception in Favor of Mortgage Executed in Another State.—The uniform sales act of the state wherein the property was purchased and the conditional sales contract registered in accordance with its laws cannot be given an effect contrary to the provisions of our registration statutes, this section and § 47-23, since our statutes make no exception in favor of a conditional sale contract or chattel mortgage executed and effected in another state when the property embraced in such instrument is subsequently brought into this state. Universal C. I. T. Credit Corp. v. Walters, 230 N. C. 443, 53 S. E. (2d) 520. See § 44-38.1.

Personal Property in State Temporarily.—Where personal property subject to a conditional sale contract or chattel mortgage is brought into this state by the nonresident purchaser while he is on a temporary visit, the personalty does not acquire a situs here within the meaning of our registration statute, and such lien is not required to be registered in any county of this state. Universal C. I. T. Credit Corp. v. Walters, 230 N. C. 443, 53 S. E. (2d) 520. See § 44-38.

§ 47-22. Counties may provide for photographic or photostatic registration.

For subsequent statute providing for photographic recording, see §§ 153-9.1 to 153-9.7.

§ 47-23. Conditional sales of personal property.

Editor's Note.—As to effect of recordation statutes on mortgages and sales of automobiles on credit, see 26 N. C. Law Rev. 173.

Laws of Foreign State Cannot Alter Effect of Section.—The uniform sales act of the state wherein the property was purchased and the conditional sales contract registered in accordance with its laws cannot be given an effect contrary to the provisions of our registration statutes, § 47-20 and this section since our statutes make no exception in favor of a conditional sale contract or chattel mortgage executed and effected in another state when the property embraced in such instrument is subsequently brought into this state. Universal C. I. T. Credit Corp. v. Walters, 230 N. C. 443, 53 S. E. (2d) 520. See § 44-38.1.

Property Temporarily in State.—Where personal property subject to a conditional sale contract or chattel mortgage is brought into this state by the nonresident purchaser while he is on a temporary visit, the personalty does not acquire a situs here within the meaning of our registration statute, and such lien is not required to be registered in any county of this state. Universal C. I. T. Credit Corp. v. Walters, 230 N. C. 443, 53 S. E. (2d) 520. See § 44-38.1.

An automobile purchased by a nonresident in another state and subject to a conditional sale contract, registered in accordance with the laws of such other state, was brought into this state by the nonresident while on a temporary visit. The automobile was seized under execution of a judgment obtained here against the nonresident. Held: The lien of the conditional sale contract is superior to the lien obtained by levy under execution. Universal C. I. T. Credit Corp. v. Walters, 230 N. C. 443, 53 S. E. (2d) 520.

§ 47-26. Deeds of gift.

Editor's Note.—

A deed of gift is absolutely void, when not registered within two years after its making. Ferguson v. Ferguson, 225 N. C. 375, 35 S. E. (2d) 231.

Unregistered Deed Void Ab Initio after Two Years.—Between the parties thereto a deed of gift, not registered, is good during the two years after the making of it, but upon failure to register it within such time, it becomes void ab initio and title vests in grantor. Winstead v. Woolard, 223 N. C. 814, 28 S. E. (2d) 507.

Evidence held to support finding that instrument was executed for valuable consideration and therefore not void under this section. Cannon v. Blair, 229 N. C. 606, 50 S. E. (2d) 732.

§ 47-27. Deeds of easements.

The provision of this section exempting decrees of condemnation from the requirement of registration is not repealed by the amendments of Chap. 107, Public Laws of 1919, and Chap. 750, Session Laws of 1943, and an easement created by judgment in condemnation proceedings is good as against creditors and purchasers for value from the owner of the servient tenement notwithstanding the absence of registration. Carolina Power, etc., Co. v. Bowman, 228 N. C. 319, 45 S. E. (2d) 531.

The provision of this section exempting decrees of courts of competent jurisdiction in condemnation proceedings from the requirement as to registration supersedes the provisions of § 40-19 that a copy of the judgment in eminent domain proceedings be registered in the county where the land lies, and the provision of § 1-228 that judgments in which transfers of title are declared shall be registered under the same rules prescribed for deeds. Id.

§ 47-32. Photostatic copies of plats, etc.; fees of clerk.

For subsequent statute providing for photographic recording, see §§ 153-9.1 to 153-9.7.

Art. 3. Forms of Acknowledgment, Probate and Order of Registration.

§ 47-38. Acknowledgment by grantor. — Where the instrument is acknowledged by the grantor or maker, or where a married woman is a grantor or maker, the form of acknowledgment shall be in substance as follows:

North Carolina, ... County.

I (here give the name of the official and his official title), do hereby certify that (here give the name of the grantor or maker) personally appeared before me this day and acknowledged the due execution of the foregoing instrument. Witness my hand and (where an official seal is required by law) official seal this the .... day of .... (year).

(Official seal.)

.....

(Signature of officer.)

(Rev., s. 1002; 1945, c. 73, s. 13; C. S. 3323.)

Editor's Note.—The 1945 amendment made this section applicable to married women.

§ 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 § 52-12 of the General Statutes, the form of certificate of her acknowledgment before any officer authorized to take the same shall be in substance as follows:

North Carolina, ... County.

I (here give name of the official and his official title), do hereby certify that (here give name of the married woman who executed the contract or 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 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).

.....

Signature of officer.

(Official Seal)

(Rev., s. 1003; 1899, c. 235, s. 8; 1901, c. 637; 1945, c. 73, s. 14; C. S. 3324.)

Editor's Note.—Prior to the 1945 amendment this section related to the private examination of married women.

For repeal of laws requiring private examination of married women, see § 47-116.

§ 47-40. Husband's acknowledgment and wife's acknowledgment before the same officer.—Where the instrument is acknowledged by both husband and wife or by other grantor before the same officer the form of acknowledgment shall be in substance as follows:

I (here give name of official and his official title), do hereby certify that (here give names of the grantors whose acknowledgment is being taken) personally appeared before me this day and acknowledged the due execution of the foregoing (or annexed) instrument.

(Rev., s. 1004; 1899, c. 235, s. 8; 1901, c. 299; 1945, c. 73, s. 15; C. S. 3325.)

Editor's Note.—Prior to the 1945 amendment the certificate contained a provision as to the private examination of a married woman.

§ 47-41. Corporate conveyances.

If the deed or other instrument is executed by the signature of the president, vice-president, presiding member or trustee of the corporation, and sealed with its common seal and attested by its secretary or assistant secretary, the following form of proof and certificate thereof shall be deemed sufficient:

This ..... day of ..... A.D. ....., personally came before me (here give name and official title of officer who signs the certificate) A. B., who, being by me duly sworn, says that he is president (vice-president, presiding member or trustee) of the ..... Company, and that the seal affixed to the foregoing (or annexed) instrument in writing is the corporate seal of said company, and that said writing was signed and sealed by him in behalf of said corporation by its authority duly given. And the said A. B. acknowledged the said writing to be the act and deed of said corporation.

.....

(Official seal) Signature of officer.

If the officer before whom the same is proven be the clerk or deputy clerk of the superior court of the county in which the instrument is offered for registration, he shall add to the foregoing certificate the following: "Let the instrument with the certificate be registered."

All corporate conveyances probated and recorded prior to February 14, 1939, wherein the same was attested by the assistant secretary, instead of the secretary, and otherwise regular, are hereby validated as if attested by the secretary of the corporation.

The following forms of probate for contracts in writing for the purchase of personal property by corporations providing for a lien on the property or the retention of a title thereto by the vendor as security for the purchase price or any part thereof, or chattel mortgages, chattel deeds of trust and conditional sales of personal property executed by a corporation shall be deemed sufficient but shall not exclude other forms of probate which would be deemed sufficient in law:

North Carolina

.....County

I, ..., do hereby certify that ....., personally came
(name of president, secretary or treasurer)
before me this day and acknowledged that he is
.....of
(president, secretary or treasurer)
.....and acknowledged,
(name of corporation)
on behalf of....., the grantor,
(name of corporation)
the due execution of the foregoing instrument.
Witness my hand and official seal, this .....
day of ....., 19.....

(Official seal)

.....
(Title of officer)

North Carolina

.....County

The due execution of the foregoing instrument by ....., the grantor therein named, for the purposes therein expressed, was this day duly proven before me by the oath and examination of ....., the subscribing witness thereto.
Witness my hand and official seal, this .....
day of ....., 19.....

(Official seal)

.....
(Title of officer)

(Rev., s. 1005; 1899, c. 235, s. 17; 1901, c. 2, s. 110; 1905, c. 114; 1907, c. 927, s. 1; 1939, c. 20, ss. 1, 2; 1943, c. 172; 1947, c. 75, s. 1; 1949, c. 1224, s. 1; C. S. 3326.)

Editor's Note.—The 1947 amendment rewrote the third and fourth paragraphs from the end of the original section to appear as the first two paragraphs above. Section 2 of the amendatory act validated the recordation of all corporate conveyances probated and recorded prior to July 1, 1947, which had been executed and admitted to registration in accordance with the above rewritten provisions, and which were otherwise regular.

The 1949 amendment added at the end of the section the form of probate for contracts for the purchase of personal property.

The last two paragraphs of the original section, which appear as paragraphs three and four above, are set out for convenience though they have not been changed. The portion of the section preceding the paragraphs rewritten by the 1947 amendment has not been set out.

For brief comment on the 1949 amendment, see 27 N. C. Law Rev. 440.

§ 47-43. Form of certificate of acknowledgment of instrument executed by attorney in fact.

Cross Reference.—For section amending this section, see § 47-43.1 and note.

§ 47-43.1. Execution and acknowledgment of instruments by attorneys or attorneys in fact.—When an instrument purports to be executed by parties acting through another by virtue of a power of attorney, it shall be sufficient if the attorney or attorney in fact signs such instrument either in the name of the principal by the attorney or attorney in fact or signs as attorney or attorney in fact for the principal; and if such instrument purports to be under seal, the seal of the attorney in fact shall be sufficient. For such instrument to be executed under seal, the power of attorney must have been executed under seal. (1949, c. 66, s. 1.)

Editor's Note.—Section 1 of the act inserting the above section provides that § 47-43 is amended by adding § 47-43.1 at the end thereof. Section 2 of the act, read in conjunction with section 4, provides that all instruments executed

prior to February 11, 1949, which satisfy the requirements of the act, and are otherwise valid as to form and substance, shall be deemed sufficient and valid in law.

For brief comment on this section, see 27 N. C. Law Rev. 421.

Art. 4. Curative Statutes; Acknowledgments; Probates; Registration.

§ 47-48. Clerk's certificate failing to pass on all prior certificates.

The provisions of this section shall apply to all instruments recorded in any county of this state prior to January first, one thousand nine hundred and forty-five. (1917, c. 237; 1945, c. 808, s. 1; C. S. 3330.)

Editor's Note.—The 1945 amendment added the above sentence at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

§ 47-50. Order of registration omitted.—In all cases prior to March 3, 1949, where it appears from the records in the office of the register of deeds of any county in this state that the execution of a deed of conveyance or other instrument by law required or authorized to be registered was duly acknowledged, as required by the laws of the state of North Carolina, and the clerk or deputy clerk of the superior court of such county has properly proved and adjudged that the certificate or certificates of the official before whom such acknowledgment was taken is in due form, except that the order for registration by said clerk was omitted, any and all such probates and registration are hereby validated, and the record of such deeds of conveyance, or other instruments authorized or required to be registered, may be read in evidence upon the trial or hearing of any cause with the same force and effect as if the same had been duly ordered registered. (1911, cc. 91, 166; 1913, c. 73; 1915, c. 179, s. 1; 1941, cc. 187, 229; 1949, c. 493; C. S. 3332.)

Editor's Note.—The 1949 amendment changed the date in line two from January 1, 1941 to March 3, 1949.

§ 47-53. Probates omitting official seals, etc.—In all cases where the acknowledgment, private examination, or other proof of the execution of any deed, mortgage, or other instrument authorized or required to be registered has been taken or had by or before any commissioner of affidavits and deeds of this state, or clerk or deputy clerk of a court of record, or notary public of this or any other state, territory, or district, and such deed, mortgage, or other instrument has heretofore been recorded in any county in this state, but such commissioner, clerk, deputy clerk, or notary public has omitted to attach his or her official or notarial seal thereto, or if omitted, to insert his or her name in the body of the certificate, or if omitted, to sign his or her name to such certificate, if the name of such officer appears in the body of said certificate or is signed thereto, or it does not appear of record that such seal was attached to the original deed, mortgage, or other instrument, or such commissioner, clerk, deputy clerk, or notary public has certified the same as under his or her "official seal," or "notarial seal," or words of similar import, and no such seal appears of record or where the officer uses "notarial" in his or her certificate and signature shows that "C. S. C.," or "clerk of superior court," or similar exchange of capacity, and the word "seal" follows the signature, then all such acknowledgments, private examinations or other proofs of such deeds, mortgages, or other instruments, and the registration thereof, are hereby made in all respects valid and binding. The provisions of this section apply to acknowledgments, private examinations, or proofs taken prior to January first, one thousand nine hundred and forty-five: Provided, this section does not apply to pending litigation. (Rev., s. 1012; 1907, cc. 213, 665, 971; 1911, c. 4; 1915, c. 36; 1929, c. 8, s. 1; 1945, c. 808, s. 2; C. S. 3334.)

Editor's Note.—

The 1945 amendment inserted, after the word "thereto" in line thirteen, the words "or if omitted, to insert his or her name in the body of the certificate, or if omitted, to sign his or her name to such certificate, if the name of such officer appears in the body of said certificate or is signed thereto." It also inserted the words "or where the officer uses 'notarial' in his or her certificate and signature shows that 'C. S. C.,' or 'clerk of superior court,' or similar exchange of capacity, and the word 'seal' follows the signature."

§ 47-64. Probates before officers, stockholders or directors of corporations prior to January 1, 1945.—No acknowledgment or proof of execution, including privy examination of married women, of any deed, mortgage or deed of trust to which instrument a corporation is a party, executed prior to the first day of January, one thousand nine hundred and forty-five, shall be held invalid by reason of the fact that the officer taking such acknowledgment, proof or privy examination was an officer, stockholder, or director in said corporation; but such proofs and acknowledgments and the registration thereof, if in all other respects valid, are declared to be valid. Nor shall the registration of any such instrument ordered to be registered be held invalid by reason of the fact that the clerk or deputy clerk ordering the registration was an officer, stockholder or director in any corporation which is a party to any such instrument. (Ex. Sess. 1913, c. 41; 1929, c. 24, s. 1; 1943, c. 135; 1945, c. 860; C. S. 3346.)

Editor's Note.—

The 1945 amendment substituted "forty-five" for "forty-three" in line six.

§ 47-99. Certificate of clerks without seal.—All certificates of acknowledgment and all verifications of pleadings, affidavits, and other instruments executed by clerks of the Superior Court of the State prior to March 1, 1945, and which do not bear the official seal of such clerks, are hereby validated in all cases in which the instruments bearing such acknowledgment or certification are filed or recorded in any county in the State other than the county in which the clerk executing such certificates of acknowledgment or verifications resides, and such acknowledgments and verifications are hereby made and declared to be binding, valid and effective to the same extent and in the same manner as if said official seal had been affixed. (1925, c. 248; 1945, c. 798.)

Editor's Note.—The 1945 amendment substituted in line five "March 1, 1945" for "March 10, 1925."

§ 47-102. Absence of notarial seal.—Any deed executed prior to the first day of January, nineteen hundred and forty-five, and duly acknowledged before a North Carolina notary public, and the probate recites "witness my hand and notarial seal," or words of similar import, and no seal was

affixed to the said deed, shall be ordered registered by the clerk of the superior court of the county in which the land lies, upon presentation to him: Provided, the probate is otherwise in due form. (1935, c. 130; 1943, c. 472; 1945, c. 808, s. 3.)

Editor's Note.—The 1945 amendment substituted "forty-five" for "thirty-five" in line three.

§ 47-108.2. Acknowledgments and examinations before notaries holding some other office.—In every case where deeds or other instruments have been acknowledged, and where privy examination of wives had, before a notary public, when the notary public at the time was also holding some other office, and the deed or other instrument has been otherwise duly probated and recorded, such acknowledgment taken by, and such privy examination had before such notary public is hereby declared to be sufficient and valid. (1945, c. 149.)

§ 47-108.3. Validation of acts of certain notaries public prior to November 26th, 1921.—In all cases where prior to November 26th, 1921, instruments by law, or otherwise, required, permitted or authorized to be registered, certified, probated, recorded or filed with certificates of notaries public showing the acknowledgments or proofs of execution thereof as required by the laws of the state of North Carolina have been registered, certified, probated, recorded or filed, such registration, certifications, probates, recordations and filings are hereby validated and made as good and sufficient as though such instruments had been in all respects properly registered, certified, probated, recorded or filed, notwithstanding there are no records in the office of the governor of the state of North Carolina or in the office of the clerk of the superior court of the county in which such notaries public were to act that such persons acting as such notaries public had ever been appointed or subscribed written oaths or received any certificates or commissions or were qualified as notaries public at the time of the performance of the acts hereby validated. (1947, c. 102.)

Editor's Note.—The act inserting this section, which was ratified Feb. 19, 1947, provides that it shall not apply to pending litigation.

§ 47-108.4. Acknowledgments, etc., of instruments of married women made since February 7, 1945.—All acknowledgments, probates and registrations of instruments wherein any married woman was a grantor, including deeds and mortgages on land, made since February 7th, 1945, are hereby validated, approved and declared of full force and effect. (1947, c. 991, s. 2.)

Editor's Note.—The act from which this section was codified, effective April 5, 1947, provides that it shall not apply to pending litigation.

§ 47-108.5. Validation of certain deeds executed in other states where seal omitted.—All deeds to lands in North Carolina, executed prior to January 1, 1948, without seal attached to the maker's name, which deeds were acknowledged in another state, the laws of which do not require a seal for the validity of a conveyance of real property located in that state, and which deeds have been duly recorded in this state, shall be as valid to all intents and purposes as if the same had been executed under seal. (1949, cc. 87, 296.)

Editor's Note.—For brief comment on this section, see 27 N. C. Law Rev. 475.

§ 47-108.6. Validation of certain conveyances of foreign dissolved corporations.—In all cases when, prior to the first day of January, 1947, any dissolved foreign corporation has, prior to its dissolution, by deed of conveyance purported to convey real property in this state, and said instrument recites a consideration, is signed by the proper officers in the name of said corporation, sealed with the corporate seal and duly registered in the office of the register of deeds of the county where the land described in said instrument is located, but there is error in the attestation clause and acknowledgment in failing to identify the officers signing said deed and to recite that authority was duly given and that the same was the act of said corporation, said deed shall be construed to be a deed of the same force and effect as if said attestation clause and acknowledgment were in every way proper. (1949, c. 1212.)

Editor's Note.—For brief comment on this section, see 27 N. C. Law Rev. 440.

§ 47-108.7. Validation of acknowledgments, etc., by deputy clerks of superior court.—All acts heretofore performed by deputy clerks of the superior court in taking acknowledgments, examining witnesses and probating wills, deeds and other instruments required or permitted by law to be recorded are hereby validated: Provided, nothing in this section shall affect pending litigation. (1949, c. 1072.)

Editor's Note.—The act from which this section was codified became effective April 20, 1949.

§ 47-108.8. Acts of registers of deeds or deputies in recording plats and maps by certain methods validated.—All acts heretofore performed by a register of deeds, or a deputy register of deeds in recording plats and maps by transcribing a correct copy thereof or permanently attaching the original to the records in a book designated "Book of Plats" is hereby validated the same as if said plats had been recorded as required by G. S. § 47-30: Provided, however, that nothing herein contained shall affect pending litigation (1949, c. 1073.)

Editor's Note.—The act from which this section was codified became effective April 20, 1949.

§ 47-108.9. Validation of probate of instrument pursuant to section 47-12.—The probates of all instruments taken on and after February 7, 1945 in accordance with the provisions of G. S. 47-12, as amended by Section 11 of chapter 7 of the Session Laws of 1945 and section 1 of chapter 991 of the Session Laws of 1947 and as further amended by sections 2 and 3 of chapter 815 of the Session Laws of 1949, are hereby in all respects validated; provided, however, that this section shall not apply to pending litigation (1949, c. 815, s. 3.)

Art. 5. Registration of Official Discharges from the Military and Naval Forces of the United States.

§ 47-109. Book for record of discharges in office of register of deeds; specifications.—There shall be provided, and at all times maintained, in the office of the register of deeds of each county in North Carolina a special and permanent book, in which shall be recorded official discharges from the army, navy, marine corps and other branches of the armed forces of the United States. S

book shall be securely bound, and the pages of the same shall be printed in the form of discharge papers, with sufficient blank lines for the recording of such dates as may be contained in the discharge papers offered for registration. (1921, c. 198, s. 1; 1945, c. 659, s. 2; C. S. 3366(k).)

Editor's Note.—The 1945 amendment struck out the words "military and naval" formerly appearing in line six and inserted in lieu thereof the words "army, navy, marine corps and other branches of the armed."

§ 47-110. Registration of official discharge or certificate of lost discharge.—Upon the presentation to the register of deeds of any county of any official discharge, or official certificate of lost discharge, from the army, navy, marine corps, or any other branch of the armed forces of the United States he shall record the same without charge in the book provided for in § 47-109. (1921, c. 198, s. 2; 1943, c. 599; 1945, c. 659, s. 1; C. S. 3366(l).)

Local Modification.—Alleghany: 1945, c. 877.
Editor's Note.—The 1945 amendment rewrote this section.

§ 47-113. Certified copy of registration; fee.—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; and it shall be the duty of the register of deeds to furnish such certified copy upon the payment of a fee of fifty (50) cents therefor: Provided, that the register of deeds shall furnish such certified copy without charge to any member or former member of the armed forces of the United States who applies therefor. (1921, c. 198, s. 5; 1945, c. 659, s. 3; C. S. 3366(o).)

Editor's Note.—The 1945 amendment added the proviso.

§ 47-114. Payment of expenses incurred.—The county commissioners of each county are hereby authorized and empowered in their discretion to appropriate from the general fund of the county an amount sufficient to cover any additional expense incurred by the register of deeds of the county in carrying out the purposes of this article. (1945, c. 659, s. 3½.)

Art. 6. Execution of Powers of Attorney.

§ 47-115. Execution in name of either principal or attorney in fact; indexing in names of both.—Any instrument in writing executed by an attorney in fact shall be good and valid as the instrument of the principal, whether or not said instrument is signed in the name of the principal by the attorney in fact or by the attorney in fact designating himself as attorney in fact for the principal, from which it will appear that it was the purpose of the attorney in fact to be acting for and on behalf of the principal mentioned or referred to in the instrument. This section shall not affect any pending litigation or the status of any matter heretofore determined by the courts. This section shall apply to all such instruments heretofore or hereafter executed. Registers of deeds shall be required to index all such instruments filed for registration both in the name of the principal or principals executing the power of appointment and in the name of the attorney in fact executing the instrument: Provided, that instruments heretofore registered and indexed only in the name of the attorney in fact shall be valid and in all respects binding upon the principal or principals insofar as validity or registration is concerned. (1945, c. 204.)

Art. 7. Private Examination of Married Women Abolished.

§ 47-116. Repeal of laws requiring private examination of married women.—All deeds, contracts, conveyances, leaseholds or other instruments executed from and after the ratification of this section shall be valid for all purposes without the separate, privy, or private examination of a married woman where she is a party to or a grantor in such deed, contract, conveyance, leasehold or other instrument, and it shall not be necessary nor required that the separate or privy examination of such married woman be taken by the certifying officer. From and after the ratification of this section all laws and clauses of laws contained in any section of the General Statutes requiring the privy or private examination of a married woman are hereby repealed. (1945, c. 73, s. 21.)

Chapter 48. Adoption of Minors.

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Sec.

§ 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.—The 1949 act rewrote this chapter of the General Statutes as amended by Session Laws 1945, cc. 155, 787 and 788, and inserted the present thirty-five sections in lieu of the former fifteen sections. For discussion of the 1949 act, see 27 N. C. Law Rev. 418.

Act Rewriting Chapter Inoperative.—Chapter 885 of the Session Laws of 1947, purporting to rewrite this chapter was held inoperative and void by reason of the fact that the enacting clause prescribed by art. II, sec. 21, of the constitution of North Carolina was omitted. In re Advisory Opinion, 227 N. C. 708, 43 S. E. (2d) 73. For discussion of the invalid act, see 25 N. C. Law Rev. 392, 408.

Construction Should Be Fair and Reasonable.—The right of adoption is not only beneficial to those immediately concerned, but likewise to the public, and construction of the statute should not be narrow or technical, but rather fair and reasonable, where all material provisions of the statute have been complied with. Locke v. Merrick, 223 N. C. 798, 28 S. E. (2d) 523.

§ 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 twenty-one years.

(2) "Licensed child-placing agency" means any agency operating under a license to place children for adoption issued by the state board of public welfare, 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.

(3) For the purpose of this chapter, an abandoned child shall be any child under the age of eighteen years 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.

(4) "Readoption" means an adoption by any person of a child who has been previously legally adopted. (1949, c. 300.)

§ 48-3. Who may be adopted.—Any minor child, irrespective of place of birth or place of residence, may be adopted in accordance with the provisions of this chapter. (1949, c. 300.)

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

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

(c) Provided further, that the petitioner or petitioners shall have resided in North Carolina, or on federal territory within the boundaries of North Carolina, for one year next preceding the filing of the petition. (1949, c. 300.)

§ 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 ten 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.

(c) If the parent, parents, or guardian of the person deny that an abandonment has taken place, this issue of fact shall be determined as provided in G. S. § 1-273, and if abandonment is determined, then the consent of the parent, parents, or guardian of the person shall not be required. Upon final determination of this issue of fact the proceeding shall be transferred back to the special proceedings docket for further action by the clerk.

(d) A copy of the order of the court declaring a child abandoned must be filed in the proceeding with the petition in which case consent must be given or withheld in accordance with G. S. § 48-subsection (2). (1949, c. 300.)

Cross Reference. — For case decided under § 48-5 as stood prior to the 1949 revision of this chapter, see no to § 48-10.

Former § 48-10, to which this section corresponds, provided that parents or guardians who had been declared a juvenile court to be unfit to have the custody of the ch were not necessary parties to adoption proceedings.

was held that this provision was intended to apply only to final, absolute and unconditional determination of unfitness, and not to a judgment of unfitness retained "for further orders as the continued welfare of said child and changing conditions may require." In re Morris, 224 N. C. 487, 31 S. E. (2d) 539.

§ 48-6. When consent of father not necessary.—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. (1949, c. 300.)

Cross Reference.—For cases decided under § 48-6 as it stood prior to the 1949 revision of this chapter, see notes to § 48-23.

§ 48-7. When consent of parents or guardian necessary.—(a) Except as provided in G. S. § 48-5, and G. S. § 48-6, 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 non-residents as provided in G. S. § 1-104.

(c) If the address of such person cannot be ascertained for the purpose of service of process 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. § 1-98 et seq., 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.)

Editor's Note.—As to revocability of consent in adoption proceedings, see 26 N. C. Law Rev. 293.

§ 48-8. Capacity of parents to consent.—A parent who has not reached the age of twenty-one 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 such parent had attained twenty-one years of age. (1949, c. 300.)

§ 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 shall 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 superintendent 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 superintendent of public welfare or the executive head of such agency may give consent to the adoption of the child by the petitioners. A county superintendent 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 superintendent 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.

(b) The surrender of the child and consent for the child to be adopted given by the parent or guardian of the person to the superintendent of public welfare or to the licensed child placing agency shall be filed with the petition along with the consent of the superintendent of public welfare or of the executive head of the agency to the adoption prayed for in the petition.

(c) Where the child has been surrendered to an agency operating under the laws of another state, and authorized by such state to place children for adoption, the written consent of such agency shall be sufficient for the purposes of this chapter. (1949, c. 300.)

§ 48-10. When child's consent necessary.—In any proceeding under this chapter, a child who is twelve years of age or over or who becomes twelve years of age before the granting of the final order must also consent to the proposed adoption. (1949, c. 300.)

§ 48-11. Consent not revocable.—No consent described in G. S. §§ 48-6, 48-7, or 48-9, shall be revocable by the consenting party after the entering of an interlocutory decree or a final order of adoption when entering of an interlocutory decree has been waived in accordance with the provisions of G. S. § 48-21: Provided, no consent shall be revocable after six months from the date of the giving of the consent; provided further, that when the consent has been given generally to a superintendent of public welfare or to a duly licensed child placing agency, it shall not be revocable after thirty days from the date of the giving of the consent. When the consent of any person or agency is required under the provisions of this chapter, the filing of such consent with the petition shall be sufficient to make the consenting person or agency a party of record to the proceeding. (1949, c. 300.)

Cross Reference.—For case decided under § 48-11 as it stood prior to the 1949 revision of this chapter, see note to § 48-34.

§ 48-12. Nature of proceeding; venue.—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. (1949, c. 300.)

§ 48-13. Reference to parental status.—No reference shall be made in any petition, interlocutory decree, or final order of adoption to the marital status of the natural parents of the child sought to be adopted, to their fitness for the care and custody of such child, nor shall any reference be made therein to any child being born out of wedlock.

In the case of a child born out of wedlock and not legitimated prior to the time of the signing of the consent, an affidavit setting forth such facts sufficient to show that only the consent required under G. S. § 48-6 is necessary shall be filed with and become a part of the report provided for in G. S. § 48-16. (1949, c. 300.)

§ 48-14. Use of original name of child unnecessary; name used in proceedings for adoption.—(a) Only in the report required by G. S. § 48-16 on the investigation of the conditions and antecedents of the child sought to be adopted shall the original name of the child given by the natural parent or parents be necessary.

(b) In the petition, interlocutory decree, and final order of adoption and in all other papers related to the case the name selected by the petitioner or petitioners as the name for the child may be used as the true and legal name and the original name shall not be necessary. (1949, c. 300.)

§ 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 state board of public welfare, 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 state board of public welfare, and a copy sent to the superintendent of public welfare 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.)

§ 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 superintendent of public welfare, 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 superintendent of public welfare of one county to make an investigation of the condition and antecedents of the child and the superintendent of public welfare of another county or counties to make any other part of the necessary investigation.

(c) The county superintendent or superintendents of public welfare of the authorized representative of such agency described hereinbefore must make a written report within sixty days to his or their findings, on a standard form or following an outline supplied by the state board of public welfare, 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 no wise 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.)

§ 48-17. Interlocutory decree of adoption.—(a) Upon examination of the written report, required in G. S. § 48-16, the court may issue in triplicate an interlocutory decree of adoption giving the care and custody of the child to the petitioners. Such interlocutory decree must be issued within six months of the filing of the petition unless a final order is entered as provided in G. S. § 48-21 (c). It may be issued on a standard form supplied by the state board of public welfare or may be typewritten, giving all the information hereinafter required.

(b) The interlocutory decree must state:

(1) that all necessary parties are properly before the court and that the time for answering has expired;

(2) the name of the child used in the petition;

(3) the full names of the petitioners and their county of residence;

(4) the fact and date of filing of the petition;

(5) when the petitioners acquired custody of the child and from what person or agency and that proper consent has been given;

(6) that the petitioners are fit persons to have the care and custody of the child;

(7) that the petitioners are financially able to provide for him;

(8) that the child is a suitable child for adoption; and

(9) that the adoption is for the best interests of the child. (1949, c. 300.)

§ 48-18. Effect of interlocutory decree.—(a) Upon issuance of the interlocutory decree the child shall remain or be placed in the care and custody of the petitioners pending further orders of the court. Such decree shall be provisional only and may be rescinded or modified at any time prior to the final order. Until the final order is made, the child shall be a ward of the court having jurisdiction.

(b) When a husband and wife have petitioned jointly to adopt and an interlocutory decree has been entered, and the death of one spouse occurs before the time for the entering of the final order, the petition of the living petitioner shall not be invalidated by the fact of the death of the other petitioner, and the court may proceed to grant the adoption to the surviving petitioner. (1949, c. 300.)

§ 48-19. Report on placement after interlocutory decree.—When the court enters an interlocutory decree of adoption, it must order the county superintendent of public welfare 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 state board of public welfare, such report being for examination by the court before entering any final order. (1949, c. 300.)

§ 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 adoption 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 superintendent of public welfare or licensed child placing agency having made the investigation provided for in G. S. § 48-16, and to the state board of public welfare, 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 superintendent of public welfare 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 superintendent of public welfare of the county in which the petition was filed shall be notified by the court of such dismissal and said superintendent of public welfare shall be responsible for taking appropriate action for the protection of the child. (1949, c. 300.)

§ 48-21. Final order of adoption; termination of proceeding within three years.—(a) If no appeal has been taken from any order of the court, the court must complete or dismiss the proceeding by entering a final order within three years of the filing of the petition. A final order of adoption must not be entered earlier than one year from the date of the interlocutory decree except as hereinafter provided.

(b) If an appeal is taken from any order of the court, the proceeding must be completed by the court by entering a final order of adoption or a final order dismissing the proceeding within two years from the final judgment upon the appeal.

(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 the child is by blood a grandchild, nephew or niece of one of the petitioners or is the stepchild of the petitioner.

(d) Upon examination of the written report required under G. S. § 48-16, the court may, in its discretion, shorten the probationary period between the granting of the interlocutory decree and the final order of adoption by the length of time the child has resided in the home of the petitioners prior to the granting of the interlocutory decree; provided, that the child was placed in the home of the petitioners by a superintendent of public welfare or by a licensed child placing agency and such fact has been certified to the court by the superintendent of public welfare or the executive head of the child placing agency, but no final order shall be entered until the child shall have resided in the home of the petitioners for a period of one year. (1949, c. 300.)

§ 48-22. Contents of final order.—(a) The final order of adoption must be entered in triplicate and may be made on a standard form furnished by the state board of public welfare or may be typewritten, giving all the information hereinafter required.

(b) The final order of adoption must state:

(1) that all necessary parties are properly before the court and that the time for answering has expired;

(2) the name of the child used in the proceeding;

(3) the full names of the petitioners and their county of residence;

(4) the date when the petitioners acquired custody of the child and from what person or agency and that proper consent has been given;

(5) the fact and date of the filing of the petition;

(6) the fact and date of the interlocutory decree if such a decree has been entered;

(7) that the petitioners are fit persons to have the care and custody of the child;

(8) that the petitioners are financially able to provide for him;

(9) that the child is a suitable child for adoption; and

(10) that the adoption is for the best interests of the child.

(c) The order shall thereupon decree the adoption of the child by the petitioners and may order that the name of the child be changed to that requested in the petition. (1949, c. 300.)

§ 48-23. Effect of final order.—The final order forthwith shall establish the relationship of parent and child between the petitioners and the child, and, from the date of the signing of the final order of adoption, the child shall be entitled to inherit real and personal property from the adoptive parents in accordance with the statutes of descent and distribution. (1949, c. 300.)

History of Former § 48-6.—For a brief history of former § 48-6, to which this section corresponds, and the effect of the 1941 amendment thereto, see Phillips v. Phillips, 227 N. C. 438, 42 S. E. (2d) 604.

For comment on the 1945 amendment to former § 48-6, see 23 N. C. Law Rev. 346.

Conclusiveness of Proceedings.—Under former § 48-6, to which this section corresponds, it was held that adoption proceedings are conclusive as to persons who were parties thereto, and as to their privies, notwithstanding a defect as to a party who would be entitled to disregard them as not binding on him, but who does not complain of his nonjoinder. Locke v. Merrick, 223 N. C. 798, 28 S. E. (2d) 523.

Right of Adopted Child to Inherit.—Under former § 48-6, as it stood prior to the 1941 amendment, the effect of the adoption was simply to create a personal status between the adoptive parent and the child adopted, so that the adopted child might inherit from the adoptive parent such estate of the adoptive parent as such parent, during his lifetime, might voluntarily have given to such child. Phillips v. Phillips, 227 N. C. 438, 42 S. E. (2d) 604.

Under former § 48-6, as it stood prior to the 1941 amendment, the adopted child could not inherit through the adoptive parent, or from any source other than the "estate of the petitioner." The right to inherit was limited to the property of the adoptive parent, and the adopted child could not inherit from his father's ancestors or other kindred, or be a representative of them. Id.

§ 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, the consent, the report on the condition and antecedents of the child and the suitability of the foster home, a copy of the interlocutory decree, the report on the placement, and a copy of the final order must be sent by the clerk of the superior court to the state board of public welfare in the following order:

(1) Within ten days after the petition is filed with the clerk of the superior court, a copy of the petition giving the date of the filing of the original petition, and the consent must be filed by the clerk with the state board of public welfare.

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

(3) Within ten days after the final order of adoption is made the clerk must file with the state board of public welfare the report on the supervision of the placement during the interlocutory period, and a copy of the final order.

(c) The said board must cause all papers and reports related to the proceeding to be permanently indexed and filed. (1949, c. 300.)

§ 48-25. Record 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 state board of public welfare shall be open for general public inspection.

(b) With the exception of the information contained in the petition, the interlocutory decree, and the final order, it shall be a misdemeanor for any person having charge of the file or of the record to disclose, except as provided in G. S. § 48-26, any information concerning the contents of any other papers in the proceeding. (1949, c. 300.)

§ 48-26. Procedure for opening record for necessary information.—(a) Any necessary information in the files or the record of an adoption proceeding may be disclosed, to the party requiring it, upon a written motion in the cause before the clerk of original jurisdiction who may issue an order to open the record. Such order must be reviewed by a judge of the superior court and if, in the opinion of said judge, it be to the best interest of the child or of the public to have such information disclosed, he may approve the order to open the record.

(b) The original order to open the record must be filed with the proceeding in the office of the clerk of the superior court. If the clerk shall refuse to issue such order, the party requesting such order may appeal to the judge who may order that the record be opened, if, in his opinion, it be to the best interest of the child or of the public. (1949, c. 300.)

§ 48-27. Procedure when appeal is taken.—(a) In the event of an appeal from ruling of the clerk in an adoption proceeding, the clerk must impound all papers and reports not open to the public pending final determination of the appeal. Within ten days after final determination of the appeal, the clerk must forward all papers and reports as specified in G. S. § 48-24.

(b) The clerk must not at any time furnish to anyone copies or certified copies in the proceeding other than the petition, the interlocutory decree, and the final order. (1949, c. 300.)

§ 48-28. Questioning validity of adoption proceeding.—(a) After the final order of adoption is signed, no party to an adoption proceeding no

anyone claiming under such a party may later question the validity of the adoption proceeding by reason of any defect or irregularity therein, jurisdictional or otherwise, but shall be fully bound thereby, save for such appeal as may be allowed by law. No adoption may be questioned by reason of any procedural or other defect by anyone not injured by such defect, nor may any adoption proceeding be attacked either directly or collaterally by any person other than a natural parent or guardian of the person of the child. The failure on the part of the clerk of the superior court, the county superintendent of public welfare, or the executive head of a licensed child placing agency to perform any of the duties or acts within the time required by the provisions of this section shall not affect the validity of any adoption proceeding.

(b) The final order of adoption shall have the force and effect of, and shall be entitled to, all the presumptions attached to a judgment rendered by a court of general jurisdiction. (1949, c. 300.)

§ 48-29. Change of name; report to state registrar; new birth certificate to be made.—(a) For proper cause shown the court may decree that the name of the child shall be changed to such name as may be prayed in the petition. When the name of any child is so changed, the court shall forthwith report such change to the bureau of vital statistics of the state board of health. Upon receipt of the report, the state registrar of the bureau of vital statistics shall prepare a new birth certificate for the child named in the report which shall contain the following information: full adoptive name of child, sex, race, date of birth, 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 shall be shown as the place of birth, and the names of the attending physician and the local registrar shall be omitted. 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.

(b) The state registrar shall place the original certificate of birth and all papers in his hand pertaining to the adoption under seal which shall not be broken except in the manner provided in G. S. § 48-26 for the opening of the record of adoption. Thereafter when a certified copy of the certificate of birth of such person is issued it shall be in the form of a birth registration card containing only the full name, birth date, state of birth, race, sex, date of filing, and birth certificate number, except when an order of a court shall direct the issuance of a copy of the original certificate of birth in the manner hereinbefore provided.

(c) The state registrar shall send a copy of the new birth certificate to the register of deeds of the county where the adoption proceedings were instituted. Upon receipt of the said certificate the register of deeds shall cause it to be filed and indexed in the same manner as provided by law in the case of original birth certificates. Whenever a record of the original birth certificate of the adopted child is also on file in the same county the register of deeds of said county is authorized, empowered, and directed, upon filing the new certificate, to remove and destroy such record of the said original certificate. (1949, c. 300.)

§ 48-30. Guardian appointed when custody granted of child with estate.—When the court grants the petitioners custody of a child, if the child is an orphan and without guardian and possesses any estate to be administered, the court must appoint a guardian as provided by law. (1949, c. 300.)

§ 48-31. Rights of adoptive parents.—When a child is adopted pursuant to the provisions of this chapter, the adoptive parents shall not thereafter be deprived of any rights in the child, at the instance of the natural parents or otherwise, except in the same manner and for the same causes as are applicable in proceedings to deprive natural parents of the children. (1949, c. 300.)

§ 48-32. Readoption of child previously adopted.—Any minor child may be readopted in accordance with the provisions of this chapter. All provisions relating to the natural parent or parents shall apply to the adoptive parent or parents, except that in no case of readoption shall a natural parent be made a party to the proceedings nor shall the consent of a natural parent be necessary. For the purposes of service of process, necessary parties, and consent, the adoptive parent shall be substituted for the natural parent. (1949, c. 300.)

§ 48-33. Procuring custody of child by forfeiting parents declared crime.—Any parent whose rights and privileges have been forfeited as provided by G. S. § 48-5 and who shall, otherwise than by legal process, procure the possession and custody of such child with respect to whom his rights and privileges have been forfeited shall be guilty of a crime, and shall be punished as for abduction. (1949, c. 300.)

§ 48-34. Past adoption proceedings validated.—All proceedings for the adoption of minors in courts of this state are hereby validated and confirmed and the orders and judgments heretofore entered therein are declared to be binding upon all parties to said proceedings and their privies and all other persons, until such orders or judgments shall be vacated as provided by law; provided that this section shall not apply to litigation pending on the effective date of this chapter in which the validity of a prior adoption proceeding is involved. (1949, c. 300.)

In an adoption proceeding in 1923, where the court found that the parents of a minor child had abandoned such child and the evidence on which the finding was made does not appear in the record, there is a presumption that it was sufficient to sustain the finding. Locke v. Merrick, 223 N. C. 798, 28 S. E. (2d) 523.

§ 48-35. Prior proceedings not affected.—Adoption proceedings pending on date of ratification shall not be affected, except that the provisions of G. S. § 48-34 shall apply thereto, and such proceedings shall be completed in accordance with provisions of the statutes in effect at the time such proceedings were instituted; provided that the petitioners in proceedings pending on date of ratification may discontinue such proceedings by taking voluntary nonsuits and, upon paying the costs accrued in such discontinued proceedings, may institute new proceedings under the provisions of this chapter, in which cases of all of the provisions of this chapter shall apply. (1949, c. 300.)

Chapter 49. Bastardy.

Art. 1. Support of Illegitimate Children.

Art. 2. Legitimation of Illegitimate Children.

Art. 1. Support of Illegitimate Children.

§ 49-1. Title.

Stated in State v. Dill, 224 N. C. 57, 29 S. E. (2d) 145.

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

Editor's Note.—

For note concerning this chapter, see 22 N. C. Law Rev. 250.

For discussion of problems arising under this article, see 26 N. C. Law Rev. 305.

Duty of Support Not Primarily for Benefit of Child.—The duty of a putative father to support his illegitimate child was not created primarily for the benefit of the child. The legislation is social in nature and was enacted to prevent illegitimates from becoming public charges. The benefit to the child is incidental. Such rights as it may have must be enforced under this section and in accord with the procedure therein prescribed. Allen v. Hunnicutt, 230 N. C. 49, 52 S. E. (2d) 18.

Remedy Is Exclusive.—This chapter and § 7-103 provide an exclusive remedy to compel a father to provide for the support of his illegitimate child, and these statutes do not authorize the child to maintain a civil action to compel its father to provide for its support. Allen v. Hunnicutt, 230 N. C. 49, 52 S. E. (2d) 18.

As stated in Burton v. Belvin, 142 N. C. 151, 55 S. E. 71, the natural obligation of the father to support will be enforced under the statute recognizing the obligation and imposing the duty. Allen v. Hunnicutt, 230 N. C. 49, 52 S. E. (2d) 18.

The Begetting of an Illegitimate Child Is Not of Itself a Crime.—

The only "prosecution" contemplated by this legislation is that grounded on the willful neglect or refusal of any parent to support and maintain his or her illegitimate child, the mere begetting of the child not being denominated a crime. State v. Dill, 224 N. C. 57, 58, 29 S. E. (2d) 145; State v. Stiles, 228 N. C. 137, 141, 44 S. E. (2d) 728.

And the question of paternity is incidental to the prosecution for nonsupport. State v. Bowser, 230 N. C. 330, 53 S. E. (2d) 282.

Willfulness Is Essential Element of Offense.—

Willfulness is an essential element of the offense denounced by this section, and a verdict "guilty of failure to support and maintain his bastard child" is insufficient to support a judgment. State v. Allen, 224 N. C. 530, 31 S. E. (2d) 530.

Willfulness of the refusal to support one's illegitimate child is an essential ingredient of the offense denounced by this section, and must be proven beyond a reasonable doubt; and instructions, which fail to so charge, deprive defendant of his right to have the jury consider his willfulness as an issuable fact. State v. Hayden, 224 N. C. 779, 32 S. E. (2d) 333.

Under this section, the neglect or refusal to support an illegitimate child must be willful and it must be so charged in the warrant or bill of indictment, and the omission of such allegation is fatal. State v. Morgan, 226 N. C. 414, 38 S. E. (2d) 166, 168; State v. Vanderlip, 225 N. C. 610, 35 S. E. (2d) 885.

"Willful" Defined.—The word "willful," when used in this section creating an offense, means the act is done purposely and deliberately in violation of the law; it means an act done without any lawful justification, reason or excuse. State v. Stiles, 228 N. C. 137, 140, 44 S. E. (2d) 728.

State Must Prove Paternity of Child and Willful Neglect.—

In order to convict defendant under this section the burden is on the state to show not only that he is the father of the child, and that he had refused or neglected to support and maintain it, but further that his refusal or neglect is willful, that is, intentionally done, "without just cause, excuse or justification," after notice and request for support. State v. Hayden, 224 N. C. 779, 32 S. E. (2d) 333; State v. Stiles, 228 N. C. 137, 139, 44 S. E. (2d) 728; State v. Ellison, 230 N. C. 59, 52 S. E. (2d) 9.

Amendment of Warrant.—The trial court has authority to permit the solicitor to amend a warrant charging defendant with willful failure to support his illegitimate child by inserting the word "maintain," so as to charge his willful failure to support and maintain his illegitimate child. State v. Bowser, 230 N. C. 330, 53 S. E. (2d) 282.

Jurisdiction Determined by Age of Defendant at Time He Is Charged.—Where defendant is over sixteen years of age during the time he is charged with willfully neglecting or refusing to support his illegitimate child, the superior court and not the juvenile court has jurisdiction, notwithstanding that conception of the child occurred prior to defendant's sixteenth birthday. State v. Bowser, 230 N. C. 330, 53 S. E. (2d) 282.

Admissibility of Testimony of Prosecutrix as to Nonaccess of Husband.—In a prosecution of defendant for willful failure to support his illegitimate child conceived during wedlock of the mother, the admission of testimony by the prosecutrix as to the nonaccess of the husband at the time of conception is error entitling defendant to a new trial. State v. Bowman, 230 N. C. 203, 52 S. E. (2d) 345.

Evidence Held Sufficient.—Evidence in prosecution of defendant for willful neglect or refusal to support his illegitimate child held sufficient to overrule motions to nonsuit. State v. Bowser, 230 N. C. 330, 53 S. E. (2d) 282.

Verdict Held Insufficient.—A verdict of "guilty of willful nonsupport of illegitimate child" is insufficient in that it fails to fix the paternity of the child. State v. Ellison, 230 N. C. 59, 52 S. E. (2d) 9.

§ 49-4. When prosecution may be commenced.

—The prosecution of the reputed father of an illegitimate child may be instituted under this chapter within any of the following periods, and not thereafter:

1. Three years next after the birth of the child; or

2. Where the paternity of the child has been judicially determined within three years next after its birth, at any time before the child attains the age of fourteen years; or

3. 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: Provided, the action is instituted before the child attains the age of fourteen years.

The prosecution of the mother of an illegitimate child may be instituted under this chapter at any time before the child attains the age of fourteen years. (1933, c. 228, s. 3; 1939, c. 217, s. 3; 1945, c. 1053.)

Editor's Note.—

The 1945 amendment rewrote this section.

As to effect of amendment, see 23 N. C. Law Rev. 331.

Maximum Time for Prosecution Is Six Years from Birth.—

A prosecution of the father of an illegitimate child for the willful neglect and refusal to support such child, whose paternity had been established under the old law, C. S., 265-279, and which prosecution originated more than 13 years after the birth of the child, was held barred under the terms of this section, since the prosecution was a new and independent proceeding, rather than a motion in the original proceeding to enforce the order of support as contemplated by the 1933 Act. State v. Dill, 224 N. C. 57, 29 S. E. (2d) 145.

§ 49-7. Jurisdiction of inferior courts; issues and orders.

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 group

ing 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.)

Editor's Note.—
The 1945 amendment added all of the above paragraph at the end of this section except the last proviso, which was added by the 1947 amendment. As the rest of the section was not affected by the amendments it is not set out.

For comment on the 1945 amendment, see 23 N. C. Law Rev. 343.

For comment on the 1947 amendment, see 25 N. C. Law Rev. 412.

Effect of § 8-50.1.—While this section is not expressly repealed, it would seem to be superseded by § 8-50.1, which: (1) contains virtually identical provisions applicable to "any criminal action or proceedings in which the question of paternity arises;" and (2) extends legislative approval of use of the blood grouping evidence to "any civil action." 27 N. C. Law Rev. 456.

Modification of Orders.—
This and the following section contemplate initial findings and an order of support, subject to modification or increase from time to time, and to be enforced by such prescribed supplemental orders as the exigencies of the case may require. State v. Dill, 224 N. C. 57, 58, 29 S. E. (2d) 145.

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

Cross Reference.—See annotations under § 49-7.

Art. 2. Legitimation of Illegitimate Children.

§ 49-10. Legitimation.—The putative father of any child born out of wedlock may apply by a verified written petition filed in a special proceeding in the superior court of the county in which he 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 plaintiffs' 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. (Rev., s. 263; Code, s. 39; 1947, c. 663, s. 1; C. S. 277.)

Editor's Note.—The 1947 amendment rewrote this section.

For a brief account of the 1947 amendments to this article, see 25 N. C. Law Rev. 414.

§ 49-12. Legitimation by subsequent marriage.—When the mother of any child born out of wedlock and the reputed father of such child shall intermarry or shall have intermarried at any time after the birth of such child, the child shall in all respects after such intermarriage be deemed and held to be legitimate and entitled to all the rights in and to the estate, real and personal, of its father and mother that it would have had had it been born in lawful wedlock. (1917, c. 219, s. 1; 1947, c. 663, s. 2; C. S. 279.)

Editor's Note.—
The 1947 amendment struck out "illegitimate" formerly appearing before the word "child" in line one and inserted after the word "child" the words "born out of wedlock."

§ 49-13. New birth certificate on legitimation.—A certified copy of the order of legitimation when issued under the provisions of G. S. § 49-10 shall be sent by the clerk of the superior court under his official seal to the state registrar of vital statistics who shall then make a new birth certificate bearing the full name of the father.

When a child is legitimated under the provisions of G. S. § 49-12 the state registrar of vital statistics shall make a new birth certificate bearing the full name of the father upon presentation of a certified copy of the marriage license issued to the father and the mother of the child. (1947, c. 663, s. 3.)

Chapter 50. Divorce and Alimony.

§ 50-1. Jurisdiction.—The superior court and such other courts as are now or may hereafter be so vested by statute shall have concurrent jurisdiction of actions for divorce and alimony, or either. (Rev., s. 1557; Code, s. 1282; 1868-9, c. 93, s. 45; 1949, c. 264, s. 1; C. S. 1655.)

Editor's Note.—Prior to the 1949 amendment this section applied only to the superior court.

§ 50-3. Venue.

Section Not Jurisdictional—Waiver.—
The provision of this section, that summons shall be returnable to court of the county in which either plaintiff or defendant resides, is not jurisdictional but relates to venue, and may be waived, and if an action for divorce be instituted in any other county, it may be tried there, unless defendant before the time of answering expires demands in writing that trial be had in the proper county. Smith v. Smith, 226 N. C. 506, 39 S. E. (2d) 391, 393.

§ 50-4. What marriages may be declared void on application of either party.—The superior court in term time, 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 § 51-3. (Rev., s. 1560; Code, s. 1283; 1871-2, c. 193, s. 33; 1945, c. 635; C. S. 1658.)

Editor's Note.—
The 1945 amendment inserted the word "second" in the last line.

§ 50-5. Grounds for absolute divorce.

4. If there has been a separation of husband and wife, whether voluntary or involuntary, provided such involuntary separation is in consequence of a criminal act committed by the defendant prior to such divorce proceeding, and they have lived separate and apart for two successive years, and the plaintiff or defendant in the suit for divorce has resided in this state for six months.

6. In all cases where a husband and wife have

lived separate and apart for ten 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 sane spouse: Provided, the evidence shall show that the insane spouse is suffering from incurable insanity, and has been confined for ten consecutive years next preceding the bringing of the action in an institution for the care and treatment of the mentally disordered. 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 wherein 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.

In all decrees granted under this subsection 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 had upon the regular guardian for said defendant spouse, if any, and if no regular guardian, upon a duly appointed quardian 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 subsection, 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.

In any action for absolute divorce upon any of the grounds set forth in this section, allegation and proof that the plaintiff or defendant has resided in North Carolina for at least six months next preceding the filing of the complaint shall constitute compliance with the residence requirements for prosecuting any such action for divorce. (Rev., s. 1561; Code, s. 1285; 1871-2, c. 193, s. 35; 1879, c. 132; 1887, c. 100; 1889, c. 442; 1899, c. 29; 1903, c. 490; 1905, c. 499; 1907, c. 89; 1911, c. 117; 1913, c. 165; 1917, cc. 25, 57; 1921, c. 63; 1929, c. 6; 1931, c. 397; 1933, c. 71, ss. 1, 2; 1943, c. 448, s. 2; 1945, c. 755; 1949, c. 264, ss. 2, 5; c. 417; C. S. 1659.)

Editor's Note.—The 1945 amendment added subsection 6. The first 1949 amendment inserted the words "or defendant" in line seven of subsection 4 and rewrote subsection 6. The second 1949 amendment added the paragraph at the end of this section. As the rest of the section was not affected by the amendments it is not set out.

For comment on the 1943 amendment, see 21 N. C. Law Rev. 347.

For comment on the 1945 amendment, see 23 N. C. Law Rev. 340.

For a brief summary of the 1949 amendments to this section and §§ 50-6 and 50-8, see 27 N. C. Law Rev. 453.

Sufficiency of Allegations.—Allegations that husband cohabited and committed adultery with another woman and that illicit relations continued over a period of time notwithstanding the protestations and pleas of the wife, states a cause of action for absolute divorce. Pearce v. Pearce, 226 N. C. 307, 37 S. E. (2d) 904.

Separation Defined.—

Separation, as this word is used in the divorce statutes, implies living apart for the entire period in such manner that those who come in contact with them may see that the husband and wife are not living together. Young v. Young, 225 N. C. 340, 34 S. E. (2d) 154.

For the purpose of obtaining a divorce under this or the succeeding section, separation may not be predicated upon evidence which shows that during the period the parties have held themselves out as husband and wife living together, nor when the association between them has been of such a character as to induce others, who observed them, to regard them as living together in the ordinary acceptation of that descriptive phrase. Id.

Instance of insufficient evidence of separation by mutual agreement and living separate and apart as is contemplated by this and the succeeding section. Id.

Separation Must Have Been Voluntary in Its Inception.—Where plaintiff's cause of action is couched in the language of this section, he must prove his case secundum allegata by showing that the separation was voluntary in its inception. Pearce v. Pearce, 225 N. C. 571, 35 S. E. (2d) 636.

Assent to Separation Obtained by Fraud.—If the assent of wife is obtained by fraud or deceit, the separation is not voluntary within the meaning of this section. Pearce v. Pearce, 225 N. C. 571, 35 S. E. (2d) 636.

Sufficiency of Evidence of Residence.—Plaintiff's testimony that he had been continuously a resident of North Carolina up to the time he went to another state for temporary work, and that he returned here once or twice a month and did not intend to make his home in such other state but intended to remain a citizen of North Carolina, is held sufficient to be submitted to the jury on the question of his residence in this State for the period prescribed by this and the following section. Welch v. Welch, 22(N. C. 541, 39 S. E. (2d) 457.

The fact that plaintiff went to another state to engage temporarily in work there, and, upon mistaken advice instituted an action for divorce in such other state upon allegations of residence therein, is evidence against him on the issue of his residence in this state for the statutory period but is not conclusive and does not constitute an estoppel. Id.

Cited in Smith v. Smith, 226 N. C. 544, 39 S. E. (2d 458; Norman v. Norman, 230 N. C. 61, 51 S. E. (2d) 927.

§ 50-6. Divorce after separation of two years on application of either party.—Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony on the application of

either party, if and when the husband and wife have lived separate and apart for two years, and the plaintiff or defendant in the suit for divorce has resided in the state for a period of six months. This section shall be in addition to other acts and not construed as repealing other laws on the subject of divorce. (1931, c. 72; 1933, c. 163; 1937, c. 100, ss. 1, 2; 1943, c. 448, s. 3; 1949, c. 264, s. 3.)

Editor's Note.—

The 1949 amendment inserted the words "or defendant" in line six.

For comment on the 1943 amendment, see 21 N. C. Law Rev. 347.

Jurisdictional Averments.—

Where complaint alleges, and there is evidence tending to show, that husband and wife, "have lived separate and apart for two years" next immediately preceding the institution of the action, and that plaintiff "has resided in the state for a period of six months," nothing else appearing, the establishment of these allegations by proof would entitle plaintiff to a divorce. This section so provides. Taylor v. Taylor, 225 N. C. 80, 82, 33 S. E. (2d) 492.

"Living Apart."—

If a plaintiff, in a divorce action on grounds of separation, contributes to the support of his wife, solely in an attempt to fulfill the obligation imposed by statute, his conduct is not inconsistent with a legal separation; but, if he makes such payments in recognition of his marital status and in discharge of his marital obligations, there is no living separate and apart within the meaning of the statute. Williams v. Williams, 224 N. C. 91, 29 S. E. (2d) 39.

Meaning of "Separation."—See note under § 50-5.

In accord with 1st paragraph in original. See Dudley v. Dudley, 225 N. C. 83, 33 S. E. (2d) 489.

The separation contemplated by this section is apparently unrestricted. Taylor v. Taylor, 225 N. C. 80, 82, 33 S. E. (2d) 492.

The expression used in Byers v. Byers, 222 N. C. 298, 22 S. E. (2d) 902, "that the bare fact of living separate and apart for the period of two years, standing alone, will not constitute a cause of action for divorce," should be viewed in the light of its setting, and construed accordingly. It was not intended as a delimitation of the statute. Byers v. Byers, 223 N. C. 85, 89, 25 S. E. (2d) 466.

Separation means cessation of cohabitation, and cohabitation means living together as man and wife, though not necessarily implying sexual relations. Cohabitation includes other marital responsibilities and duties. Young v. Young, 225 N. C. 340, 34 S. E. (2d) 154; Dudley v. Dudley, 225 N. C. 83, 33 S. E. (2d) 489.

A separation by act of the parties, or one of them, or under order of court a mensa et thoro, suffices to meet the terms of this section. Taylor v. Taylor, 225 N. C. 80, 82, 33 S. E. (2d) 492.

"Separation" would not include an involuntary living apart, where there had been no previous separation, such as might arise from the incarceration or insanity of one of the parties. Id.

"Judicial Separation" Included.—A legal separation for the requisite period of two years is ground for divorce under this section. The separation here contemplated includes a "judicial separation" as well as one brought about by the act of the parties, or one of them. Lockhart v. Lockhart, 223 N. C. 559, 27 S. E. (2d) 444.

The discontinuance of sexual relations is not in itself a living "separate and apart" within the meaning of the statute, and a divorce will be denied where it appears that, during the period relied upon, the parties had lived in the same house. Dudley v. Dudley, 225 N. C. 83, 33 S. E. (2d) 489.

Separation Must Be Voluntary in Inception.—In an action for divorce, based upon two years' separation by mutual consent, plaintiff must not only show that he and defendant have lived separate and apart for the statutory period, but also that the separation was voluntary in its inception. Williams v. Williams, 224 N. C. 91, 29 S. E. (2d) 39.

Husband Not Entitled to Divorce on His Own Criminal Conduct.—

In accord with original. See Byers v. Byers, 223 N. C. 85, 25 S. E. (2d) 466 (action under 1937 amendment).

Spouse May Not Obtain Divorce Solely on Own Dereliction.—It is not to be supposed the General Assembly intended in enacting this section to authorize one spouse willfully or wrongfully to abandon the other for a period of two years and then reward the faithless spouse a divorce for the wrong committed, in the face of a plea in bar based on such wrong. Nor is it to be ascribed as the legislative intent that one spouse may drive the other from their home for a period of two years, without any cause or excuse, and then obtain a divorce solely upon the ground of such separation created by complainant's own dereliction. Byers v. Byers, 223 N. C. 85, 90, 25 S. E. (2d) 466; Pharr v. Pharr, 223 N. C. 115, 25 S. E. (2d) 471.

The party in the wrong in the face of a plea in bar based on such wrong cannot obtain a divorce under the provisions of this section. Pharr v. Pharr, 223 N. C. 115, 117, 25 S. E. (2d) 471, following Byers v. Byers, 223 N. C. 85, 25 S. E. (2d) 466.

Where Issues to Be Passed on by Jury.—In an action under this section, where complaint alleges sufficient facts and defendant in her answer sets up a divorce a mensa with alimony granted her on the grounds of abandonment, to which plaintiff replied without admission of wrongful or unlawful conduct on his part, a judgment for defendant on the pleadings is erroneous, as there are issues of fact raised to be tried by a jury. Lockhart v. Lockhart, 223 N. C. 123, 25 S. E. (2d) 465.

Defenses.—Where defendant, in an action for divorce on the grounds of two years' separation, set up plaintiff's wrongful conduct and willful abandonment of defendant and also recrimination, either defense, if established, would defeat plaintiff. The burden, however, rests upon defendant to establish these defenses, which are affirmative. Taylor v. Taylor, 225 N. C. 80, 33 S. E. (2d) 492.

Pleading.—It is unnecessary to set out in the complaint the cause for the separation, or to allege that it was without fault on the part of plaintiff, or to aver that it was by mutual agreement of the parties. Taylor v. Taylor, 225 N. C. 80, 82, 33 S. E. (2d) 492.

Plaintiff may particularize as to the character of the separation by alleging that it was by mutual consent, abandonment, etc., in which event, if material to the cause of action, the burden would rest with plaintiff to prove the case secundum allegata. Id.

In an action under this section it was held that the mere statement in the answer that the allegation in complaint "that plaintiff and defendant have not lived together as man and wife since April 1, 1942, is not denied," was not an admission of a "separation." Moody v. Moody, 225 N. C. 89, 33 S. E. (2d) 491.

Where Recrimination Established.—This section does not authorize the granting of a divorce to one spouse where the other pleads and establishes recrimination. Pharr v. Pharr, 223 N. C. 115, 117, 25 S. E. (2d) 471.

Husband's Failure to Support Children Does Not Bar Action.—Under this and preceding section plaintiff's admission that he had been convicted for failing to support the children of his marriage is not alone sufficient to defeat his action for divorce on the ground of two years' separation. Welch v. Welch, 226 N. C. 541, 39 S. E. (2d) 457.

Evidence of Conjugal Relations within Two Years before Action.—Evidence that less than two years before the institution of divorce action defendant visited plaintiff at army camp and plaintiff visited defendant on furloughs, and that at such times they cohabited as man and wife, was sufficient to negative conclusion that conjugal relations had ceased for the period prescribed by this section, and supported verdict in defendant's favor and judgment denying plaintiff's suit for divorce on the grounds of two years' separation. Mason v. Mason, 226 N. C. 740, 40 S. E. (2d) 204.

To establish a domicile, there must be a residence, and the intention to make it a home or to live there indefinitely. Bryant v. Bryant, 228 N. C. 287, 45 S. E. (2d) 572.

Plaintiff must be physically present in this state and have the intention of making his residence here a permanent abiding place in order to be domiciled here within the meaning of this section, making residence in this state for six months a jurisdictional prerequisite to the institution of an action for divorce on the grounds of two years' separation. Id.

The fact that a person obtains automobile license and ration cards in another state, giving such state as his residence, while competent on the question of domicile, is not conclusive. Bryant v. Bryant, 228 N. C. 287, 45 S. E. (2d) 572.

Finding of Court as to Residence.—The finding of the court, supported by evidence, that plaintiff was physically present in this state for more than six months prior to instituting action for divorce and that he regarded his residence here as a permanent home, is sufficient to support

judgment denying defendant's motion in the cause to set aside the divorce decree on the ground of want of the jurisdictional requirement of domicile. Bryant v. Bryant, 228 N. C. 287, 45 S. E. (2d) 572.

How Decree Attacked on Ground of Nonresidence.—The proper procedure to attack a divorce decree on the ground that plaintiff had not been a resident of the state for six months preceding the institution of the action is by motion in the cause. Bryant v. Bryant, 228 N. C. 287, 45 S. E. (2d) 572.

Applied in Nall v. Nall, 229 N. C. 598, 50 S. E. (2d) 737.

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

The lapse of seven years from the time of the separation does not bar a cross-action for divorce a mensa on the ground of constructive abandonment, or application for alimony pendente lite, either by laches or any statute of limitation. Nall v. Nall, 229 N. C. 598, 50 S. E. (2d) 737.

Alimony.—Where in the husband's action for divorce a vinculo, the wife sets up a cross-action for divorce a mensa, the court has the power to make an order for the payment of alimony upon the jury's determination of the issues in favor of the wife. Norman v. Norman, 230 N. C. 61, 51 S. E. (2d) 927.

In an action for divorce, a verified answer and cross-action setting forth a cause of action for divorce a mensa, is sufficient to sustain an order allowing alimony pendente lite. Nall v. Nall, 229 N. C. 598, 50 S. E. (2d) 737.

Only the Party Injured Is Entitled to a Divorce under This Section.—

In accord with original. See Lawrence v. Lawrence, 226 N. C. 624, 39 S. E. (2d) 807.

When the misconduct of the complaining party is calculated to and does reasonably induce the conduct of defendant, relied upon in an action for divorce a mensa et thoro he or she, as the case may be, will not be permitted to take advantage of his or her own wrong, and the decree of divorcement will be denied. Byers v. Byers, 223 N. C. 85, 89, 25 S. E. (2d) 466, citing Page v. Page, 161 N. C. 170, 76 S. E. 619.

Acts Constituting Abandonment.—

It is not necessary for the 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, which would constitute abandonment by the husband. Blanchard v. Blanchard, 226 N. C. 152, 36 S. E. (2d) 919, 920, holding evidence insufficient to show abandonment by husband.

Abandonment imports willfulness and maliciously turning the spouse out of doors. Brooks v. Brooks, 226 N. C. 280, 37 S. E. (2d) 909, 912.

Allegation of actual physical violence is not required under this section. Pearce v. Pearce, 226 N. C. 307, 37 S. E. (2d) 904.

Complaint Must Show Plaintiff's Innocence.—

In a cross-action under this section, the omission of an allegation that plaintiff's conduct was without provocation on defendant's part is fatal. Pearce v. Pearce, 225 N. C. 571, 35 S. E. (2d) 636.

Conduct of Defendant Must Be Set Out with Particularity.—When a wife bases her action for alimony without divorce upon the grounds that her husband has been guilty of cruel treatment of her and of offering indignities to her person within the meaning of the statute pertaining to divorce from bed and board, she "must meet the requisite" of this section and not only set out with particularity the acts on the part of her husband and upon which she relies, but she is also required to allege, and consequently to prove, that such acts were without adequate provocation on her part. Best v. Best, 228 N. C. 9, 12, 44 S. E. (2d) 214.

Under this section plaintiff must set out with particularity the language and conduct on the part of defendant relied upon, and must allege and prove that such acts were without adequate provocation on her part. Lawrence v. Lawrence, 226 N. C. 624, 39 S. E. (2d) 807.

A wife who seeks to assert a cause of action under this section must allege with particularity the language and conduct relied upon as constituting such indignities to her person as to render her condition intolerable and her life burdensome. Pearce v. Pearce, 225 N. C. 571, 35 S. E. (2d) 636.

Examples of Sufficient Cause.—

Allegations that the husband had been living in adultery, had repeatedly avowed his loss of affection for and his desire to be rid of his wife, had ejected her from his bed, and finally ordered her from his home, saying that he never intended to live with her again, states a cause of action. Pearce v. Pearce, 226 N. C. 307, 37 S. E. (2d) 904.

Failure to Allege and Prove That Husband's Accusations of Infidelity Were False.—In action for divorce a mensa et thoro and for subsistence, plaintiff alleged that defendant had repeatedly accused her of having sexual relations with her foster father and other men, and her evidence tended to show that all of the specific acts of abuse and misconduct complained of occurred in connection with this accusation. Plaintiff further alleged that she had been faithful and dutiful, and that defendant's acts of abuse and misconduct were without provocation or justification, but did not specifically allege or testify that the accusation was false. It was held that defendant's motion for judgment as of nonsuit should have been allowed, since even if the allegation denying provocation or justification be taken as denial of the charge of infidelity, plaintiff offered no testimony in support of such denial. Lawrence v. Lawrence, 226 N. C. 624, 39 S. E. (2d) 807.

Allegations of Habitual Drunkenness.—Allegations in complaint that defendant had been an habitual drunkard during the prior three years are sufficient to state a cause of action for divorce from bed and board under this section. Best v. Best, 228 N. C. 9, 44 S. E. (2d) 214.

Applied in Sumner v. Sumner, 227 N. C. 610, 44 S. E. (2d) 40.

Cited in Lockhart v. Lockhart, 223 N. C. 559, 27 S. E. (2d) 444; Stanley v. Stanley, 226 N. C. 129, 37 S. E. (2d) 118.

§ 50-8. Affidavit to be filed with complaint; affidavit of intention to file complaint.—The plaintiff in a complaint seeking either divorce or alimony, or both, shall file with his or her complaint an affidavit that the facts set forth in the complaint are true to the best of affiant's knowledge and belief. The plaintiff shall also set forth in such affidavit, either that the facts set forth in the complaint, as grounds for divorce, have existed to his or her knowledge at least six months prior to the filing of the complaint, and that complainant or defendant has been a residence of the state for six months next preceding the filing of the complaint; or, if the wife be the plaintiff, that the husband is removing, or about to remove, his property and effects from the state, whereby she may be disappointed in her alimony: Provided, however, that if the cause for divorce is two years separation then it shall not be necessary to set forth in the affidavit that the grounds for divorce have existed at least six months prior to the filing of the complaint, it being the purpose of this proviso to permit a divorce after a separation of two years without waiting an additional six months for filing the complaint: Provided, that if the plaintiff is a nonresident the action shall be brought in the county of the defendant's residence and summons personally served upon the defendant. If any wife files in the office of the superior court clerk of the county where she resides an affidavit, setting forth the fact that she intends to file a petition or bring an action for divorce against her husband, and that she has not had knowledge of the facts upon which the petition or action will be based for six months, she may reside separate and apart from her husband. If she fails to file her petition or bring her action for divorce within ninety days after the six months have expired since her knowledge of the facts upon which she intends to file her said petition or bring her said action, then she shall not be entitled any longer to the benefit of this section. (Rev., s. 1563; Code, s. 1287; 1868-9, c. 93, s. 46; 1869-70, c. 184; 1907, c. 1008, s. 1; 1925, c. 93; 1933, c. 71, ss. 2, 3; 1943, c. 448, s. 1; 1947, c. 165; 1949, c. 264, s. 4; C. S. 1661.)

Editor's Note.—The 1947 amendment, effective July 1, 1947, struck out a portion of the first sentence thereby eliminating the necessity for alleging in an affidavit in an action for divorce that there has been no collusion in bringing such action. The amendatory act, which did not

apply to pending litigation, validated all judgments rendered before the effective date in actions for divorce where the affidavit failed to allege that there was no collusion between husband and wife.

For brief comment on the 1947 amendment, see 25 N. C. Law Rev. 412.

The 1949 amendment inserted the words "or defendant" in lines five and six of the second sentence, and added the second proviso thereto.

Verification of Subsequent Pleadings May Not Be Waived.—The requirement that when one pleading in a court of record is verified, every subsequent pleading in the same proceeding, except a demurrer, "must be verified also," is one which may be waived, except in those cases where the form and substance of the verification is made an essential part of the pleading; as in an action for divorce in which a special form of affidavit is required under this section, in a proceeding to restore a lost record, § 98-14, and in an action against a county or municipal corporation, § 153-64. Calaway v. Harris, 229 N. C. 117, 47 S. E. (2d) 796.

False Affidavit.—In an action for divorce the affidavit, required by this section in connection with the complaint, is jurisdictional, and a complaint accompanied by a false statutory affidavit, if it be properly so found, would be regarded as insufficient to empower the court to grant a decree of divorce; and the correct procedure for relief against the decree would be by motion in the cause. Young v. Young, 225 N. C. 340, 34 S. E. (2d) 154, wherein the plaintiff was held to have practiced imposition upon the court.

Proof Must Correspond to Allegations.—In accord with original. See Young v. Young, 225 N. C. 340, 34 S. E. (2d) 154.

Cited in Hodges v. Hodges, 226 N. C. 570, 39 S. E. (2d) 596.

§ 50-9. Effect of answer of summons by defendant.—In all cases upon an action for a divorce absolute, where judgment of divorce has heretofore been granted and where the plaintiff has caused to be served upon the defendant in person a legal summons, whether by verified complaint or unverified complaint, and such defendant answered such summons, and where the trial of said action was duly and legally had in all other respects and judgments rendered by a judge of the superior court upon issues answered by a judge and jury, in accordance with law, such judgments are hereby declared to have the same force and effect as any judgment upon an action for divorce otherwise had legally and regularly. (1929, c. 290, s. 1; 1947, c. 393.)

Editor's Note.—The 1947 amendment inserted near the beginning of the section the words "where judgment of divorce has heretofore been granted and."

§ 50-10. Material facts found by jury; parties cannot testify to adultery.

Question for Jury.—Where the facts in a divorce action were in dispute the case was one for the jury. Taylor v. Taylor, 225 N. C. 80, 33 S. E. (2d) 492.

Evidence in divorce action held insufficient to carry case to jury. Moody v. Moody, 225 N. C. 89, 33 S. E. (2d) 491.

Quoted in State v. Davis, 229 N. C. 386, 50 S. E. (2d) 37.

§ 50-11. Effects of absolute divorce.

No Permanent Alimony.—

Alimony, both temporary and permanent, may be awarded in statutory proceedings for alimony without divorce and in an action for divorce a mensa et thoro; in an action for absolute divorce temporary alimony pendente lite but not permanent alimony may be awarded. Stanley v. Stanley, 226 N. C. 129, 37 S. E. (2d) 118, 120, citing Duffy v. Duffy, 120 N. C. 346, 27 S. E. 28.

Prior Award of Alimony Preserved.—Under the proviso in this section, a prior award of alimony is protected from annulment by a decree in absolute divorce based on two years separation, which would otherwise probably have resulted. Stanley v. Stanley, 226 N. C. 129, 37 S. E. (2d) 118, 121.

But Mere Separation Agreement Is Not Protected.—This section does not protect a mere separation agreement as an award of alimony, and it is, therefore, not only against public policy, but contrary to this section, that permanent alimony should be the outcome of an action for divorce a vinculo. Stanley v. Stanley, 226 N. C. 129, 37 S. E. (2d) 118, 121.

A judgment for subsistence, entered in an action for alimony without divorce survives a judgment for absolute divorce obtained under the two year separation statute. Simmons v. Simmons, 223 N. C. 841, 28 S. E. (2d) 489.

Cited in Brown v. Brown, 224 N. C. 556, 31 S. E. (2d) 529; Pearce v. Pearce, 225 N. C. 571, 35 S. E. (2d) 636.

§ 50-13. Custody of children in divorce.

Provided, custody of children of parents who have been divorced outside of North Carolina, and controversies respecting the custody of children not provided for by this section or section 17-39 of the General Statutes of North Carolina, may be determined in a special proceeding instituted by either of said parents, or by the surviving parent if the other be dead, in the superior court of the county wherein the petitioner, or the respondent or child at the time of filing said petition, is a resident.

(1949, c. 1010.)

Editor's Note. — The 1949 amendment rewrote the first sentence of the second paragraph. As only this sentence was changed, the rest of the section is not set out.

The welfare of the child at the time of the contest is controlling in determining the right to the custody of the child as between its divorced parents. Hardee v. Mitchell, 230 N. C. 40, 51 S. E. (2d) 884.

In applying this statute the question of granting the custody and tuition of the child to the father or mother is discretionary with the court. The welfare of the child is the paramount consideration, or, as stated in In re Lewis, 88 N. C. 31, "the polar star by which the discretion of the court is to be guided." Brake v. Brake, 228 N. C. 609, 46 S. E. (2d) 643.

Remedy of Plaintiff in Divorce Suit Is by Motion in the Cause.—Where a wife institutes suit for divorce, her remedy to require the defendant to provide support for a minor child of the marriage is by motion in the cause, which may be filed either before or after final judgment. Winfield v. Winfield, 228 N. S. 256, 45 S. E. (2d) 259.

Where Divorce Decree Entered in Another State.—A decree for absolute divorce which awarded the custody of the child of the marriage was entered in another state and the parties thereafter moved to this state. The proper procedure for either party to determine the right to the custody of the child is by a special proceeding under this section. Hardee v. Mitchell, 230 N. C. 40, 51 S. E. (2d) 884.

Effect of Death of Party.—Under this section as it stood prior to the 1949 amendment, after the death of a mother to whom the custody of a child has been awarded pursuant to this section, the court in which the divorce action was pending had no jurisdiction to determine the custody of the child in a controversy between the father and the parents of the deceased mother. Under § 110-21 (3), jurisdiction of such a proceeding was vested exclusively in the juvenile branch of the superior court of the county in which the child resided or was to be found. Phipps v. Vannoy, 229 N. C. 629, 50 S. E. (2d) 906. The 1949 amendment was intended to overrule this case. 27 N. C. Law Rev. 452.

Custody of Grandparents.—Where the custody of a minor child has been awarded the mother in a divorce proceeding and subsequently, after both parents, who are proper and fit persons to have the custody of such child, have moved out of the state, the child being left by the mother with her parents, residents of the state and highly proper persons to rear the child, upon petition of the father for custody of the child, the court has authority under this section, to order that the child continue in the custody of the grandparents. Walker v. Walker, 224 N. C. 751, 32 S. E. (2d) 318.

Support and Counsel Fees Pendente Lite Where Husband Denies Paternity.—Where, upon the wife's motion in the cause to require defendant to provide support for the minor child of the marriage, made after decree of absolute divorce, the husband files affidavit denying paternity, and at his instance the issue is transferred to the civil issue docket, the trial court has the discretionary power to order defendant to provide for support of the child and counsel fees pendente lite. Winfield v. Winfield, 228 N. C. 256, 45 S. E. (2d) 259.

Jurisdiction.—Upon the institution of a divorce action the court is vested with jurisdiction of the children of the marriage for the purpose of entering orders respecting their care and custody. But the action is not instituted, within the meaning of this rule, until and unless the court acquires jurisdiction of the person of the defendant, and is subject to the fundamental requirement of notice and

opportunity to be heard. If both parents are in court and subject to its jurisdiction, an order may be entered, in proper instances, binding the parties and enforceable through its coercive jurisdiction. Coble v. Coble, 229 N. C. 81, 47 S. E. (2d) 798.

Decree under § 17-39 Does Not Oust Jurisdiction.—A decree awarding the custody of a child under the provisions of § 17-39 does not oust the jurisdiction of the court to hear and determine a motion in the cause for the custody of the child in a subsequent divorce action between the parties. Robbins v. Robbins, 229 N. C. 430, 50 S. E. (2d) 183.

Domicile of Husband Not Necessarily Domicile of Wife and Children. — Where the husband in his divorce action alleges that he had notified his wife that he would no longer live with her as husband and wife, he may not assert the fictional unity of persons for the purpose of maintaining that his domicile was the domicile of his wife and children. Coble v. Coble, 229 N. C. 81, 47 S. E. (2d) 798.

Proceeding Is In Rem.—The awarding of the custody of the children in an action for divorce is in rem, and the court must have jurisdiction over the children, who are the res, or must have jurisdiction of the person of their custodian who is given notice and an opportunity to be heard in order to have authority to enforce its decree by coercive action. Coble v. Coble, 229 N. C. 81, 47 S. E. (2d) 798.

Necessity for Service.—Where a parent is about to abscond and take her children beyond the jurisdiction of the court for the purpose of avoiding the service of process, the court may act and act promptly. But even then its order becomes effective and binding only upon service. Coble v. Coble, 229 N. C. 81, 47 S. E. (2d) 798.

Judge Is without Jurisdiction to Hear Matter outside District.—Upon application for the custody of the children of the marriage after decree of divorce, the resident judge entered a temporary order awarding the custody to the father, and issued an order to defendant wife to appear outside the county and outside the district to show cause why the temporary order should not be made permanent. Held: The judge was without jurisdiction to hear the matter outside the district, and an order issued upon the hearing of the order to show cause was void ab initio. Patterson v. Patterson, 230 N. C. 481, 53 S. E. (2d) 658.

Jurisdiction to Award Custody of Children without the State.—In so far as this section undertakes to vest a judge with authority, without the service of process and without notice, to enter an effective binding order awarding the custody of an infant beyond the confines of the state, it is invalid. Coble v. Coble, 229 N. C. 81, 47 S. E. (2d) 798.

Order Made without Jurisdiction and in Denial of Due Process.—An order of a judge of the superior court awarding custody of minor children to a plaintiff under this section, is made without jurisdiction and in denial of due process of law, when at the time such order was made there had been neither service of summons upon nor notice to the defendant, and when both the defendant and the minor children were without the state. Coble v. Coble, 229 N. C. 81, 47 S. E. (2d) 798.

Modification of Decree.—

A decree awarding custody of the child of the marriage as between its divorced parents is determinative of the present rights of the parties, but is not permanent and may be later modified by the court upon change of conditions. Hardee v. Mitchell, 230 N. C. 40, 51 S. E. (2d) 884.

Findings Sufficient to Sustain Decree.—Findings that the parties had been married and divorced, that the wife was a person of good character, resident in this state, that the husband is financially responsible, and that the best interest of the minor child of the marriage would be promoted by awarding its custody to the wife, is sufficient to sustain decree awarding its custody to her and requiring him to make contributions for the support of the child. Hardee v. Mitchell, 230 N. C. 40, 51 S. E. (2d) 884.

Cited in Taylor v. Taylor, 225 N. C. 80, 33 S. E. (2d) 492; In re McGraw, 228 N. C. 46, 44 S. E. (2d) 349.

§ 50-14. Alimony on divorce from bed and board.

Cited in Lockhart v. Lockhart, 223 N. C. 559, 27 S. E. (2d) 444.

§ 50-15. Alimony pendente lite; notice to husband.

I. IN GENERAL.

Cited in Stanley v. Stanley, 226 N. C. 129, 37 S. E. (2d) 118.

II. APPLICATION AND PROCEEDINGS THEREON.

In an action for divorce, a verified answer and cross-action setting forth a cause of action for divorce a mensa, is sufficient to sustain an order allowing alimony pendente lite. Nall v. Nall, 229 N. C. 598, 50 S. E. (2d) 737.

III. PREREQUISITES TO AWARD.

A. Entitled to Relief.

Adultery Does Not Bar Alimony Pendente Lite.—In action by wife for divorce a mensa, allegation of adultery on part of wife does not bar alimony pendente lite, as provision making adultery of wife bar to alimony is a part of § 50-16, but is not included in this section. Lawrence v. Lawrence, 226 N. C. 221, 37 S. E. (2d) 496.

The lapse of seven years from the time of the separation does not bar a cross-action for divorce a mensa on the ground of constructive abandonment or application for alimony pendente lite, either by laches or any statute of limitation. Nall v. Nall, 229 N. C. 598, 50 S. E. (2d) 737.

V. THE ORDER.

A. In General.

An order for support is not final, and may be modified or set aside on a showing of changed conditions. Byers v. Byers, 223 N. C. 85, 92, 25 S. E. (2d) 466.

§ 50-16. Alimony without divorce.

Two separate remedies are provided by this section, one for alimony without divorce, and one for reasonable subsistence and counsel fees pendente lite. The amounts allowed are determined by the trial court in its discretion and are not reviewable. Either party may apply for a modification at any time before the trial of the action. Oldham v. Oldham, 225 N. C. 476, 35 S. E. (2d) 332.

Jurisdiction Depends on Statute.—Jurisdiction over the subject matter of divorce or an action for alimony without divorce is given only by statute. Hodges v. Hodges, 226 N. C. 570, 39 S. E. (2d) 596, 597.

Husband's duty to provide support is not a debt in the legal sense of the word, but an obligation imposed by law, and penal sanctions are provided by this section for its wilful neglect or abandonment. Ritchie v. White, 225 N. C. 450, 35 S. E. (2d) 414.

Cross Action in Suit for Divorce.—If alimony without divorce, under this section, were the nature and purpose of the pleading, it could not be maintained by cross-action in a suit for divorce instituted by the husband. Ericson v. Ericson, 226 N. C. 474, 38 S. E. (2d) 517, 518.

Complaint Must Be Verified.—The court does not obtain jurisdiction in an action brought for relief under the provisions of the statutes relating to divorce, alimony, or divorce and alimony, unless the complaint is verified, and the form of the verification depends upon the character of the relief sought. Hodges v. Hodges, 226 N. C. 570, 39 S. E. (2d) 596, 597.

The provision of this section is mandatory as to the verification of pleadings but relieves the wife of the necessity of filing the affidavit required by § 50-8, and substitutes therefor the form prescribed for the verification of pleadings in ordinary civil actions. Id.

Complaint Must Allege Good Cause.—

In accord with 2nd paragraph in original. See Best v. Best, 228 N. C. 9, 12, 44 S. E. (2d) 214.

In an action under this section, as in an action for divorce a mensa et thoro by the wife, she must not only set out with some particularity the acts of cruelty upon the part of the husband, but she must aver, and consequently offer proof, that such acts were without adequate provocation on her part. The omission of such allegations is fatal and demurrer will be properly sustained. Howell v. Howell, 223 N. C. 62, 25 S. E. (2d) 169; Best v. Best, 228 N. C. 9, 13, 44 S. E. (2d) 214.

The essential elements required to be alleged in an action for alimony without divorce under this section are (1) separation of the husband from the wife, and (2) his failure to provide her with necessary subsistence according to his means and condition in life. Trull v. Trull, 229 N. C. 196, 49 S. E. (2d) 225.

Allegation That Acts of Husband Were without Provocation.—An allegation in an action for alimony without divorce that the separation of defendant from plaintiff wife was without fault or misconduct on her part, is a sufficient allegation that his acts were without provocation on her part. Trull v. Trull, 229 N. C. 196, 49 S. E. (2d) 225.

Complaint Praying for Subsistence and Other Relief. — Where a complaint alleges certain acts of misconduct constituting bases for divorce, both absolute and from bed and board, with prayer for relief demanding subsistence for the plaintiff and the minor child of the marriage, and for such other relief as may be just and proper, without prayer for divorce, the cause is an action for alimony without divorce

under this section. Brooks v. Brooks, 226 N. C. 280, 37 S. E. (2d) 909.

Suit Not Barred by Separation Agreement.—Jurisdiction of the court invoked under this section was not barred by separation agreement pleaded, where wife sued for alimony and support without divorce on grounds of specific acts of cruelty by husband and declared intention to sue for divorce in two years. Butler v. Butler, 226 N. C. 594, 39 S. E. (2d) 745, 747.

Action for Divorce Is Not Defeated by Order for Support.—An order for support, either pendente lite or under this section, without more, would not perforce defeat an action for divorce under ch. 100, Public Laws 1937 (§ 50-6). Byers v. Byers, 223 N. C. 85, 92, 25 S. E. (2d) 466.

A money judgment for arrears of alimony, not by its terms conditional and on which execution was directed to issue, was not subject to modification or recall under this section; and hence was entitled to full faith and credit. Barber v. Barber, 323 U. S. 77, 65 S. Ct. 137, 89 L. Ed. 114.

A judgment for subsistence survives a judgment of absolute divorce obtained by defendant under this section. Simmons v. Simmons, 223 N. C. 841, 842, 28 S. E. (2d) 489.

Amount.—

In accord with 1st paragraph in original. See Best v. Best, 228 N. C. 9, 14, 44 S. E. (2d) 214; Barwick v. Barwick, 228 N. C. 109, 112, 44 S. E. (2d) 597, citing Oldham v. Oldham, 225 N. C. 476, 35 S. E. (2d) 332.

The allowance of subsistence and counsel fees pendente lite is in the discretion of the trial court, who is not required to make formal findings of fact upon such a motion, unless the charge of adultery is made against the wife; and the court's ruling will not be disturbed in the absence of abuse of discretion. Phillips v. Phillips, 223 N. C. 276, 25 S. E. (2d) 848.

When allowable, the amount of attorneys' fees in an action for alimony without divorce is within the sound discretion of the court below and is unappealable except for abuse of that discretion. The statute itself, however, contains some guides to the exercise of that discretion and practice has developed others. Within the rule of reasonableness the court must consider along with other things the condition and circumstances of the defendant. Generally speaking, in this respect this section runs parallel with § 50-15 regarding allowances for attorneys' fees. Stadiem v. Stadiem, 230 N. C. 318, 52 S. E. (2d) 899.

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 without divorce 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. Butler v. Butler, 226 N. C. 594, 39 S. E. (2d) 745, 747.

Elements to Be Considered in Allowing Counsel Fees.—There are so many elements to be considered in a pendente lite allowance of attorneys' fees for 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. Stadiem v. Stadiem, 230 N. C. 318, 52 S. E. (2d) 899.

Effect of Abandonment of Suit.—The fact that after the institution of an action for alimony without divorce the client abandons the suit instituted in this state and institutes a suit for divorce in another state, and counsel employed here are permitted to withdraw, since no further services could be performed, does not affect such counsel's right to an order allowing them counsel fees out of the property of defendant for the services performed here in good faith. Stadiem v. Stadiem, 230 N. C. 318, 52 S. E. (2d) 899.

Court May Enter Second Order Allowing Additional Counsel Fees.—The fact that an order allowing counsel fees has been entered in an action under this sction does not preclude the court from thereafter entering a second order allowing additional counsel fees for subsequent services. Stadiem v. Stadiem, 230 N. C. 318, 52 S. E. (2d) 899.

Amount of Additional Counsel Fees Held Not Unreasonable.—On an appeal from an order allowing additional counsel fees under this section, the amount was held not so unreasonable as to constitute an abuse of discretion. Stadiem v. Stadiem, 230 N. C. 318, 52 S. E. (2d) 899.

No Allowance Where Plaintiff, in Law, Has No Case.—Discretion in allowance of support to a wife while suing husband under this section, 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 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. Butler v. Butler, 226 N. C. 594, 39 S. E. (2d) 745, 747.

Grounds for Relief.—Under this section there are available to the wife not only the grounds specifically set forth, but also any ground that would constitute cause for divorce from bed and board under § 50-7, or cause for absolute divorce under § 50-5. Brooks v. Brooks, 226 N. C. 280, 37 S. E. (2d) 909.

Plaintiff, in order to obtain affirmative relief under the provisions of this section, must meet the requirements of § 50-7 for divorce from bed and board. Blanchard v. Blanchard, 226 N. C. 152, 36 S. E. (2d) 919.

Adultery Revived after Condonation.—Under this section an allegation of adultery cannot be held fatally defective on the ground that it sets forth facts amounting to condonation when the complaint also alleges acts of misconduct committed by defendant after the reconciliation which revive the old grounds. Brooks v. Brooks, 226 N. C. 280, 37 S. E. (2d) 909.

Indignities.—The acts of a husband which will constitute such indignities to the person of his wife, as to render her condition intolerable and life burdensome, largely depend upon the facts and circumstances in each particular case. And such facts and circumstances are for the jury to pass upon unaffected by any temporary order entered for subsistence and attorney's fees. Barwick v. Barwick, 228 N. C. 109, 112, 44 S. E. (2d) 597.

If the wife is compelled to leave the home of the husband because he offers such indignities to her person as to render her condition intolerable and life burdensome, his acts constitute in law an abandonment of the wife by the husband, and allegations to this effect are sufficient to state a cause of action for alimony without divorce. Id.

Cruelty Causing Wife to Leave Home.—When the husband by cruel treatment renders the life of the wife intolerable or puts her in such fear for her safety that she is compelled to leave the home, the abandonment is his, and is sufficient ground for alimony without divorce. Eggleston v. Eggleston, 228 N. C. 668, 47 S. E. (2d) 243.

Establishing One Cause for Divorce Is Sufficient, etc.—Where complaint alleges adultery and also sets forth acts of misconduct constituting a basis for divorce from bed and board, the failure of the complaint to allege that the misconduct was without adequate provocation is not fatal, since such allegation is not necessary in an action for absolute divorce on the ground of adultery, and this ground, independently, is sufficient to sustain the action for alimony without divorce. Brooks v. Brooks, 226 N. C. 280, 37 S. E. (2d) 909.

Allegations of Habitual Drunkenness.—Allegations in a complaint that defendant had been an habitual drunkard during the prior three years is sufficient to state a cause of action for alimony without divorce under the term "shall be a drunkard" within the meaning of this section. Best v. Best, 228 N. C. 9, 44 S. E. (2d) 214.

Where complaint states a cause of action it is a sufficient basis for an order allowing alimony pendente lite. Brooks v. Brooks, 226 N. C. 280, 37 S. E. (2d) 909.

Only Adultery Is Absolute Bar to Allowance.—There is no defense that limits the power of the trial court to award subsistence pendente lite, under this section, except the defense of wife's adultery, so that the reasonableness of a separation agreement need not be determined before the court can award temporary allowances. Oldham v. Oldham, 225 N. C. 476, 35 S. E. (2d) 332.

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 under this section is so strongly entrenched in practice as to be considered an established legal right. Butler v. Butler, 226 N. C. 594, 39 S. E. (2d) 745, 747.

What Must Be Proved to Obtain Subsistence and Counsel Fees Pendente Lite.—Subsistence and counsel fees pendente lite may now be allowed under this section, and although plaintiff does not ask for divorce, she must charge and prove such injurious conduct on the part of the husband as would entitle her to a divorce a mensa et thoro, at least. Abandonment, failure to support, and adultery, are sufficient to satisfy the statute. Phillips v. Phillips, 223 N. C. 276, 277, 25 S. E. (2d) 848.

Applied in Lawrence v. Lawrence, 226 N. C. 221, 37 S. E. (2d) 496; Lamm v. Lamm, 229 N. C. 248, 49 S. E. (2d) 403.

Cited in Lockhart v. Lockhart, 223 N. C. 559, 27 S. E. (2d) 444; Stanley v. Stanley, 226 N. C. 129, 37 S. E. (2d) 118; Norman v. Norman, 230 N. C. 61, 51 S. E. (2d) 927.

Chapter 51. Marriage.

Art. 1. General Provisions.

§ 51-1. Requisites of marriage; solemnization. No justice of the peace who holds the office of register of deeds shall, while holding said office, perform any marriage ceremony. (Rev., s. 2081; Code, s. 1812; 1871-2, c. 193, s. 3; 1908, c. 47; 1909, c. 704, s. 2; 1909, c. 897; 1945, c. 839; C. S. 2493.)

Editor's Note.—
The 1945 amendment added the above sentence at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

§ 51-2. Capacity to marry.—All unmarried persons of eighteen years, or upwards, of age, may lawfully marry, except as hereinafter forbidden: Provided, that persons over sixteen years of age and under eighteen years of age may marry under a special license to be issued by the register of deeds, which said special license shall only be issued after there shall have been filed with the register of deeds a written consent to such marriage, signed by one of the parents of any such person or signed by the person standing in loco parentis to such male or female, and the fact of the filing of such written consent shall be set out in said special license: provided, that when the special license is procured by fraud and misrepresentation, the parent or person standing in loco parentis of the male or female shall be a proper party plaintiff in an action to annul said marriage. When an unmarried female between the ages of twelve and sixteen is pregnant or has given birth to a child and such unmarried female and the putative father of her child, either born or unborn, shall agree to marry and consent in writing to such marriage is given by one of the parents of the female, or by that person standing in loco parentis to such female, or by the guardian of the person of such female, or by the superintendent of public welfare of the county of residence of either party, such written consent shall be sufficient authorization for the register of deeds to issue a special license to marry. All couples resident of the state of North Carolina who marry in another state must file a copy of their marriage certificate in the office of the register of deeds of the home county of the groom within thirty days from the date of their return to the state, as residents, which certificate shall be indexed on the marriage license record of the office of the register of deeds and filed with marriage license in his office; the fee for the filing and indexing said certificate shall be fifty cents: Provided, the failure to file said certificate shall not invalidate the marriage. (Rev., s. 2082; Code, s. 1809; R. C., c. 68, s. 14; 1871-2, c. 193; 1923, c. 75; 1933, c. 269, s. 1; 1939, c. 375; 1947, c. 383, s. 2; C. S. 2494.)

Editor's Note.—
The 1947 amendment rewrote this section. For brief account of amendment, see 25 N. C. Law Rev. 414.

§ 51-3. Want of capacity; void and voidable marriages.—All marriages between a white person and a negro or Indian, or between a white person and person of negro or Indian descent to the third generation, inclusive, or between a Cherokee Indian of Robeson county and a negro, or between a Cherokee Indian of Robeson county and a person of negro descent to the third generation, inclusive, or between any two persons nearer of kin than first cousins, or between a male person under sixteen years of age and any female, or between a female person under sixteen years of age and any male, or between persons either of whom has a husband or wife living at the time of such marriage, or between persons either of whom is at the time physically impotent, or is incapable of contracting from want of will or understanding, shall be void: Provided, double first cousins may not marry; and provided further, that no marriage followed by cohabitation and the birth of issue shall be declared void after the death of either of the parties for any of the causes stated in this section, except for that one of the parties was a white person and the other a negro or Indian, or of negro or Indian descent to the third generation, inclusive, and for bigamy; provided further, that no marriage by persons either of whom may be under sixteen years of age, and otherwise competent to marry, shall be declared void when the girl shall be pregnant, or when a child shall have been born to the parties unless such child at the time of the action to annul shall be dead. (Rev., s. 2083; Code, s. 1810; R. C., c. 68, ss. 7, 8, 9; 1871-2, c. 193, s. 2; 1887, c. 245; 1911, c. 215, s. 2; 1913, c. 123; 1917, c. 135; 1947, c. 383, s. 3; 1949, c. 1022; C. S. 2495.)

Editor's Note.—
The 1947 amendment substituted "sixteen" for "fourteen" in line eleven. For brief comment on amendment, see 25 N. C. Law Rev. 414.

The 1949 amendment added the last proviso at the end of the section. For brief comment on amendment, see 27 N. C. Law Rev. 453.

What "Negro Descent" Includes.—
Every person who has one-eighth Negro blood in his veins is within the prohibited degree within the meaning of the Constitution and this section. State v. Miller, 229 N. C. 228, 229, 29 S. E. (2d) 751.

Art. 2. Marriage License.

§ 51-8.1. Nonresidents required to apply for license forty-eight hours before issuance.—No marriage license shall be issued by any register of deeds for the marriage of any two persons, both of whom are nonresidents of the state of North Carolina, unless application for such license has been on file in the office of the register of deeds issuing the license for at least forty-eight hours. Such application must be made in writing and filed subject to public inspection in the office of the register of deeds to which the application is made and shall give the names of the parties to the marriage, their race, ages, and residence addresses. For receiving and filing such application the register of deeds shall collect a fee of fifty cents (50c).

Any register of deeds who knowingly or without reasonable inquiry, personally or by his deputy, violates any of the provisions of this section shall forfeit and pay two hundred dollars ($200.00) to any parent, guardian, or other person standing in loco parentis, who sues for the same.

This section shall only apply to Bertie and Pamlico counties. (1945, cc. 1046, 1103; 1947, cc. 288, 289, 391, 538; 1949, cc. 13, 62, 329.)

Editor's Note.—The original section applied to Bertie, Camden, Chowan, Currituck, Dare, Gates, Hertford, Hyde, Martin, Pamlico, Pasquotank, Perquimans, Tyrrell and Washington counties. The 1947 amendments struck out Chowan, Currituck, Dare, Gates, Martin, Pasquotank and Perquimans from the list of counties. And the 1949 amendments struck out Camden, Hertford, Tyrrell and Washington. The title of the act (1949, c. 13) striking out Tyrrell and Washington refers only to Washington county.

§ 51-9. Health certificates required of applicants for licenses.—No license to marry shall be issued by the register of deeds of any county to a male or female applicant therefor except upon the following conditions: The said applicant shall present to the register of deeds a certificate executed within thirty days from the date of presentation showing that, by the usual methods of examination made by a regularly licensed physician, no evidence of any venereal disease was found. Such certificate shall be accompanied by the original report from a laboratory approved by the state board of health for making such tests showing that the Wassermann or any other approved test of this nature was made, such tests to have been made within thirty days of the time application for license is made. Before any laboratory shall make such tests or any serological test required by this section, it shall apply to the North Carolina state board of health for a certificate of approval; and such application shall be in writing and shall be accompanied by such reports and information as shall be required by the North Carolina state board of health. The North Carolina state board of health may, in its discretion, revoke or suspend any certificate of approval issued by it for the operation of such a laboratory; and after notice of such revocation or suspension, no such laboratory shall operate as an approved laboratory under this section.

Furthermore, such certificate shall state that, by the usual methods of examination made by a regularly licensed physician, no evidence of tuberculosis in the infectious or communicable stage was found.

And, furthermore, such certificate shall state that, by the usual methods of examination made by a regularly licensed physician, the applicant was found to be not subject to epileptic attacks, an idiot, an imbecile, a mental defective, or of unsound mind. (1939, c. 314, s. 1; 1941, c. 218, s. 1; 1945, c. 577, s. 1; 1947, c. 929.)

Editor's Note.—

The 1945 amendment struck out the words "in the infectious or communicable stage" formerly appearing after the word "disease" in line nine, and substituted in line fourteen the words "was made" for the words "is negative."

The 1947 amendment added the last two sentences of the first paragraph.

§ 51-10. Exceptions to section 51-9.—Exceptions to § 51-9, in case of persons who have been infected with a venereal disease, are permissible only under the following conditions:

(1) When the applicant has completed treatment and is certified by a regularly licensed physician as having been cured or probated, and when said physician has certified that he has informed both the applicant and the proposed marital partner of any possible future infectivity of the applicant,

(2) When the applicant is found to be in that stage of such disease that is not communicable to the marital partner as certified by a regularly licensed physician, provided that the applicant signs an agreement to take adequate treatment until cured or probated,

(3) When the applicant is pregnant and it is necessary to protect the legitimacy of the offspring, provided that the applicant signs an agreement to take adequate treatment until cured or probated,

(4) When the applicant and the proposed marital partner are both infected with the same disease and have signed an agreement to take treatment until cured or probated. (1939, c. 314, s. 2; 1945, c. 577, s. 2.)

Editor's Note.—The 1945 amendment rewrote this section.

§ 51-12. Eugenic sterilization for persons adjudged of unsound mind, etc.

For comment on the 1943 amendment, see 21 N. C. Law Rev. 348.

§ 51-20. Marriage license tax.—The board of commissioners of any county may levy a tax of four dollars ($4.00) on each marriage license issued, which tax shall be collected by the register of deeds of the county in which the license is issued. All such marriage license taxes collected by the register of deeds shall promptly be placed in the county general fund.

The register of deeds of each county shall submit to the board of commissioners on the first Monday in January, April, July, and October of each year a sworn statement or report in detail, showing the names of the persons to whom marriage licenses have been issued during the preceding three months, and accompany such sworn report or statement with the amount of such taxes collected by him or that should have been collected by him in the preceding three months.

This section shall not be construed to modify in any manner the provisions of §§ 51-2 or 51-8.1.

Nothing in this section shall prevent any register of deeds whose compensation is derived from fees from retaining such fees as heretofore allowed by law to such register of deeds for issuing said license. (1947, c. 831, s. 1.)

Chapter 52. Married Women.

Art. 3. Free Traders.

Sec.
52-22 to 52-25. [Repealed.]

Art. 1. Powers and Liabilities of Married Women.

§ 52-1. Property of married woman secured to her.

Chapter Creates No New Rights in Husband.—The provisions of this chapter, in so far as the husband is concerned, constitute in the main abridgements of rights he had as to his wife's property under the common law, and do not purport to create in him, as against her, rights he did not have at common law. Scholtens v. Scholtens, 230 N. C. 149, 52 S. E. (2d) 350.

A husband may not maintain an action against his wife for a personal tort committed by her against him during coverture, since this common law disability has not been abrogated or repealed by statute. Scholtens v. Scholtens, 230 N. C. 149, 52 S. E. (2d) 350.

§ 52-2. Capacity to contract.—Subject to the provisions of § 52-12, regulating contracts of wife with husband affecting corpus or income of estate, every married woman is authorized to contract and deal so as to affect her real and personal property in the same manner and with the same effect as if she were unmarried, but no conveyance of her real estate shall be valid unless made with the written assent of her husband as provided by section six of article ten of the constitution, and the execution of the same acknowledged or proven as required by law. (Rev., s. 2094; Code, s. 1826; 1871-2, c. 193, s. 17; 1911, c. 109; 1945, c. 73, s. 16; C. S. 2507.)

I. IN GENERAL.

Editor's Note.—
The 1945 amendment omitted the requirement of privy examination of the wife.

As to effect of amendment on this and other sections, see 23 N. C. Law Rev. 357.

The Effect of This Section.—
This statute contains a permanent delimitation making a conveyance of real estate invalid unless with the written assent of the husband. Buford v. Mochy, 224 N. C. 235, 29 S. E. (2d) 729.

Statute providing that earnings and damages from personal injury are wife's property (§ 52-10), should be read in light of this section. Helmstetler v. Duke Power Co., 224 N. C. 821, 32 S. E. (2d) 611.

II. POWERS CONFERRED.

Oral Agreement to Hold Land in Trust for Husband.—A married woman is under no legal handicap which would prevent her from entering into an oral agreement with her husband to hold title to real estate for his benefit or for their joint benefit. Carlisle v. Carlisle, 225 N. C. 462, 35 S. E. (2d) 418.

Husband and Wife May Form Business Partnership.—This section has been held to vest the wife with the power to contract with the husband so as to create a business partnership. Eggleston v. Eggleston, 228 N. C. 668, 47 S. E. (2d) 243.

§ 52-4. Conveyance or lease of wife's land requires husband's joinder.—No lease or agreement for a lease or sublease or assignment by any married woman of her lands or tenements, or chattels real, to run for more than three years, or to begin in possession more than six months after its execution, or any conveyance of any freehold estate in her real property, shall be valid, unless the same be executed by her and her husband, and proven or acknowledged by them. (Rev., s. 2096; Code, s. 1834; 1871-2, c. 193, s. 26; 1945, c. 73, s. 17; C. S. 2509.)

Editor's Note.—The 1945 amendment omitted the requirement of privy examination of the wife.

§ 52-5. Separation by divorce or deed; husband non compos.

Cited in Buford v. Mochy, 224 N. C. 235, 29 S. E. (2d) 729 (dis. op.).

§ 52-7. Husband cannot convey, et cetera, wife's land without her consent; not liable for his debts.—No real estate belonging at the time of marriage to females nor any real estate by them subsequently acquired nor any real estate of a married woman shall be subject to be sold or leased by the husband for the term of his own life or any less term of years, except by and with the consent of his wife first had and obtained, to be ascertained and effectuated by deed and due proof or acknowledgment according to law. And no interest of the husband whatever in such real estate shall be subject to sale to satisfy any execution obtained against him; and every such sale is hereby declared null and void. (Rev., s. 2097, Code, s. 1840; R. C., c. 56; 1848, c. 41; 1945, c. 73, s. 18; C. S. 2510.)

Editor's Note.—
The 1945 amendment omitted certain dates and the requirement of privy examination.

§ 52-10. Earnings and damages from personal injury are wife's property.

In General.—
A married woman is now entitled to recover in tort for all pecuniary loss sustained by her, including nursing and care, and loss from inability to perform labor or to carry on her household duties. This transfers to the wife, the husband's common-law right of action to recover for her services and for imposed nursing and care occasioned by the tort of another. Helmstetler v. Duke Power Co., 224 N. C. 821, 824, 32 S. E. (2d) 611.

"The effect of the legislation on the subject is to equalize the legal status of husband and wife, and to deny to each any overlapping recovery on account of the other's loss or injury." Id.

Services rendered by a married woman outside the home and not within the scope of her household or domestic duties, would properly be recoverable on implied assumpsit or quantum meruit in her own name. Coley v. Dalrymple, 225 N. C. 67, 70, 33 S. E. (2d) 477.

Read in Light of Other Laws.—This section should be read in the light of Art. X, sec. 6, of the constitution which protects a married woman in the sole ownership of her property, and also in connection with § 52-2, which seeks to secure to her the free use of her property. Helmstetler v. Duke Power Co., 224 N. C. 821, 823, 32 S. E. (2d) 611.

The mutual rights and duties growing out of the marital relationship are not affected by this and the following sections relating to the capacity of married women to contract and dispose of their property as if they were unmarried. Ritchie v. White, 225 N. C. 450, 35 S. E. (2d) 414.

A married woman is still a feme covert with the rights, privileges and obligations incident to such status under the law. Coley v. Dalrymple, 225 N. C. 67, 69, 33 S. E. (2d) 477, citing Buford v. Mochy, 224 N. C. 235, 29 S. E. (2d) 729.

This section does not relieve a married woman of her marital obligations, or deny to her the privilege of sharing in the family duties and aiding in such work as the helpmeet of her husband, when minded so to do. Coley v. Dalrymple, 225 N. C. 67, 69, 33 S. E. (2d) 477, citing Helmstetler v. Duke Power Co., 224 N. C. 821, 32 S. E. (2d) 611.

Effect on Rights of Husband.—
When a married woman is negligently injured by the tort of another, her husband cannot maintain an action to recover damages sustained by him through (1) imposed nursing and care, (2) loss of his wife's services, (3) mental anguish, and (4) loss of consortium. Under existing law, the injured spouse alone may sue for his or her earnings or damages for personal injuries. Helmstetler v. Duke Power Co., 224 N. C. 821, 32 S. E. (2d) 611.

Quoted in Carlisle v. Carlisle, 225 N. C. 462, 35 S. E. (2d) 418.

Cited in Scholtens v. Scholtens, 230 N. C. 149, 52 S. E. (2d) 350.

§ 52-12. Contracts of wife with husband affecting corpus or income of estate.—(a) No contract between husband and wife made during their coverture shall be valid to affect or change any part of the real estate of the wife, or the accruing income thereof for a longer time than three years next ensuing the making of such contract, or to impair or change the body or capital of the personal estate of the wife, or the accruing income thereof, for a longer time than three years next ensuing the making of such contract, unless such contract is in writing, and is duly proven as is required for the conveyances of land; and 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 her. The certificate of the officer shall be conclusive of the facts therein stated. But the same may be impeached for fraud as other judgments may be.

(b) This section shall not apply to any judgment of the superior court which, by reason of its being consented to by a husband and his wife, or their attorneys, may be construed to constitute a contract between such husband and wife. (Rev., s. 2107; Code, s. 1835; 1871-2, c. 193, s. 27; 1945, c. 73, s. 19; 1947, c. 111; C. S. 2515.)

I. IN GENERAL.

Editor's Note.—

The 1945 amendment omitted the requirement of privy examination of the wife.

The 1947 amendment added subsection (b).

Legislature Did Not Intend to Reduce Marriage to a Commercial Basis.—While in ordinary transactions married women are permitted to deal with their earnings and property practically as they please or as free traders, the general assembly did not intend to reduce the institution of marriage, or the obligations of family life, to a commercial basis. Ritchie v. White, 225 N. C. 450, 35 S. E. (2d) 414.

Effect of Fraud or Want of Consideration.—Where the jury finds that a release signed by the wife in favor of the husband was procured by fraud, the husband's contention that the fact that the acknowledgment of the release taken in conformity with this section precludes attack of the release for want of consideration, is untenable, since in such instance there is no contract to which the provisions of this section could apply. Garrett v. Garrett, 229 N. C. 290, 49 S. E. (2d) 643.

Judgment on Pleadings.—In an action by a wife against her former husband to enforce a separation agreement between them, executed in accordance with this section, plaintiff was held entitled to have the court render judgment on the pleadings in her favor. Smith v. Smith, 225 N. C. 189, 34 S. E. (2d) 148.

Cited in Buford v. Mochy, 224 N. C. 235, 29 S. E. (2d) 729 (dis. op.); Bass v. Moore, 229 N. C. 211, 49 S. E. (2d) 391.

II. TRANSACTIONS INCLUDED.

Section Applies to Every Form of Conveyance Except Testamentary Devise.—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. Any manner of conveyance—testamentary devises excepted—otherwise than as therein provided is void. Ingram v. Easley, 227 N. C. 442, 444, 42 S. E. (2d) 624, containing specific examples of transactions that are void for want of compliance with this section.

Contract Fixing Monthly Allowance to Wife.—A contract between husband and wife, which does not purport to divest the wife of dower or the husband of curtesy, but which does fix the sum of money the wife is to receive from her husband each month thereafter, as long as the agreement remains in effect, for her support and the support of their minor child, is within the class of contracts which, in order to be valid and binding on the parties, must be executed in the manner and form required by this section, and, not being so executed, the same is void as to the wife and also as to the husband. Daughtry v. Daughtry, 225 N. C. 258, 34 S. E. (2d) 435.

Conveyance of Wife's Land to Third Party in Trust for Husband.—The law will not permit the salutary object of this section to protect married women to be circumvented by indirection, and a wife may not effectually convey her real estate to a third person to be held in trust by him for the husband or to be conveyed by him to the husband unless the examining or certifying officer incorporates in his certificate his conclusions that the conveyance "is not unreasonable or injurious to the wife." McCullen v. Durham, 229 N. C. 418, 50 S. E. (2d) 511.

Agreement to Hold in Trust Land Conveyed to Wife by Third Party.—A married woman may enter into a parol agreement with her husband to hold title to real estate conveyed to her by a third party, for his benefit or for their joint benefit. Such an agreement would not involve her separate estate; consequently the contract is not required to be executed in the manner set forth in this section. Bass v. Bass, 229 N. C. 171, 48 S. E. (2d) 48.

Contract Creating Business Partnership. — Husband and wife may enter into a contract creating a business partnership between them under § 52-2, but where the wife's separate estate is involved as a part of the partnership property, the provision of this section must be observed. Eggleston v. Eggleston, 228 N. C. 668, 47 S. E. (2d) 243.

IV. EFFECT OF NONCOMPLIANCE.

Separation agreement which was not executed in manner required by this section and § 52-13 was void ab initio, and where execution of such agreement appears from pleadings in husband's action for divorce on ground of two years separation, allegations of wife's answer must be weighed in the light of this fact. Pearce v. Pearce, 226 N. C. 307, 37 S. E. (2d) 904; Pearce v. Pearce, 225 N. C. 571, 35 S. E. (2d) 636.

Partnership Agreement.—A husband and wife may enter into a partnership agreement and be answerable for the partnership debts made for or on behalf of the firm with third parties. But, as between themselves, where the partnership agreement purports to affect or change any part of the real estate of the wife or the accruing income thereof, for a longer period than three years next ensuing the making of the contract, or if the agreement impairs or changes the body or capital of the personal estate of the wife, or accruing income thereof for a longer period than three years next ensuing the agreement, the contract is void and unenforceable unless executed in accordance with this section. Carlisle v. Carlisle, 225 N. C. 462, 35 S. E. (2d) 418.

Estoppel of Husband.—

A deed by husband to wife, acknowledged as required by this section, intending to convey and conveying in fee land held by such husband and wife by entireties, is an estoppel against the husband, his heirs and others standing in privity to him, although the deed contains no technical covenants. Keel v. Bailey, 224 N. C. 447, 31 S. E. (2d) 362.

Conveyance Void Where Officer Fails to State His Conclusions in Certificate.—A conveyance of her land by a wife to her husband is void if the officer taking the acknowledgment of the wife fails to state in his certificate his conclusions that the conveyance "is not unreasonable or injurious to her" as required by this section. McCullen v. Durham, 229 N. C. 418, 50 S. E. (2d) 511.

§ 52-13. Contracts between husband and wife generally; releases.

Legislature Did Not Intend to Reduce Marriage to a Commercial Basis.—While in ordinary transactions married women are permitted to deal with their earnings and property practically as they please or as free traders, the general assembly did not intend to reduce the institution of marriage, or the obligations of family life, to a commercial basis. Ritchie v. White, 225 N. C. 450, 35 S. E. (2d) 414.

Art. 2. Acts Barring Reciprocal Property Rights of Husband and Wife.

§ 52-19. Divorce a vinculo and felonious slaying a bar.

Heir Murdering Ancestor Excluded from Beneficial Interest in Estate.—The fact that this section and the other statutory provisions that a murderer shall forfeit all interest in the estate of his victim, §§ 28-10 and 30-4, are applicable only to the relation of husband and wife does not deprive equity of the power of declaring an heir who has murdered his ancestor a constructive trustee for the benefit of those who would

have taken if the murderer had predeceased the intestate. Garner v. Phillips, 229 N. C. 160, 47 S. E. (2d) 845. For suggested revision of this section and related statutes, see 26 N. C. Law Rev. 232.

§ 52-21. Husband's living in adultery, etc., or divorce a mensa at wife's suit a bar.

Cited in Buford v. Mochy, 224 N. C. 235, 29 S. E. (2d) 729 (dis. op.).

Art. 3. Free Traders.

§§ 52-22 to 52-25: Repealed by Session Laws 1945, c. 635.

Chapter 53. Banks.

Art. 1. Definitions.

§ 53-1. "Bank," "surplus," "undivided profits," and other words defined.

The term "bank" shall be construed to mean any corporation, other than building and loan associations, industrial banks, and credit unions, receiving, soliciting, or accepting money or its equivalent on deposit as a business.

(1945, c. 743, s. 1.)

Editor's Note.—

The 1945 amendment rewrote the second paragraph. As the rest of the section was not affected by the amendment it is not set out.

Art. 2. Creation.

§ 53-2. How incorporated.—Any number of persons, not less than five, who may be desirous of forming a company and engaging in the business of establishing, maintaining, and operating banks of discount and deposit to be known as commercial banks, or engaging in the business of establishing, maintaining, and operating offices of loan and deposits to be known as savings banks, or of establishing, maintaining, and operating banks having departments for both classes of businesss, or operating banks engaged in doing a trust and fiduciary business, shall be incorporated in the manner following and in no other way; that is to say, such persons shall, by a certificate of incorporation under their hands and seals set forth:

(1947, c. 781.)

The 1947 amendment inserted the word "and" after the word "trust" in the twelfth line, and struck out the words "and surety" formerly appearing after the word "fiduciary" in the same line. As only the preliminary paragraph was affected by the amendment the rest of the section is not set out.

§ 53-15. Repealed by Acts 1947, c. 696.

Art. 3. Dissolution and Liquidation.

§ 53-20. Liquidation of banks.

(16) Unclaimed Dividends Held in Trust.—The unclaimed dividends remaining in the hands of the commissioner of banks for six months after the order for final distributions shall be held in trust for the several depositors and creditors of the liquidated bank; and the money so held by him shall be paid over to the persons respectively entitled thereto as and when satisfactory evidence of their right to the same is furnished. In case of doubtful or conflicting claims the commissioner of banks shall have authority to apply to the superior court of the county, by motion in the pending action, for an order from the resident or presiding judge of the superior court directing the payment of the moneys so claimed. When issues of fact are raised by said motion, the same may upon request of any claimant, be submitted to the jury for determination as other issues of fact are determined. The interest earned on the unclaimed dividend so held shall be applied toward defraying the expenses incurred in the distribution of such unclaimed dividends. The balance of interest, if any, shall be deposited and held as other funds of the banking department to the credit of the commissioner of banks. After the commissioner of banks has held the unclaimed dividend held in trust by him under the provisions of this statute for the several depositors and creditors of the liquidated bank for a period of ten years he is hereby given the authority to pay the principal amount of such unclaimed dividends to the University of North Carolina, to be held by the University of North Carolina without liability for profit or interest until a just claim therefor shall be preferred by the parties entitled thereto. Upon payment of the said unclaimed dividends to the University of North Carolina, the commissioner of banks shall be fully discharged from all further liability therefor.

(1947, c. 621, s. 1.)

The 1947 amendment added the last two sentences to subsection 16. As the rest of the section was not affected by the amendment it is not set out.

For brief discussion of the 1947 amendment and other

provisions relating to escheats, see 25 N. C. Law Rev. 421. See also 26 N. C. Law Rev. 110.

In determining residence of fiduciaries for purposes of venue or citizenship, the personal residence of the fiduciary controls, in the absence of statute. This is true as to statutory receivers of banks. Hartford Acci., etc., Co. v. Hood, 225 N. C. 361, 34 S. E. (2d) 204.

Art. 6. Powers and Duties.

§ 53-48. Loans, limitations of.—The total direct and indirect liability of any person, firm or corporation, other than a municipal corporation for money borrowed, including in the liabilities of a firm, the liabilities of the several members thereof, shall at no time exceed twenty per cent of two hundred and fifty thousand dollars, or fractional part thereof, of the unimpaired capital and permanent surplus of the bank and not more than ten per cent of the excess of two hundred and fifty thousand dollars of the unimpaired capital and permanent surplus of the bank: Provided, however, that the discount of bills of exchange drawn in good faith against actual existing values, the discount of solvent trade acceptances, or other solvent commercial or business paper actually owned by the person, firm or corporation negotiating the same and the purchase of any notes, the making of any loans, secured by not less than a like face amount of bonds of the United States or state of North Carolina or certificates of indebtedness of the United States, shall not be considered as money borrowed within the meaning of this section: Provided, further, that the limitations of this section shall not apply to loans or obligations to the extent that they are secured or covered by guarantees or by commitments or agreements to take over or purchase the same, made by any federal reserve bank or by the United States or any department, board, bureau, commission or establishment of the United States, including any corporation wholly owned directly or indirectly by the United States. (1921, c. 4, s. 29; 1923, c. 148, s. 6; 1925, c. 119, s. 1; 1927, c. 47, s. 7; 1937, c. 419; 1943, c. 204; 1945, c. 127, s. 1; C. S. 220(d).)

Editor's Note.—
The 1945 amendment inserted in line nineteen the words "the making of any loans."

§ 53-58. Check or note sent direct to bank on which drawn; photostatic copies of lost items; presentation of original by innocent holder.—Any bank receiving for collection or deposit any check, note, or other negotiable instrument drawn upon or payable at another bank, located in another town or city, whether within or without this state, may forward such instrument for collection, direct to the bank on which it is drawn, or at which it is payable, and such method of forwarding direct to the payer bank shall be deemed due diligence, and the failure of such payer bank, because of its insolvency or other default, to account for the proceeds thereof, shall not render the forwarding bank liable therefor: Provided, however, such forwarding bank shall have used due diligence in other respects in connection with the collection of such instrument.

In any case where checks, notes, or other negotiable instruments are transmitted by one bank to another in the process of collection and the same shall be lost or shall be destroyed, the bank last forwarding the same, or any bank in the chain of collection handling such items prior to their loss or destruction, may furnish photostatic copies of such checks, notes or other negotiable instruments, and such photostatic copies, when forwarded by the last forwarding bank before such instruments were lost or destroyed, shall be taken and treated as the original items which they represent and the bank to which forwarded and any bank subsequent thereto through which the same are forwarded to the bank upon which the same are drawn shall be relieved of any liability for treatment of the same as originals; provided, however, that the bank last forwarding such items shall be solely liable for payment upon any original of such items if subsequently presented for payment to such bank by an innocent holder, although the bank is not the drawee bank. (1921, c. 4, s. 39; 1949, c. 818; C. S. 220(n).)

Editor's Note.—The 1949 amendment added the second paragraph. For comment on the amendment, see 27 N. C. Law Rev. 427.

§ 53-62. Establishment of branches.—Any bank doing business under this chapter may establish branches in the cities in which they are located, or elsewhere, after having first obtained the written approval of the commissioner of banks, which approval may be given or withheld by the commissioner of banks, in his discretion, and shall not be given until he shall have ascertained to his satisfaction that the public convenience and advantage will be promoted by the opening of such branch. Such branch banks shall be operated as branches of and under the name of the parent bank, and under the control and direction of the board of directors and executive officers of said parent bank. The board of directors of the parent bank shall elect a cashier and such other officers as may be required to properly conduct the business of such branch, and a board of managers or loan committee shall be responsible for the conduct and management of said branch, but not of the parent bank or of any branch save that of which they are officers, managers, or committee: Provided, that the commissioner of banks shall not authorize the establishment of any branch, the paid-in capital stock of whose parent bank is not sufficient in an amount to provide for the capital of at least twenty-five thousand dollars for the parent bank, and at least twenty-five thousand dollars for each branch which it is proposed to establish in cities or towns of three thousand population or less; nor less than thirty thousand dollars in cities and towns whose population exceeds three thousand, but does not exceed ten thousand; nor less than fifty thousand dollars in cities and towns whose population exceeds ten thousand, but does not exceed twenty-five thousand; nor less than one hundred thousand dollars in cities and towns whose population exceeds twenty-five thousand. All banks operating branches prior to February 18, 1921, shall, within a time limit to be prescribed by the commissioner of banks, cause said branch bank to conform to the provisions of this section: Provided, however, that any bank with a capital stock (including both common and preferred) of one million ($1,000,000.00) dollars or more may without additional capital establish and operate such number of branches or agencies in the state of North Carolina as the commissioner of banks may in his discretion permit; but a bank operating branches under this proviso shall at all times

maintain an unimpaired capital of at least one million ($1,000,000.00) dollars: Provided further, that the commissioner of banks shall not permit the establishment of additional branches, and/or agencies unless said bank maintains its capital stock and surplus in ratio of one to ten to its deposits; Provided that in small communities having no other banking facilities, and upon a finding by the commissioner of banks that the public convenience and advantage will be promoted thereby, the opening of "tellers window agencies or branches" of then existing banks may be permitted, but no more than one such agency or branch may be so opened in any one community nor shall any bank be permitted to open such an agency or branch when its unimpaired capital and surplus in proportion to deposits is below that herein required: provided, further, that the state banking commission may authorize the establishment of a teller's window only, for a bank in the community in which its home office or a branch thereof is located, without the allocation of additional capital for said teller's window as otherwise provided by law. (1921, c. 4, s. 43; Ex. Sess. 1921 c. 56, s. 2; 1927, c. 47, s. 8; 1931, c. 243, s. 5; 1933, c. 451, s. 1; 1935, c. 139; 1947, c. 990; C. S. 220(r).)

The 1947 amendment added the last proviso to the section.

§ 53-69: Repealed by Session Laws 1945, c. 635.

Art. 7. Officers and Directors.

§ 53-86. Directors, officers, etc., accepting fees, etc. — No gift, fee, commission, or brokerage charge shall be received, directly or indirectly, by any officer, director, or employee of any bank doing business under this chapter, on account of any transaction to which the bank is a party. Any officer, director, employee, or agent who shall violate the provisions of this section shall be guilty of a misdemeanor, and shall be and thereafter remain ineligible as an officer, director, or employee of any bank doing business under this chapter. Nothing in this section shall be construed to prevent the payment of necessary and proper attorney's fees to any licensed attorney for professional services rendered, and nothing in this section shall be construed to apply to commissions on insurance and surety bond premiums. (1921, c. 4, s. 57; 1947, c. 695; C. S. 221(i).)

Editor's Note.—The 1947 amendment added the words following the comma in the last sentence.

§ 53-90. Officers and employees shall give bond.

This Statute Enters into and Forms a Part of the Bond.— The provision of this section requiring officers and employees of a bank to give bond in an amount required by the directors and upon such form as may be approved by the commissioner of banks, is the only statutory provision which becomes a part of the bond. Hartford Acci., etc., Co. v. Hood, 226 N. C. 706, 40 S. E. (2d) 198.

Effect of Renewal of Bond.—

Where a bond guaranteeing the payment of any loss sustained through the dishonesty of a bank official while "in the continuous employment of a bank" after a specified date, is kept in force for a period of years by the payment of the stipulated annual premium, recovery on the bond is limited to the maximum liability therein stipulated for losses occurring during the life of the bond, and the contention that the surety is liable for defalcations to the amount of the penal sum of the bond for each of the years during which the bonds is kept in force, is untenable. Hartford Acci., etc., Co. v. Hood, 226 N. C. 706, 40 S. E. (2d) 198, distinguishing Hood v. Simpson, 206 N. C. 748, 175 S. E. 193.

Art. 8. Commissioner of Banks and Banking Department.

§ 53-92. Appointment of commissioner of banks; state banking commission.

The state banking commission, which has heretofore been created, shall hereafter consist of the state treasurer and the attorney general, who shall serve as ex officio members thereof, and seven members who shall be appointed by the governor. Four members of the said commission shall be practical bankers and the remainder of the membership of said commission shall be selected so as to fairly represent the business, manufacturing, farming and dairying interests of the state. The present membership of said banking commission shall continue until the first day of April, 1951, and the governor shall appoint the two additional members thereof to serve until said time. Thereafter, three of the members of said commission shall be appointed for terms of two years and four of the members of said commission shall be appointed for terms of four years, and thereafter all members of said commission who are appointed by the governor shall be appointed for terms of four years. The appointive members of said commission shall receive as compensation for their services the same per diem and expenses as is paid to the members of the advisory budget commission, which compensation shall be paid from the fees collected from the examination of banks, as provided by law.

(1949, c. 372.)

Editor's Note. — The 1949 amendment rewrote the second paragraph. As the rest of the section was not affected by the amendment it is not set out.

§ 53-103: Repealed by Session Laws 1945, c. 743, s. 1.

§ 53-104. Commissioner of banks shall have supervision over, etc.—Every bank or corporation transacting the business of banking, or doing a banking business in connection with any other business, under the laws of and within this state, and any individual, partnership, association, or corporation which undertakes or attempts to transact the business of banking, or do a banking business in connection with any other business, shall be under the supervision of the commissioner of banks. It shall be his duty to execute and enforce through the state bank examiners and such other agents as are now or may hereafter be created or appointed, all laws which are now or may hereafter be enacted relating to banks as defined in this chapter. For the more complete and thorough enforcement of the provisions of this chapter, the state banking commission is hereby empowered to promulgate such rules, regulations, and instructions, not inconsistent with the provisions of this chapter, as may in its opinion be necessary to carry out the provisions of the laws relating to banks and banking as herein defined, and as may be further necessary to insure such safe and conservative management of the banks under its supervision as will provide adequate protection for the interests of the depositors, creditors, stockholders, and public in their relations with such banks. All banks doing business under the provisions of this chapter shall conduct their business in a manner consistent with all laws relating to banks and banking, and all rules, regulations, and

instructions that may be promulgated or issued by the state banking commission. (1921, c. 4, s. 63; 1931, c. 243, s. 5; 1939, c. 91, s. 2; 1945, c. 743, s. 1; C. S. 222(a).)

Editor's Note.—
The 1945 amendment rewrote the first sentence and struck out the former first part of the second sentence reading: "The commissioner of banks shall exercise control of and supervision over the banks doing business under this chapter, and."

Art. 9. Bank Examiners.

§ 53-122. Fees for examinations and other services.

(f) In the first half of each calendar year, the state banking commission shall review the estimated cost of maintaining the office of the commissioner of banks for the next fiscal year, and, if the estimated fees provided for under paragraphs (a) and (b) shall exceed the estimated cost of maintaining the office of the commissioner of banks for the next fiscal year, then the state banking commission may reduce by uniform percentage the fees provided for in paragraphs (a) and (b) of this section but not in a percentage greater than fifty per cent (50%) nor to an amount which will reduce the amount of the fees to be collected below the estimated cost of maintaining the office of the commissioner of banks for the next fiscal year. (1921, c. 4, s. 77; 1927, c. 47, s. 15; 1931, c. 243, s. 5; 1943, c. 733; 1945, c. 467; C. S. 223(f).)

Editor's Note.—
The 1945 amendment increased the reduction allowed in subsection (f) from 25 to 50 per cent. As the rest of the section was not affected by the amendment it is not set out.

Art. 11. Industrial Banks.

§ 53-136. Industrial bank defined.—The term "industrial bank," as used in this article shall be construed to mean any corporation organized or authorized under this article which is engaged in receiving, soliciting or accepting money or its equivalent on deposit and in lending money to be repaid in weekly, monthly, or other periodical installments or principal sums as a business: Provided, however, this definition shall not be construed to include building and loan associations, commercial banks, or credit unions. (1923, c. 225, s. 1; 1945, c. 743, s. 1; C. S 225(a).)

Editor's Note.—
Prior to the 1945 amendment this section related only to corporations engaged in lending money. The amendment substituted at the end of the section the words "commercial banks, or credit unions" for the words "or commercial or savings banks."

§ 53-137. Manner of organization.—Any number of persons, not less than five, may organize an industrial bank by setting forth in a certificate of incorporation, under their hands and seals, the following:

1. The name of the industrial bank.
2. The location of its principal office in this state.
3. The nature of its business.
4. The amount of its authorized capital stock which shall be divided into shares of ten, twenty, twenty-five, fifty, or one hundred dollars each: Provided, fractional shares may be issued for the purpose of complying with the requirements of § 53-88.
5. The names and post office addresses of subscribers for stock, and the number of shares subscribed by each. The aggregate of such subscriptions shall be the amount of the capital with which the industrial bank will begin business.
6. Period, if any, limited for the duration of the industrial bank.

This section shall not apply to banks organized and doing business prior to the adoption of this section. (1923, c. 225, s. 2; 1945, c. 743, s. 1; C. S. 225 (b).)

Editor's Note.—
The 1945 amendment rewrote this section.

§ 53-141. Powers.

1. To discount and negotiate promissory notes, drafts, bills of exchange and other evidence of indebtedness, and to loan money on real or personal security and reserve lawful interest in advance upon such loans, and to discount or purchase notes, bills of exchange, acceptances or other choses in action.

2. Upon the making of a loan or discount, to deduct in advance, from the proceeds of such loan, interest at a rate not exceeding six per centum (6%) per annum upon the amount of the loan from the date thereof until the maturity of the final installment, notwithstanding that the principal amount of such loan is required to be repaid in installments.

3. To charge for loans made pursuant to this section a fee of two dollars and fifty cents on installment loans of fifty dollars or less and on loans in excess of fifty dollars, one dollar for each fifty dollars or fraction thereof loaned, up to and including two hundred and fifty dollars, and for loans in excess of two hundred and fifty dollars, one dollar for each two hundred and fifty dollars excess or fraction thereof, to cover expenses, including any examination or investigation of the character and circumstances of the borrower, comaker, or surety. An additional fee of five dollars may be charged on such loans where same are secured by mortgage on real estate. No charge shall be collected unless a loan shall have been made.

(1945, c. 283; 1949, c. 952, ss. 1, 2.)

Editor's Note.—
Prior to the 1945 amendment the charge for a loan was one dollar for each fifty dollars or fraction thereof loaned, up to and including loans of two hundred and fifty dollars. The 1949 amendment rewrote subsections 1 and 2. As only subsections 1, 2 and 3 were affected by the amendments the rest of the section is not set out.

For comment on the 1949 amendment, see 27 N. C. Law Rev. 425.

§ 53-143. Investments; securities; loans; limitations.—The provisions of §§ 53-46, 53-48 and 53-49, with reference to the limitations of investments in securities, limitations of loans and suspensions of investment and loan limitations, shall be applicable to industrial banks. (1923, c. 225, s. 8; 1945, c. 127, s. 2; C. S. 225 (h).)

Editor's Note.—
The 1945 amendment rewrote this section.

§ 53-145. Sections of general law applicable.—Sections 53-1, 53-3, 53-4, 53-5, 53-6, 53-7, 53-8, 53-9, 53-10, 53-11, 53-12, 53-13, 53-18, 53-20, 53-22, 53-23, 53-42, 53-47, 53-50, 53-51, 53-54, 53-63, 53-64, 53-67, 53-68, 53-70, 53-71, 53-72, 53-73, 53-74, 53-78, 53-79, 53-80, 53-81, 53-82, 53-83, 53-85, 53-87, 53-88, 53-90, 53-91, 53-105, 53-106, 53-107, 53-108, 53-109, 53-110, 53-111, 53-112, 53-117, 53-118, 53-119, 53-120, 53-121, 53-122, 53-123, 53-124, 53-125, 53-126, 53-128, 53-129, 53-132, 53-133, 53-134, relating to the su-

pervision and examination of commerical banks, shall be construed to be applicable to industrial banks, insofar as they are not inconsistent with the provisions of this article. Sections 53-19, 53-24, 53-37, 53-39, 53-40, 53-41, 53-44, 53-45, 53-58, 53-59, 53-61, 53-66, 53-75, 53-76, 53-77, 53-86, 53-113, 53-114, 53-115, 53-116, 53-135, 53-146, and 53-148 through 53-158, relating to commercial banks, shall be construed to be applicable to industrial banks. (1923, c. 225, s. 13; 1927, c. 141; 1939, c. 244, s. 3; 1945, c. 743, s. 1; C. S. 225(m).)

Editor's Note.—
The 1945 amendment inserted in the first sentence the following sections: 53-6, 53-22, 53-23, 53-68, 53-70, 53-71, 53-72, 53-73, 53-74, 53-85, 53-108, 53-111, 53-112, 53-126 and 53-133. And it inserted in the second sentence the following sections: 53-58, 53-59, 53-61, 53-66, 53-113 and 53-135.

Art. 12. Joint Deposits.

Editor's Note.—The above article heading is set out to denote a change from the wording used in original.

Art. 13. Conservation of Bank Assets and Issuance of Preferred Stock.

§ 53-148. Provisions for bank conservators; duties and powers.

As to conservators of estates of missing persons, see §§ 33-63 to 33-66.

Art. 14. Banks Acting in a Fiduciary Capacity.

§ 53-159. Banks may act as fiduciary.—Any bank licensed by the commissioner of banks, where such powers or privileges are granted it in its charter, may be guardian, trustee, assignee, receiver, executor or administrator in this state without giving any bond; and the clerks of the superior courts, or other officers charged with the duty or clothed with the power of making such appointments, are authorized to appoint such bank to any such office. (1945, c. 743, s. 1.)

§ 53-160. License to do business.—Before any such bank is authorized to act in any fiduciary capacity without bond, it must be licensed by the commissioner of banks of the state. For such license the licensee shall pay to the state banking commission an annual license fee of two hundred dollars ($200.00), which shall be remitted to the state treasurer for the use of the commissioner of banks in the supervision of banks acting in a fiduciary capacity, insofar as it may be necessary, and the surplus, if any, shall remain in the state treasury for the use of the general fund of the state. (1945, c. 743, s. 1.)

§ 53-161. Examination as to solvency.—The commissioner of banks shall examine into the solvency of such bank, and shall, if he deem it necessary, at the expense of the bank, make or cause to be made an examination at its home office of its assets and liabilities. (1945, c. 743, s. 1.)

§ 53-162. Certificate of solvency.—After any such bank has been licensed by the commissioner of banks, a certificate issued by the commissioner of banks, showing the bank to be solvent to an amount not less than one hundred thousand dollars ($100,000.00), shall authorize such bank to act in a fiduciary capacity without bond. There shall be no charge for the seal of this certificate. (1945, c. 743, s. 1.)

§ 53-163. Clerk of superior court notified of license and revocation.—The commissioner of banks, upon granting license to any such bank, shall immediately notify the clerk of the superior court of each county in the state that such bank has been licensed under this article, and, whenever the commissioner of banks is satisfied that any bank licensed by him has become insolvent, or is in imminent danger of insolvency, he shall revoke the license granted to such bank and notify the clerk of the superior court of each county in the state of the revocation. After such notification, the right of any such bank to act in a fiduciary capacity shall cease. (1945, c. 743, s. 1.)

Art. 15. Loan Agencies or Brokers.

§ 53-164. Supervision by commissioner of banks; fees.—Loan agencies or brokers, as defined in § 105-88, shall be under the supervision and control of the commissioner of banks. Such person, firms, or corporations (hereinafter referred to as "loan agencies or brokers") shall, for the purposes of defraying the necessary expenses of the commissioner of banks and his agents in supervising them, pay to the commissioner of banks the fees prescribed in § 53-122 at the times therein specified. (1945, c. 282, s. 1.)

Editor's Note.—The act from which this article was codified became effective on June 1, 1945.

§ 53-165. Banking commission to make rules and regulations.—The state banking commission is hereby authorized, empowered and directed to make all rules and regulations deemed by the commission to be necessary or desirable in providing for the protection of the public and the efficient management of the loan agencies or brokers, including regulations as may be deemed necessary to prevent the renewal or making of new loans for the purpose of collecting additional fees on the same extension of credit, relating to the keeping of accurate and uniform books, records and accounts, and to give all necessary instructions with respect to such loaning agencies or brokers. And it shall be the duty of all such loaning agencies or brokers and their officers, agents and employees, to comply fully with all such rules, regulations and instructions, established and promulgated by the state banking commission. (1945, c. 282, s. 2.)

§ 53-166. Charges not to exceed those of industrial banks on installment loans.—Such loan agencies or brokers shall be authorized to charge not in excess of the same fees and the interest that may lawfully be charged by industrial banks on installment loans. Provided, however, that such fees shall not be charged more frequently than once each sixty days on any loan or renewal thereof. (1945, c. 282, s. 3.)

§ 53-167. Violation a misdemeanor.—Any person, firm or corporation violating any of the provisions of this article shall, upon conviction, be guilty of a misdemeanor and fined or imprisoned in the discretion of the court. (1945, c. 282, s. 4.)

§ 53-168. Business of making certain loans on motor vehicles exempted.—Nothing in this article shall be construed to apply to any person, firm or corporation engaged solely in the business of making loans of fifty dollars ($50.00) or more secured by motor vehicles. (1945, c. 282, s. 4½.)

Chapter 54. Co-Operative Organizations.

SUBCHAPTER I. BUILDING AND LOAN ASSOCIATIONS.

Art. 2. Shares and Shareholders.

Sec.
54-18.1. Shares issued in two or more names.

Art. 3. Loans.

54-21. Insured and guaranteed loans.
54-21.1. Purchase of loans.
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SUBCHAPTER IV. CO-OPERATIVE ASSOCIATIONS.

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SUBCHAPTER I. BUILDING AND LOAN ASSOCIATIONS.

Art. 2. Shares and Shareholders.

§ 54-18.1. Shares issued in two or more names.—A single membership in an association may be held by two or more persons and the share or share account certificates may be issued in their names, and in the absence of written instructions to the contrary, consented to by the association, the value of such share or share account certificates and any dividends thereon may be paid by such association to any one or more of such persons whether the others be living or not, and the receipt or acquittance of the person so paid shall fully exonerate and discharge the association from all liability to any person having any interest in such account, and the last survivor of such persons may transfer such membership and the share or share account certificates to himself or any other person. Nothing herein contained shall be construed to repeal or modify any of the provisions of § 105-24 relating to the administration of the inheritance tax laws, or provisions of laws relating to inheritance tax, nor shall the provisions herein contained regulate the rights and liabilities of the parties having interest in such share or share account certificates as among themselves but shall regulate, govern and protect the associations in their dealings with members holding share or share account certificates as herein provided, and further provided that the provisions herein shall also apply to members of federal savings and loan associations having their principal offices in this state. (1947, c. 718.)

Art. 3. Loans.

§ 54-20. Direct reduction of principal.—All payments made on a loan under such plan of direct periodical reduction shall be applied first to interest, and then to the principal of advances made for the account of the borrower and charged thereto, and to the principal of the loan. The board of directors may adopt any other direct periodic reduction of principal plan that will require complete repayment of such loans: Provided, no plan of payment shall be adopted that will not mature and pay off the loan within twenty years from the date of the making thereof: Provided further, the board of directors may authorize the renewal or extension of the time of repayment of any loan theretofore made. Every person who has obtained or shall obtain a loan upon this or any other plan, or who has assumed or shall assume payment of a loan theretofore made upon this or any other plan or who shall be obligated upon any loan held by an association, shall be by reason thereof a member of the association making or holding such loan and shall be deemed a member until such loan is fully paid or assumed by another person or persons acceptable to the association. Such association may issue certificates of stock or membership to such member, but certificates shall not be necessary or required. (1937, c. 18; 1945, c. 189, s. 1.)

Editor's Note.—Prior to the 1945 amendment the last sentence of the second paragraph read as follows: "No association shall make any loan upon this plan to any person unless he be a member of such association." As the first paragraph was not changed it is not set out.

§ 54-21. Insured and guaranteed loans.—(a) Notwithstanding any other provisions of law, any such association, incorporated under the laws of this state, is authorized to make any real estate mortgage loan, which is insured or guaranteed, in any manner, in whole or in part, by the United States or any instrumentality thereof, or for which there is a commitment to insure or guarantee; provided, the association making any insured or guaranteed second lien shall also hold the first lien on the property.

(b) And, further, notwithstanding any other provision of law, any such association, incorporated under the laws of this state, is authorized to make any real estate repair or improvement loan under Title I of an Act of Congress of the United States entitled "National Housing Act", as amended, when such loan is insured in whole or in part by the government of the United States or any instrumentality thereof; provided, however, no such loans may be made by any association when the total outstanding balance of principal and interest due the association on such loans shall equal or exceed the sum of its unencumbered contingent reserve and the insurance reserve accumulated to the credit of the association by reason of such loans. (1941, c. 64; 1945, c. 189, s. 2; 1947, c. 694.)

Editor's Note.—Prior to the 1945 amendment this section related only to federal housing administration loans. The 1947 amendment added subsection (b).

§ 54-21.1. Purchase of loans.—Any such association, incorporated under the laws of this state, is authorized to invest any funds on hand, in excess of the demands of its shareholders, in the purchase of loans of a type which the association would be permitted to make under this article; provided, that such purchase shall not be made until the purchase has received the approval of two-thirds (2/3) of the entire membership of the board of directors, in a regular or called session, and provided, that separate appraisals be made on each property involved and a certificate of title be furnished by an approved attorney for the association. (1945, c. 189, s. 3.)

§ 54-21.2. Investments.—Any such association incorporated under the laws of this state is authorized to invest any funds on hand, in excess of the demands of its shareholders, in bonds or evidences of indebtedness of the United States government, or guaranteed by it, and bonds or other evidences of indebtedness of the state of North Carolina; provided, that nothing herein shall be construed as altering the provisions of § 54-14. (1945, c. 189, s. 4.)

Art. 4. Under Control of Insurance Commissioner.

§ 54-27. Statement examined, approved, and published; fees.—It shall be the duty of the insurance commissioner to receive and thoroughly examine each annual statement required by this subchapter, and if made in compliance with the requirements thereof, to publish an abstract of the same in one of the newspapers of the state, to be selected by the general agent or attorney making such statement, and at the expense of his principal. The commissioner of insurance shall collect a fee of five dollars from each association filing such statement, and the fees shall be paid into the state treasury to be credited to the general fund. (Rev., s. 3895; 1905, c. 435, s. 12; 1945, c. 635; C. S. 5188.)

Editor's Note.—The 1945 amendment rewrote the second sentence.

SUBCHAPTER III. CREDIT UNIONS.

Art. 11. Powers of Credit Unions.

§ 54-86. Investment of funds.

2. They may be deposited to the credit of the corporation in savings banks, credit unions, building and loan associations, state banks or trust companies, incorporated under the laws of the state, or in National banks located therein.

(1947, c. 781.)

The 1947 amendment struck out the former second sentence of clause 2. As only this clause was changed the rest of the section is not set out.

SUBCHAPTER IV. CO-OPERATIVE ASSOCIATIONS.

Art. 16. Organization of Associations.

§ 54-111. Nature of the association.—Any number of persons, not less than five, may associate themselves as a mutual association, society, company, or exchange, for the purpose of conducting any agricultural, housing, horticultural, forestry, dairy, mercantile, mining, manufacturing, telephone, electric light, power, storage, refrigeration, flume, irrigation, water, sewerage, or mechanical business on the mutual plan. For the purposes of this subchapter, the words association, company, corporation, exchange, society, or union shall be construed to mean the same; Provided that the membership of agricultural organizations incorporated under this subchapter shall consist of producers of agricultural products, handled by such organizations or by organizations owned and controlled by such producers; provided further, that the membership of housing organizations incorporated under this subchapter shall consist only of veterans. (1915, c. 144, s. 1; 1925, c. 179, ss. 1, 2; 1931, c. 447; 1949, c. 1042, ss. 1, 2(a); C. S. 5242.)

Editor's Note.—The 1949 amendment inserted "housing" in line five and added the last proviso.

§ 54-111.1. Low-rent veterans' housing projects; non-profit co-operative housing corporations.—There may be organized under the laws of this state low-rent veterans' housing projects which may be converted into projects with federal assistance, if and when such federal assistance becomes available; and non-profit co-operative ownership housing corporations the permanent occupancy of the dwelling of which is restricted to members of such corporation all of whom must be veterans, or a project constructed by a non-profit corporation organized for the purpose of construction of homes for members of the corporation all of whom shall be veterans, at prices, costs, or charges comparable to the prices, costs, or charges proposed to be charged such members. Provided, however, that nothing contained in this section shall be construed as exempting any property of any such association from ad valorem taxation. (1949, c. 1042, s. 3.)

§ 54-112. Use of term restricted.—No corporation or association hereafter organized or doing business for profit in this state shall be entitled to use the term "mutual" as part of its corporate or other business name or title, unless it has complied with the provisions of this subchapter; and any corporation or association violating the provisions of this section may be enjoined from doing business under such name at the instance of any shareholder of any association legally organized under this subchapter. (1915, c. 144, s. 18; 1925, c. 179, s. 1; 1945, c. 635; C. S. 5243.)

Editor's Note.—The 1945 amendment changed the word "hereinafter" in line two to read "hereafter" and changed the word "for" in the said line to read "or."

§ 54-117. General corporation law applied; dealing in products of, or renting to, non-members.—All mutual associations shall be maintained in accordance with the general corporation law, except as otherwise provided for in this subchapter. And no corporation or association hereafter organized under this subchapter for doing business in this state shall be permitted to deal in the products of non-members to an amount greater in value than such as are handled by it for members. Provided, no housing corporation or association hereafter organized under this subchapter shall be permitted to rent to non-members for a period longer than ninety days. (1915, c. 144, s. 17; 1925, c. 179, s. 1; 1931, c. 447, s. 2; 1949, c. 1042, s. 2(b); C. S. 5248.)

Editor's Note.—The 1949 amendment added the proviso.

Art. 18. Powers and Duties.

§ 54-124. Nature of business authorized.—An association created under this subchapter shall have power to conduct any agricultural, housing, horticultural, forestry, dairy, mercantile, mining, manufacturing, telephone, electric light, power, storage, refrigeration, flume, irrigation, water, sewerage, or mechanical business, on the mutual plan. (1915, c. 144, s. 8; 1925, c. 179, ss. 1, 2; 1949, c. 1042, s. 2; C. S. 5255.)

Editor's Note.—The 1949 amendment inserted the word "housing."

Chapter 55. Corporations.

Art. 4. Powers and Restrictions.

Art. 15A. Amendments Extending Corporate Existence Validated.

Art. 2. Formation.

§ 55-2. How created.—Three or more persons who desire to engage in any business, or to form any company, society, or association, not unlawful, except railroads other than street railways, or banking or insurance, or building and loan associations, may be incorporated in the following manner only (except those corporations which are to be and remain under the patronage and control of the state, and which are created by the state for charitable, educational and reformatory purposes): Such persons shall, by a certificate of incorporation, under their hands and seals, set forth—

(1945, c. 635.)

Editor's Note.—The 1945 amendment rewrote the exception clause appearing within the parentheses in the first sentence. As only the introductory paragraph was affected by the amendment the rest of the section is not set out.

§ 55-11. Public parks and drives.

Local Modification.—Mecklenburg: 1945, c. 304.

Art. 4. Powers and Restrictions.

§ 55-26. Express powers.

12. To make contributions or gifts to corporations, trusts, community chests, funds, foundations, or associations organized and operated exclusively for religious, charitable, literary, scientific, or educational purposes or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, when such contributions or gifts are authorized or approved by its board of directors: Provided, that such contributions or gifts during any income year of the corporation do not exceed five per centum (5%) of its net income as computed under article four, Schedule D, of chapter one hundred five, of the General Statutes, disregarding for such purpose the aggregate amount of such contributions or gifts: Provided further, that the assets of the corporation exceed its liabilities immediately after any such contribution or gift is made. (Rev., s. 1128; Code, ss. 663, 666, 691, 692, 693; 1893, c. 59; 1901, c. 2, s. 1; 1909, c. 507, s. 1; 1925, c. 235; 1925, c. 298; 1929, c. 269; 1939, c. 279; 1945, c. 775; C. S. 1126.)

Editor's Note.—The 1945 amendment added subsection 12. As the rest of the section was not affected by the amendment it is not set out.

IV. RIGHTS AS TO PROPERTY.

Necessity for Authorization by Directors to Sell Corporate Property.—Corporate directors are trustees of its property, and usually a corporation may sell, transfer and convey its corporate real estate only when authorized to do so by its board of directors. And the statutory provisions may be supplemented by stipulation in the corporation's by-laws. Tuttle v. Junior Bldg. Corp., 228 N. C. 507, 46 S. E. (2d) 313.

In the absence of charter provisions or by-laws to the contrary, the president of a corporation is the general manager of its corporate affairs, and his contracts made in the name of the corporation in the general course of business and within the apparent scope of his authority are ordinarily enforceable, but ordinarily he has no power to sell or contract to sell the real or personal property of the corporation without authority from its board of directors. Id.

Corporation Having General Power to Buy and Sell Realty.—Paragraph 11, which requires the holders of ⅔ of the stock to approve the action of the directors of a corporation in selling the entire corporate property, does not apply to the sale of realty by a corporation having general power to buy and sell real estate, and the fact that such corporation is an incorporated fraternal association and contracts to sell its building designated as the fraternal order building does not bring the transaction within the statute when the building is not used for permanent office, home or other facility in carrying on its business. Tuttle v. Junior Bldg. Corp., 227 N. C. 146, 41 S. E. (2d) 365.

§ 55-38. Resident process agent.

The purpose of this section was, in recognition of reciprocal duties, to prevent a foreign corporation from accepting protection of our laws in the transaction of its ordinary business, create obligations and, by reason of its remoteness from any forum available to a local citizen, secure immunity from liability. State Highway, etc., Comm. v. Diamond Steamship Transp. Corp., 225 N. C. 198, 34 S. E. (2d) 78.

Within reasonable limits the statute should be liberally construed to accomplish its remedial purpose. State Highway, etc., Comm. v. Diamond Steamship Transp. Corp., 225 N. C. 198, 34 S. E. (2d) 78.

Service on Secretary of State.—Every state has the undoubted right to provide for service of process upon any foreign corporation doing business therein; to require such companies to name agents upon whom service may be made; and also to provide that in case of the company's failure to appoint such an agent, service, in proper cases, may be made upon an officer designated by law. But the power to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the state enacting the law. Central Motor Lines v. Brooks Transp. Co., 225 N. C. 733, 36 S. E. (2d) 271, 162 A. L. R. 1419.

Transitory Cause of Action Arising in Another State.—In action to recover damages for tort occurring in New Jersey by a domestic corporation against a foreign corporation, formerly domesticated in North Carolina with a local process agent, but which had withdrawn all personnel and property from the state, except an intrastate franchise for transportation of freight, it was held service of process on lessee of defendant's franchise was invalid, as was service on the secretary of state under this section. Central Motor Lines v. Brooks Transp. Co., 225 N. C. 733, 36 S. E. (2d) 271, 162 A. L. R. 1419.

What Constitutes Doing Business.—No satisfactory general definition can be made of the phrase "doing business" as found in our statutes, and, generally speaking, each case must be determined on its own facts. The question is one of fact, and must be determined largely according to the facts of each individual case, rather than by the application of fixed, definite, and precise rules. State Highway, etc., Comm. v. Diamond Steamship Transp. Corp., 225 N. C. 198, 201, 34 S. E. (2d) 78.

The court has been careful not to bring within the purview of the statute sporadic activities of a foreign corporation which are not directly in performance of its charter functions, or which are not of such a character as to indicate a course of business which might be expected to recur as opportunity offered; but the nature of the activities themselves, their magnitude, the multiplicity of contacts, the possibility that incidents may occur and liabilities be created—especially where the entrance into the state is in the ordinary prosecution of the business which the corporation is chartered to carry on and is carrying on, and which definitely regards the state as a theater for future transactions of a like sort as often as occasion might arise—these are important considerations in determining whether

a corporation is, in a given instance, doing business in the state. On a single visitation to the state the matter in hand may explode into a multitude of transactions of far-reaching importance. Id.

Where a vessel of defendant foreign corporation, a regular carrier of freight in the coastwise trade, entered the port of Wilmington and discharged a substantial part of its valuable cargo in the regular course of business, and was there damaged by striking a bridge and remained some months in said port, undergoing repairs and having considerable business dealings with local residents, the service of process upon the secretary of state was valid and sufficient to bring defendant into court. Id.

Where defendant foreign corporation leased airports to individual defendant and by terms of agreement lessor was to furnish planes, parts, repairs, etc., to provide insurance for airports to be operated in name of corporate defendant, with right to demand lessee devote full time to business, and to furnish forms for keeping the records, it was held that corporation was doing business in this state so as to subject it to jurisdiction of courts and that process served on it under this section was valid. Harrison v. Corley, 226 N. C. 184, 37 S. E. (2d) 489.

Same—Question of Fact.—

In accord with original. See Harrison v. Corley, 226 N. C. 184, 37 S. E. (2d) 489.

Same—Question Is One of Due Process under the United States Constitution.—Whether defendant, on the day the alleged liability for damages was incurred, was engaged in business activities within the state, and thus was validly served with process under this section, is a question of due process of law under the constitution of the United States which must be determined in harmony with the decisions of the supreme court of the United States. Harrison v. Corley, 226 N. C. 184, 37 S. E. (2d) 489, 491.

Franchise to Transport Freight Is Property.—Intrastate franchise for the transportation of freight in North Carolina, owned by foreign corporation, is "property" within the meaning of this section. Central Motor Lines v. Brooks Transp. Co., 225 N. C. 733, 36 S. E. (2d) 271, 162 A. L. R. 1419.

Discontinuance of Business.—The statute authorizes service of process on the secretary of state, in an action by a resident of this state against a foreign corporation, after the business, once carried on by defendant, has been discontinued. State Highway, etc., Comm. v. Diamond Steamship Transp. Corp., 225 N. C. 198, 34 S. E. (2d) 78.

The provisions for service of summons, under this section, are a condition on which a foreign corporation is allowed to do business, and are accepted by it when it enters the state and engages in business without domesticating or appointing a process agent. It cannot, by the simple expedient of closing shop and departing the jurisdiction, withdraw such assent so as to defeat a suit on an action which arose while it was engaged in business. Harrison v. Corley, 226 N. C. 184, 37 S. E. (2d) 489, 493.

§ 55-41. Certain corporate conveyances validated.—All deeds and conveyances of land in this state, made by any corporation of this state prior to January first, one thousand nine hundred forty-eight, executed in its corporate name and signed and attested by its proper officers, from which the corporate seal was omitted, shall be good and valid, notwithstanding the failure to attach said corporate seal. (1939, c. 23; 1949, c. 436.)

Editor's Note.—The 1949 amendment changed the date from 1938 to 1948.

§ 55-41.2. Certain conveyances of corporations now dissolved validated.—All deeds and conveyances of land in this state, made by any corporation of this state prior to January 1, 1939, executed in its corporate name and signed by either its president, vice-president, or secretary, and sealed with the common seal of the corporation, where said corporation has been dissolved for at least seven years, and said deed or conveyance has been on record for at least seven years, shall be good and valid, notwithstanding the failure of one of such officers to sign such instrument. (1949, c. 825.)

§ 55-43. Conditional sale contracts.—Contracts, in writing, for the purchase of personal property by corporations, providing for a lien on the property or the retention of title thereto by the vendor or as a security for the purchase price, or any part thereof, or chattel mortgages, chattel deeds of trust and conditional sales of personal property, are sufficiently executed if signed in the name of the corporation by the president, secretary or treasurer in his official capacity, and may be acknowledged and ordered to registration as is now provided by law for the execution, acknowledgment and registration of deeds by natural persons. (1909, c. 335, s. 1; 1949, c. 1224, s. 2; C. S. 1139.)

Editor's Note.—The 1949 amendment rewrote this section and inserted the words "or chattel mortgages, chattel deeds of trust and conditional sales of personal property." For brief comment on the amendment, see 27 N. C. Law Rev. 440.

§ 55-44. Mortgaged property subject to execution for labor, clerical services, and torts.—Mortgages, deeds of trust or other conveyances upon condition of public service corporations upon their property or earnings cannot exempt said property or earnings from execution for the satisfaction of any judgment obtained in courts of the state against such corporations for labor and clerical services performed, or torts committed whereby any person is killed or any person or property injured. (Rev., s. 1131; Code, s. 1255; 1879, c. 101; 1897, c. 334; 1901, c. 2, s. 2; 1915, c. 201, s. 1; 1929, cc. 29, 256; 1931, c. 238; 1945, c. 635; C. S. 1140.)

Editor's Note.—

The 1945 amendment inserted the words "deeds of trust or other conveyances upon condition."

Art. 5. Directors and Officers.

§ 55-48. Directors.—The business of every corporation shall be managed by its directors who must be at least three in number but such directors need not be stockholders in the corporation unless the articles of incorporation or the by-laws so provide. A corporation may, by its certificate of incorporation or by-laws, determine the number of shares a stockholder must own to qualify him as a director. The directors shall be chosen annually by the stockholders at the time and place provided in the by-laws, and shall hold office for one year and until others are chosen and qualified in their stead; but by so providing in its certificate of incorporation, a corporation may classify its directors in respect to the time for which they will severally hold office, the several classes to be elected for different terms, but no class may be elected for a shorter period than one year, or for a longer period than five years, and the term of office of at least one class must expire in each year. A corporation which has more than one kind of stock may, by so providing in its certificate of incorporation, confer the right to choose the directors of any class upon the stockholders of such class, to the exclusion of the others. One director of every corporation of this state shall be, and only one need be, an actual resident of the state, notwithstanding the provisions of the charter or any other act.

Every nonprofit, nonstock corporation which has been or may be organized under the laws of this state may, in its charter or by-laws, provide for the selection of its board of trustees or board of directors by election by the members or subscribers, or by selection by other designated as

sociations, corporations or individuals, or by any combination of such methods of election set forth in the charter or by-laws. (Rev., ss. 1147, 1148; 1901, c. 2, ss. 14, 44; 1937, c. 179; 1945, c. 200; 1949, c. 917; C. S. 1144.)

Editor's Note. — The 1945 amendment added the second paragraph. The 1949 amendment rewrote the first sentence of the first paragraph and eliminated the former requirement that a director be a stockholder, or the guardian of a stockholder, etc.

The 1945 amendatory act provides: "The selection of any board of trustees or board of directors of a nonprofit, nonstock corporation by any of the methods authorized by this act is hereby ratified, validated and confirmed, and the acts of any such board shall be construed to be the acts of the corporation: Provided, that this section shall not apply to pending litigation."

For brief comment on the 1949 amendment, see 27 N. C. Law Rev. 440.

Applied in Thomas v. Baker, 227 N. C. 226, 41 S. E. (2d) 842.

Cited in Tuttle v. Junior Bldg. Corp., 228 N. C. 507, 46 S. E. (2d) 313.

§ 55-49. Officers, agents, and vacancies.

Applied in Thomas v. Baker, 227 N. C. 226, 41 S. E. (2d) 842.

§ 55-50. Books to be audited on request of stockholders.

Character of Audit Required.—Dictionary definitions alone will not determine the character of the audit required under this section upon demand by the stockholder. Some discretion must certainly be vested in the court to see, at least, that it reasonably reflects the information customarily given in audits of that kind, so that the interested stockholder may be able to discover whether the assets of the company are being administered in accordance with sound corporate practice. Southern Mills v. Summit Yarn Co., 223 N. C. 479, 486, 27 S. E. (2d) 289.

Misjoinder of Causes of Action.—Where plaintiff, in a suit against two corporate defendants, joins a cause of action based upon an alleged breach of contract by one of defendants only, with a cause of action against the other defendant to compel an audit of its affairs, under this section, on demand of a stockholder, and also, in the same complaint, asserts another cause of action against the first defendant for fraud and deceit, judgment of the court below, overruling defendants' demurrers, was held properly reversed and the action dismissed. Southern Mills v. Summit Yarn Co., 223 N. C. 479, 27 S. E. (2d) 289.

§ 55-56. Liability for fraud.—In case of fraud by the officers, directors, managers, or stockholders, in a corporation, the court shall adjudge personally liable to creditors and others injured thereby the officers, directors, managers, and stockholders who were concerned in the fraud. (Rev., s. 1155; Code, s. 686; 1901, c. 2, s. 107; 1945, c. 635; C. S. 1152.)

Editor's Note.—The 1945 amendment substituted "officers" for "president" in line two.

Art. 6. Capital Stock.

§ 55-66. Decrease of capital stock.—The decrease of capital stock may be effected by—

1. Retiring or reducing any class of the stock.
2. Drawing the necessary number of shares by lot for retirement.
3. The surrender by every stockholder of his shares and the issue to him in place thereof of a decreased number of shares.
4. The purchase at not above par of certain shares for retirement.
5. Retiring shares owned by the corporation.
6. Reducing the par value of shares.

No such decrease of capital stock decreases the liability of any stockholder whose shares have not been fully paid, for debts of the corporation theretofore contracted. (Rev., s. 1164; 1901, c. 2, s. 32; 1939, c. 221; 1949, c. 950; C. S. 1161.)

Editor's Note.—The 1949 amendment struck out provisions of the last paragraph relating to publication of certificate decreasing capital stock and liability of directors in default of such publication. For brief comment on the amendment, see 27 N. C. Law Rev. 440.

Quoted in part in Rex-Hanover Mills Co. v. United States, 53 F. Supp. 235.

§ 55-67. Certificates and duplicates. — Every stockholder shall be entitled to have a certificate signed by the president or a vice-president and by the treasurer or an assistant treasurer or the secretary or an assistant secretary of the corporation certifying the number of shares owned by him in such corporation; provided, however, that where such certificate is signed by a transfer agent, or an assistant transfer agent, or by a transfer clerk acting on behalf of the corporation and a registrar, the signature of any such president, vice-president, treasurer, assistant treasurer, secretary or assistant secretary upon such certificate may be facsimile, engraved or printed. In case any officer or officers who shall have signed, or whose facsimile signature or signatures shall have been placed upon any such certificate or certificates, shall cease to be such officer or officers of the corporation, whether because of death, resignation or otherwise, before such certificate or certificates shall have been delivered by the corporation, such certificate or certificates may nevertheless be adopted by the corporation and be issued and delivered with the same effect as if the person or persons who signed such certificate or certificates, or whose facsimile signature or signatures shall have been placed thereon, had not ceased to be such officer or officers of the corporation. A corporation may issue a new certificate of stock in the place of any certificate theretofore issued by it, alleged to have been lost or destroyed, and the directors authorizing such issue of a new certificate may require the owner of the lost or destroyed certificate, or his legal representatives, to give the corporation a bond, in such sum as they may direct, as an indemnity against any claim that may be made against the corporation. A new certificate may be issued without requiring any bond when, in the judgment of the directors, it is proper to do so. (Rev., ss. 1165, 1166; 1885, c. 265; 1901, c. 2, s. 94; 1927 c. 173; 1949, c. 809; C. S. 1162.)

Editor's Note.—The 1949 amendment added the proviso to the first sentence and inserted the second sentence. For brief comment on the amendment, see 27 N. C. Law Rev. 441.

Art. 7. Capital Stock without Nominal or Par Value.

§ 55-73. Corporations which may create shares without nominal or par value. Classes of stock or debentures.—Any corporation heretofore or hereafter organized under the laws of this state, whether under a special act of legislature or otherwise, except banks, trust companies and insurance companies, may, in its original certificate of incorporation, articles of association, charter or any amendment thereof, create shares of stock with or without nominal or par value, and may create two or more classes of stock or debentures, any class or classes of which may be with or without nominal or par value, with such designations, preferences, voting powers, restrictions and qualifications as shall be fixed in such certificate

of incorporation, articles of association, charter or amendment thereof, or by resolution adopted by those holding a majority of the outstanding capital stock entitled to vote. Subject to any provisions so fixed, every share without nominal or par value shall equal every other such share. (1921, c. 116, s. 1; 1925, c. 262, s. 1; 1949, c. 929; C. S. 1167(a).)

Editor's Note. — The 1949 amendment substituted "a majority" for "two-thirds" in line sixteen. For brief comment on the amendment, see 27 N. C. Law Rev. 440.

§ 55-77. Tax on certificate of incorporation or amendments.—The tax upon the certificate of incorporation, or extension or renewal of corporate existence, or increase of capital stock without nominal or par value shall be the same as if each share of stock had a par or face value of one hundred dollars. (1921, c. 116, s. 5; 1945, c. 635; C. S. 1167(e).)

Editor's Note.—
The 1945 amendment substituted "of" in line two for "or."

Art. 8. Uniform Stock Transfer Act.

§ 55-97. Lost or destroyed certificate.

Editor's Note.—
The 2nd word in the 2nd paragraph of this section as it appears in original should be "issuance."

Art. 9. Meetings, Elections and Dividends.

§ 55-110. Votes stockholders entitled to; cumulative voting.—Unless otherwise provided in the charter or by-laws of a corporation, at every election each stockholder is entitled to one vote in person, or by proxy duly authorized in writing, for each share of the capital stock held by him, but no proxy may be voted after three years from its date. No share of stock may be voted which has been transferred on the books of the corporation within twenty days of an election. The certificate of incorporation of any corporation authorized to issue shares of capital stock may provide that at all elections of directors, managers or trustees, each stockholder is entitled to as many votes as equal the number of his shares of stock multiplied by the number of directors, managers, or trustees to be elected, and that he may cast all of his votes for a single director, manager, or trustee, or may distribute them among the number to be voted for, or any two or more of them, as he sees fit. This right of cumulative voting may be exercised in the absence of charter provision when at the time of the election the stock transfer book of such corporation discloses, or it otherwise appears, that more than one-fourth of the capital stock of the corporation is owned or controlled by one person. A stockholder owning or controlling more than twenty-five per cent of the stock has the same right to vote cumulatively as any other stockholder; and no amendment of the charter or by-laws of a corporation can abrogate or abridge any right herein conferred. The right to vote cumulatively cannot be exercised unless some stockholder announces in open meeting, before the voting for directors, trustees, or managers begins, his purpose to exercise such right, and then every other stockholder may likewise vote cumulatively. (Rev., ss. 1183, 1184; 1907, c. 457, s. 1; 1909, c. 827, s. 1; 1945, c. 635; C. S. 1173.)

Editor's Note.—The 1945 amendment inserted the second sentence in lieu of the words "nor may there be voted at any election a share of stock which has been transferred on the books of the corporation within twenty days prior to the election."

§ 55-114. Jurisdiction of superior court over corporate elections.

Section Is Constitutional.—This section, empowering the court to continue corporate officers in their respective offices with the same authority and emoluments enjoyed by them prior to controversy, provides an emergency remedy which does not affect the status of the corporation but merely preserves the status quo pending determination of controversy in order that the corporation may continue to function, not under the supervision of the court, but by virtue of corporate authority theretofore given, and therefore the remedy violates no constitutional right of stockholders or directors but only imposes upon them the rules of fair play in the exercise of their property rights. Thomas v. Baker, 227 N. C. 226, 41 S. E. (2d) 842.

This section is remedial in character. Thomas v. Baker, 227 N. C. 226, 41 S. E. (2d) 842.

Corporation Is Not a Necessary Party.—In a proceeding under this section it is not necessary that the corporation, as such, be joined as a party, since its inability to take corporate action is the very situation which the section seeks to remedy. Thomas v. Baker, 227 N. C. 226, 41 S. E. (2d) 842.

It is the intent of this section that the corporation shall continue to function pending settlement of the dispute, not under the supervision of the court, but by virtue of corporate authority theretofore bestowed. Hence this summary proceeding to avoid temporary corporate paralysis. Thomas v. Baker, 227 N. C. 226, 229, 41 S. E. (2d) 842.

Authority and Emoluments of Officers Continued in Office.—In a proceeding under this section, an order continuing corporate officers in their respective offices necessarily carries with it authorization and direction that such officers should continue to exercise the same functions and receive the same emoluments as before the controversy giving rise to the proceeding. Thomas v. Baker, 227 N. C. 226, 41 S. E. (2d) 842.

Dispute as to Powers of President.—Where the directors of a corporation are evenly divided in a dispute as to whether its president should exercise managerial powers, and by reason of such division are unable to elect any officers of the corporation or resolve their differences over the management of the corporation, the superior court has jurisdiction in the premises under this section upon petition properly filed. Thomas v. Baker, 227 N. C. 226, 41 S. E. (2d) 842.

Interference with Officers in Performance of Their Duties.—The jurisdiction of the superior court to grant relief against the wrongful interference with the officers in the performance of their duties or the wrongful refusal of an officer to perform the duties of his office cannot be invoked in a proceeding under this section. Thomas v. Baker, 227 N. C. 226, 41 S. E. (2d) 842.

§ 55-115. When dividend declared.

Mandamus to Compel Dividends.—
A mandamus, or mandatory injunction, can only operate in personam; and in an action under this section, to compel the directors of a domestic corporation to pay dividends, so far as substituted service of process on nonresident directors is relied upon, the proceeding is a nullity. Southern Mills v. Armstrong, 223 N. C. 495, 27 S. E. (2d) 281, 148 A. L. R. 1248.

§ 55-116. Dividends from profits only; directors' liability for impairing capital.

Quoted in part in Rex-Hanover Mills Co. v. United States, 53 F. Supp. 235.

Art. 10. Foreign Corporations.

§ 55-118. Requisites for permission to do business.

This section must be read in connection with § 55-38, and the implication of consent with respect to the foreign corporation rendering itself liable to process is no stronger in the one than in the other. In Southern R. Co. v. Allison, 190 U. S. 326, 23 S. Ct. 713, 47 L. Ed. 1078 (reversing the decision of supreme court in Allison v. Southern R. Co., 129 N. C. 336, 40 S. E. 91, and incidentally overruling Debnam v. Southern Bell Tel., etc., Co., 126 N. C. 831, 36 S. E. 269, 65 L. R. A. 915, and Beach v. Southern R. Co., 131 N. C. 399, 42 S. E. 856), the United States supreme court interpreted North Carolina domestication law as a licensing

statute rather than one creating a new corporation. Under this section or § 55-58, or both taken together, the controlling distinction lies in the extent to which the presumption of implied consent may be indulged in without infraction of the federal right. Central Motor Lines v. Brooks Transp. Co., 225 N. C. 733, 738, 36 S. E. (2d) 271, 162 A. L. R. 1419.

Effect of Compliance.—When a foreign corporation complies with the provisions of this section, it subjects itself to the laws of this state and acquires in return certain compensating rights and privileges. Among these is the right to sue and be sued in the state courts under the rules and regulations which apply to domestic corporations. Hill v. Atlantic Greyhound Corp., 229 N. C. 728, 51 S. E. (2d) 183.

For purposes of venue domesticated foreign corporations are residents of the state. Hill v. Atlantic Greyhound Corp., 229 N. C. 728, 51 S. E. (2d) 183.

Section 1-80 Does Not Apply.—A foreign corporation domesticated under this section may sue and be sued under the rules and regulations which apply to domestic corporations, and is entitled to have an action against it, instituted by a nonresident, removed to the county of its main place of business in this state. In such case § 1-80 does not apply. Hill v. Atlantic Greyhound Corp., 229 N. C. 728, 51 S. E. (2d) 183.

Art. 11. Dissolution.

§ 55-129. Involuntary, by bankruptcy.

Evidence Showing Continuance of Corporate Entity.—Evidence that upon destruction of an incorporated boys' school by fire the remainder of its property and its student body were removed to the site of a girls' school but that it maintained the same activities as far as possible, and that the trustees of the boys' school continued to be elected separately, was held sufficient to support finding that the school had kept its entity and had not lost its right to sue or to take property because of asserted merger with the girls' college. Wachovia Bank, etc., Co. v. Plumtree School for Boys, 229 N. C. 738, 51 S. E. (2d) 477.

§ 55-132. Corporate existence continued three years.

Where a corporation is dissolved in any manner and six months shall have elapsed after the expiration of its corporate existence as continued by or pursuant to the foregoing provisions of this section for the purposes therein expressed, and any share of any stockholder of any money or other property in any division of money or other property among the stockholders of such corporation shall then remain in the hands of the directors of such corporation, such share shall escheat to the University of North Carolina to be held without liability for profit or interest until a just claim therefor shall be preferred by the party or parties entitled thereto. The provisions hereof shall apply to any corporation heretofore dissolved as well as to corporations hereafter dissolved. (Rev., s. 1200; Code, s. 667; 1901, c. 2, s. 58; 1939, c. 250, s. 1; 1947, c. 613; C. S. 1193.)

Editor's Note.—

The 1947 amendment added the above paragraph at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

For brief discussion of the 1947 amendment and other provisions relating to escheats, see 25 N. C. Law Rev. 421.

Art. 13. Receivers.

§ 55-147. Appointment and removal.

Section Does Not Limit Power of Court.—The power of the court to appoint a receiver in proper cases is not limited by this section or § 1-502. Sinclair v. Moore Cent. R. Co., 228 N. C. 389, 45 S. E. (2d) 555.

§ 55-149. Title and inventory.—All of the real and personal property of an insolvent corporation, wheresoever situated, and all its franchises, rights, privileges and effects, upon the appointment of a receiver, forthwith vest in him, and the corporation is divested of the title hereto. Within thirty days after his appointment he shall lay before the court a full and complete inventory of all estate, property, and effects of the corporation, its nature and probable value, and an account of all debts due from and to it, as nearly as the same can be ascertained, and shall make a report of his proceedings to the superior court at such times as the court may direct during the continuance of the trust. (Rev., ss. 1224, 1225; 1901, c. 2, ss. 75, 80; 1945, c. 635; C. S. 1210.)

Editor's Note.—The 1945 amendment substituted near the end of the section the words "such times as the court may direct" for the words "every civil term."

§ 55-153. Report on claims to court; exceptions and jury trial.—It is the duty of the receiver to report to the term of the superior court subsequent to a finding by him as to any claim against the corporation, and exceptions thereto may be filed by any person interested, within ten days after notice of the finding by the receiver, and not later than within the first three days of the said term; and, if, on an exception so filed, a jury trial is demanded, it is the duty of the court to prepare a proper issue and submit it to a jury; and if the demand is not made in the exceptions to the report the right to a jury trial is waived. The judge may, in his discretion, extend the time for filing such exceptions. Provided, that no court shall issue any order of distribution or order of discharge of a receiver until said receiver has proved to the satisfaction of the court that written notice has been mailed to the last known address of every claimant who has properly filed claim with the receiver, to the effect that such orders will be applied for at a certain time and place therein set forth and by producing a receipt issued by the United States post office, showing that such notice has been mailed to each of such claimant's last known address at least twenty days prior to the time set for hearing and passing upon such application to the court for said orders of distribution and/or discharge. (Rev., s. 1230; 1901, c. 2, s. 83; 1945, c. 219; C. S. 1213.)

Editor's Note.—The 1945 amendment added the proviso.

Where objections were filed by a creditor of a corporation in the hands of a receiver to an order allowing a claim against such corporation, which order adjudicated material and controverted issues of fact without consent, evidence or findings, it was held error to deny a motion to set aside the allowance of such claim and refuse to grant a hearing on such objections alleging facts which if true would constitute a valid defense to such claim. Peoples Bank, etc., Co. v. Tar River Lbr. Co., 224 N. C. 432, 31 S. E. (2d) 353. See also, Peoples Bank, etc., Co. v. Tar River Lbr. Co., 224 N. C. 153, 29 S. E. (2d) 348.

Exceptions Not Filed within Time Prescribed.—Exceptions filed and made a part of the record are not void as a matter of law because not filed within the first three days of the term of court commencing next after the filing of the receiver's report, in the absence of motion to strike or order to that effect, and a judgment entered on the basis that such exceptions were not before the court for consideration will be remanded. Benson v. Roberson, 226 N. C. 103, 36 S. E. (2d) 729.

The power to extend time for filing exceptions to receiver's report is expressly given by this section. Benson v. Roberson, 226 N. C. 103, 36 S. E. (2d) 729, 730.

Art. 14. Taxes and Fees.

§ 55-158. Taxes for filing; secretary of state not to file corporate papers until prescribed fees, etc., paid.

3. Extension or renewal of corporate existence of any corporation, forty dollars ($40.00).

4. Change of name, change of nature of business, amended certificate of incorporation (other than those authorizing increase of capital stock

and those extending or renewing corporate existence), decrease of capital stock, increase or decrease of par value of, or number of shares, forty dollars.

(1945, c. 635; 1947, c. 1042.)

Editor's Note.—
The 1945 amendment inserted in subsection 4 the words "and those extending or renewing corporate existence." The 1947 amendment rewrote subsection 3. As the rest of the section was not affected by the amendments it is not set out.

Art. 15A. Amendments Extending Corporate Existence Validated.

§ 55-164.1. Validation of amendments to corporate charters extending corporate existence.—In every case where a private corporation, chartered under the general laws of the state of North Carolina, has continued to act and do business as a corporation after the expiration of its period of existence as theretofore fixed in its charter, and has thereafter filed in the office of the secretary of state an amendment to its charter to extend or renew its corporate existence, such amendment is hereby validated and made effective for all intents and purposes to the same extent and with the same effect as if such amendment had been made within the period of such corporation's existence as theretofore fixed in its charter. (1947, c. 504, s. 1.)

§ 55-164.2. Limitation of actions attacking validity of corporate action on grounds amendment not filed during corporate existence.—No action or proceeding shall be brought or defense or counterclaim pleaded later than one year after the ratification of this article in which either the continued existence of such corporation or the validity of any of the contracts, acts, deeds, rights, privileges, powers, franchises and titles of such corporation is attacked or otherwise questioned on the grounds that such amendment was not filed within the period of such corporation's existence as theretofore fixed in its charter. (1947, c. 504, s. 2.)

The act from which this article was codified was ratified on March 25, 1947, and provides that it shall not affect pending litigation.

§ 55-164.3. Clarification of intent of preceding section.—In no event shall the limitation provided in § 55-164.2 bar any action, proceeding, defense or counterclaim based upon grounds other than those mentioned in § 55-164.2, unless the grounds set out in § 55-164.2 are an essential part thereof. (1947, c. 504, s. 3.)

Art. 16. Consolidation or Merger.

§ 55-165. Consolidation or merger; proceedings for.

Editor's Note.—
For comment on the 1943 amendment to this and the following five sections, see 21 N. C. Law Rev. 333.

Chapter 56. Electric, Telegraph, and Power Companies.

§ 56-5. Grant of eminent domain; exception as to mills and water-powers.

Applied in Carolina Power, etc., Co. v. Bowman, 229 N. C. 682, 51 S. E. (2d) 191.

Chapter 57. Hospital and Medical Service Corporations.

Sec.
57-19. Merger or consolidation, proceedings for.
57-20. Commissioner of insurance determines corporations exempt from this chapter.

§ 57-1. Regulation and definition; application of other laws; profit and foreign corporations prohibited.

As to authority of state board of health to establish sanitary standards and methods of inspection for private hospitals, etc., see §§ 130-280 to 130-282.

§ 57-3. Hospital and physician contracts.—Any corporation organized under the provisions of this chapter may enter into contracts for the rendering of hospital service to any of its subscribers by hospitals approved by the American Medical Association and/or the North Carolina Hospital Association, and may enter into contracts for the furnishing of, or the payment in whole or in part for, medical services rendered to any of its subscribers by duly licensed physicians. All obligations arising under contracts issued by such corporations to its subscribers shall be satisfied by payments made directly to the hospital or hospitals and/or physicians rendering such service, or direct to the subscriber or his, her, or their legal representatives upon the receipt by the corporation from the subscriber of a statement marked paid by the hospital(s) and/or physician(s) or both rendering such service, and all such payments heretofore made are hereby ratified. Nothing herein shall be construed to discriminate against hospitals conducted by other schools of medical practice. (1941, c. 338, s. 3; 1943, c. 537, s. 2; 1947, c. 820, s. 1.)

Editor's Note.—
The 1947 amendment rewrote the latter part of the second sentence.

§ 57-6. Issuance of certificate.

(a) The applicant is established as a bona fide non-profit hospital service corporation as defined by this chapter.

(1947, c. 820, s. 2.)

Editor's Note.—
The 1947 amendment added to subsection (a) the words "as defined by this chapter." As the rest of the section was not affected by the amendment it is not set out.

§ 57-7. Subscriber contracts; required and prohibited provisions.

2. Contracts may be issued which entitle one or more persons to benefits thereunder, provided that persons entitled to benefits thereunder, other than the certificate holder, are either spouse, lawful or legally adopted child of the certificate holder or his spouse, or other members of the immediate family of the certificate holder who reside in the same household with certificate holder and are legally, equitably, or morally de-

pendent upon and rely upon certificate holder to a material degree for the reasonable necessities of life, such as food, clothing, lodging, maintenance, support, and/or education.

5. A hospital service corporation may issue a master group contract with the approval of the commissioner of insurance provided such contract and the individual certificates issued to members of the group, shall comply in substance to the other provisions of this chapter. Any such contract may provide for the adjustment of the rate of the premium or benefits conferred as provided in said contract, and in accordance with an adjustment schedule filed with and approved by the commissioner of insurance. If such master group contract is issued, altered or modified, the subscriber's contracts issued in pursuance thereof are altered or modified accordingly, all laws and clauses in subscribers' contracts to the contrary notwithstanding. Nothing in the chapter shall be construed to prohibit or prevent the same. Forms of such contract shall at all times be furnished upon request of subscribers thereto. (1941, c. 338, s. 7; 1947, c. 820, ss. 3, 4.)

Editor's Note.—The 1947 amendment rewrote subsection 2 and the second sentence of subsection 5. As the other subsections were not affected by the amendment they are not set out.

§ 57-8. Investments and reserves.

Any such corporation may accumulate and maintain a contingent reserve in excess of the reserve hereinabove provided for, not to exceed an amount equal to six times the average monthly expenditures for hospital and/or medical claims and administrative and selling expenses.

(1947, c. 820, s. 5.)

Editor's Note.—
The 1947 amendment substituted "six" for "three" in line four of the next to last paragraph. As the rest of the section was not affected by the amendment it is not set out.

§ 57-12. Licensing of agents.

For said examination applicant shall pay the sum of ten ($10.00) dollars: Provided, that where an applicant has already paid the ten ($10.00) dollar examination fee prescribed in section 105-228.7, such applicant shall not be required to pay an additional examination fee.

(1947, c. 1023, s. 1.)

Editor's Note.—
The 1947 amendment substituted in the proviso to the fifth sentence "section 105-228.7" for "sub-section three of section 105-121". As the rest of the section was not affected by the amendment it is not set out.

§ 57-15. Amendments to certificate of incorporation.—Any corporation subject to the provisions of this chapter may hereafter amend its charter in the following manner only:

1. (a) A meeting of the board of directors, trustees or other governing authority shall be called in accordance with the by-laws specifying the amendment to be voted upon at such meeting.

(b) If at such meeting two-thirds of the directors, trustees or other governing authority present vote in favor of the proposed amendment, then the president and secretary shall under oath make a certificate to this effect, which certificate shall set forth the call for such meeting, a statement showing service of such call upon all directors, and a certified copy of so much of the minutes of the meeting as relate to the adoption of the proposed amendment;

(c) Said officers shall cause said certificate to be published once a week for two consecutive weeks in a newspaper in Raleigh and in the county where the corporation's principal office is located, or posted at the courthouse door if no newspaper be published within the county. Said printed or posted notices shall be in such form and of such size as the commissioner may approve, and in addition to setting forth in full the certificate required in paragraph (b) shall state that application for amending the corporation's charter in the manner specified has been proposed by the board of directors, trustees, or other governing authority, and shall also state the time set for the meeting of certificate holders thereby called to be held at the principal office of the corporation to take action on the proposed amendment. A true copy of such notice shall be filed with the commissioner. Such publication and filing of notice shall be completed at least thirty days prior to the date set therein for the meeting of the certificate holders and due proof thereof shall be filed with the commissioner at least fifteen days prior to the date of such meeting. If the meeting at which the proposed amendment is to be considered is a special meeting, rather than a regular annual meeting of certificate holders, such special meeting can be called only after the commissioner has given his approval in writing, and the published notice shall show the fact of such approval. At said meeting those present in person or represented by proxy shall constitute a quorum.

(d) If at such certificate holders' meeting two-thirds of those present in person or by proxy shall vote in favor of any proposed amendment, the president and secretary shall make a certificate under oath setting forth such fact together with the full text of the amendment thus approved. Said certificate shall, within thirty days after such meeting, be submitted to the commissioner for his approval as conforming to the requirement of law, and it shall be the duty of the commissioner to act upon all proposed amendments within ten days after filing of such certificates with him. Should the commissioner approve the proposed amendment or amendments, he shall certify this fact, together with the full text of such amendments as are approved by him to the secretary of state who shall thereupon issue the charter amendment in the usual form. Should the commissioner disapprove of any amendment, then the same shall not be allowed.

2. All charters and charter amendments heretofore issued upon application of the board of directors, trustees or other governing authority of any corporations subject to the provisions of this chapter are hereby validated. (1941, c. 338, s. 15; 1947, c. 820, s. 6.)

Editor's Note.—The 1947 amendment rewrote this section.

§ 57-16. Cost plus plans. — Any corporation organized under the provisions of this chapter shall be authorized as agent of any other corporation, firm, group, partnership, or association, or any subsidiary or subsidiaries thereof, municipal corporation, state, federal government, or any agency thereof, to administer on behalf of such corporation, firm, group, partnership, or association, or any subsidiary or subsidiaries thereof, municipal corporation, state, federal government, or any agency thereof, any group hospitalization

or medical service plan, promulgated by such corporation, firm, group, partnership, or association, or any subsidiary or subsidiaries thereof, municipal corporation, state, federal government, or any agency thereof, on a cost plus administrative expense basis, provided said other corporation, firm, group, partnership, or association, or any subsidiary or subsidiaries thereof, municipal corporation, state, federal government, or any agency thereof shall have had an active existence for at least one (1) year preceding the establishment of such plan, and was formed for purposes other than procuring such group hospitalization and/or medical service coverage on a cost plus administrative expense basis, and provided only that administrative costs of such a cost plus plan administered by a corporation organized under the provisions of this chapter, acting as an agent as herein provided, shall not exceed the remuneration received therefor, and provided further that the corporation organized under this chapter administering such a plan shall have no liability to the subscribers or to the hospitals for the success or failure, liquidation or dissolution of such group hospitalization or medical service plan and provided further, that nothing herein contained shall be construed to require of said corporation, firm, group, partnership, or association, or any subsidiary or subsidiaries thereof, municipal corporation, state, federal government, or any agency thereof, conformity to the provisions of this chapter if such group hospitalization is administered by a corporation organized under this chapter, on a cost plus expense basis. The administration of any cost plus plans as herein provided, shall not be subject to regulation or supervision by the commissioner of insurance. (1941, c. 338, s. 16; 1943, c. 537, s. 9; 1947, c. 820, s. 7.)

Editor's Note.—
The 1947 amendment rewrote portions of this section.

§ 57-18. Construction of chapter as to single employer plans; associations exempt.—Nothing in this chapter shall be construed to affect or apply to hospital or medical service plans which limit their membership to employees and the immediate members of the families of the employees of a single employer or his or its subsidiary or subsidiaries and which plans are operated by such employer or such limited group of the employees; nor shall this chapter be construed to affect or apply to any non-stock, non-profit medical service association which was, on January first, one thousand nine hundred and forty-three, organized solely for the purpose of, and actually engaged in, the administration of any medical service plan in this state upon contracts and participating agreements with physicians, surgeons, or medical societies, whereby such physicians or surgeons underwrite such plan by contributing their services to members of such association upon agreement with such association as to the schedule of fees to apply and the rate and method of payment by the association from the common fund paid in periodically by the members for medical, surgical and obstetrical care; and such hospital service plans, and such medical service associations as are herein specifically described, are hereby exempt from the provisions of this chapter. The commissioner of insurance may require from any such hospital service plan or medical service association such information as will enable him to determine whether such hospital service plan or medical service association is exempt from the provisions of this chapter. (1941, c. 338, s. 18; 1943, c. 537, s. 10; 1947, c. 140.)

Editor's Note.—
The 1947 amendment inserted the words "or his or its subsidiary or subsidiaries" after the word "employer" in line six.

§ 57-19. Merger or consolidation, proceedings for.—Any two (2) or more hospital and/or medical service corporations organized under and/or subject to the provisions of this chapter as determined by the commissioner of insurance may, as shall be specified in the agreement hereinafter required, be merged into one of such constituent corporations, herein designated as the surviving corporation, or may be consolidated into a new corporation to be formed by the means of such consolidation of the constituent corporations, which new corporation is herein designated as the resulting or consolidated corporation, and the directors and/or trustees, or a majority of them, of such corporations as desire to consolidate or merge, may enter into an agreement signed by them and under the corporate seals of the respective corporations, prescribing the terms and conditions of consolidation or merger, the mode of carrying the same into effect and stating such other facts as can be stated in the case of a consolidation or merger, stated in such altered form as the circumstances of the case require, and with such other details as to conversion of certificates of the subscribers as are deemed necessary and/or proper.

Said agreement shall be submitted to the certificate holders of each constituent corporation, at a separate meeting thereof, called for the purpose of taking the same into consideration; of the time, place and object of which meeting due notice shall be given by publication once a week for two consecutive weeks in some newspaper published in Raleigh, North Carolina and in the counties in which the principal offices of the constituent corporations are located, and if no such paper is published in the county of the principal office of such constituent corporations, then said notice shall be posted at the courthouse door of said county or counties for a period of two weeks.

Said printed or posted notices shall be in such form and of such size as the commissioner of insurance may approve. A true copy of said notices shall be filed with the commissioner of insurance.

Such publication and filing of notices shall be completed at least fifteen (15) days prior to the date set therein for the meeting, and due proof thereof shall be filed with the commissioner of insurance at least ten days prior to the date of such meeting.

At this meeting those present in person or represented by proxy shall constitute a quorum and said agreement shall be considered and voted upon by ballot in person or by proxy or both taken for the adoption or rejection of the same; and if the votes of two thirds of those at said meeting voting in person or by proxy shall be for the adoption of the said agreement, then that fact shall be certified on said agreement by the president and secretary of each such corporation, under the seal thereof.

The agreement so adopted and certified shall be signed by the president or vice president and secretary or assistant secretary of each of such corporations under the corporate seals thereof and acknowledged by the president or vice president of each such corporation before any officer authorized by the laws of this state to take acknowledgment of deeds to be the respective act, deed, and agreement of each of said corporations.

The said agreement shall be submitted to and approved by the commissioner of insurance, in advance of the merger or consolidation and his approval thereof shall be indicated by his signature being affixed thereto under the seal of his office.

The commissioner shall not approve any such plans, unless, after a hearing, he finds that it is fair, equitable to certificate holders and members, consistent with law, and will not conflict with the public interest.

The agreement so certified and acknowledged with the approval of the commissioner of insurance noted thereon, shall be filed in the office of the secretary of state, and shall thenceforth be taken and deemed to be the agreement and act of consolidation or merger of said corporations; and a copy of said agreement and act of consolidation or merger duly certified by the secretary of state under the seal of his office shall also be recorded, in the office of the clerk of the superior court of the county of this state in which the principal office of the surviving or consolidated corporation is, or is to be established, and in the office of the clerks of the superior courts of the counties of this state in which the respective corporations so merging or consolidating shall have their original certificates of incorporation recorded, and also in the office of the register of deeds in each county in which either or any of the corporations entering into merger or consolidation owns any real estate; and such record, or a certified copy thereof, shall be evidence of the agreement and act of consolidation or merger of said corporations, and of the observance and performance of all acts and conditions necessary to have been observed and performed precedent to such consolidation or merger. When an agreement shall have been signed, authorized, adopted, acknowledged, approved, and filed and recorded as hereinabove set forth in this section, for all purposes of the laws of this state, the separate existence of all constituent corporations, parties to said agreement, or of all such constituent corporations except the one into which the other or others of such constituent corporations have been merged, as the case may be, shall cease and the constituent corporations shall become a new corporation, or be merged into one of such corporations, as the case may be, in accordance with the provisions of said agreement, possessing all the rights, privileges, powers and franchises as well of a public as of a private nature, of each of said constituent corporations, and all and singular, the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, and all debts due to any of said constituent corporations on whatever account, shall be vested in the corporation resulting from or surviving such consolidation or merger, and all property, rights, privileges, powers, and franchises and all and every other interest shall be thereafter as effectually the property of the resulting or surviving corporation as they were of the several and respective constituent corporations, and the title to any real estate, whether vested by deed or otherwise, under the laws of this state, vested in any such constituent corporations shall not revert or be in any way impaired by reason of such consolidation or merger; provided, however, that all rights of creditors and all liens upon the property of either of or any of said constituent corporations shall be preserved, unimpaired, limited in lien to the property affected by such lien at the time of the merger or consolidation, and all debts, liabilities, and duties of the respective constituent corporations shall thenceforth attach to said resulting or surviving corporation, and may be enforced against it to the same extent as if said debts, liabilities, and duties had been incurred or contracted by it; and further provided that notice of any said liens, debts, liabilities, and duties is given in writing to the resulting or surviving corporation within six months after the date of the filing of the agreement of merger in the office of the secretary of state. All such liens, debts, liabilities, and duties of which notice is not given as provided herein are forever barred. The certificate of incorporation of the surviving corporation shall be deemed to be amended to the extent, if any, that the changes in its certificates of incorporation are stated in the agreement of merger. All certificates theretofore issued and outstanding by each constituent corporation and in good standing upon the date of the filing of such agreement with the secretary of state without reissuance thereof by the resulting or surviving corporation shall be the contract and agreement of the resulting or surviving corporation with each of the certificate holders thereof and subject to all terms and conditions thereof and of the agreement of merger filed in the office of the secretary of state.

Any action or proceeding pending by or against any of the corporations consolidated or merged may be prosecuted to judgment as if such consolidation or merger had not taken place, or the corporations resulting from or surviving such consolidation or merger may be substituted in its place.

The liability of such constituent corporations to the certificate holders thereof, and the rights or remedies of the creditors thereof, or persons doing or transacting business with such corporations, shall not, in any way, be lessened or impaired by the consolidation or merger of two or more of such corporations under the provisions of this section, except as provided in this section.

When two or more corporations are consolidated or merged the corporation resulting from or surviving such consolidation or merger shall have the power and authority to continue any contracts which any of the constituent corporations might have elected to continue. All contracts entered into between any constituent corporations and any other persons shall be and become the contract of the resulting corporations according to the terms and conditions of said contract and the agreement of consolidation or merger.

For the filing of the agreement as hereinabove provided, the secretary of state is entitled to receive such fees only as he would have received had a new corporation been formed.

Any agreement for merger and/or consolidation as shall conform to the provisions of this section, shall be binding and valid upon all the subscribers, certificate holders and/or members of such constituent corporations, provided only that any subscriber, certificate holder and/or member who shall so indicate his disapproval thereof to the resulting, consolidated or surviving corporation within ninety days after the filing of said agreement with the secretary of state shall be entitled to receive all unearned portions of premiums paid on his certificate from and after the date of the receipt of the application therefor by the resulting, surviving, or consolidated corporation; each subscriber, certificate holder and/or member who shall not so indicate his or her disapproval of said agreement and said merger within said period of ninety days is deemed and presumed to have approved said agreement and said merger and/or consolidation and shall have waived his or her right to question the legality of said merger and/or consolidation.

No director, officer, subscriber, certificate holder and/or member as such of any such corporation, except as is expressly provided by the plan of merger or consolidation, shall receive any fee, commission, other compensation or valuable consideration whatever, for in any manner aiding, promoting or assisting in the merger or consolidation. (1947, c. 820, s. 8.)

§ 57-20. Commissioner of insurance determines corporations exempt from this chapter.—The commissioner of insurance may require from any corporation writing any hospital service contracts and any corporation writing medical service contracts or both, such information as will enable him to determine whether such corporation is subject to the provisions of this chapter. (1947, c. 820, s. 9.)

Chapter 58. Insurance.

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SUBCHAPTER I. INSURANCE DEPARTMENT.

Art. 1. Title and Definitions.

§ 58-1. Title of the chapter.

Editor's Note.—For article "The 1945 Revision of the Insurance Laws of North Carolina" by Robert H. Wettach, see 23 N. C. Law Rev. 283.

For changes made by the Session Laws of 1947, see 25 N. C. Law Rev. 429.

§ 58-2. Definitions.—In this chapter, unless the context otherwise requires,

(a) "Commissioner" means commissioner of insurance of North Carolina.

(b) "Department" means department of insurance of North Carolina.

(c) "Company" or "insurance company" or "insurer" shall be deemed to include any corporation, association, partnership, society, order, individual or aggregation of individuals engaging or proposing or attempting to engage as principals in any kind of insurance business, including the exchanging of reciprocal or inter-insurance contracts between individuals, partnerships and corporations.

(d) "Domestic company" means a company incorporated or organized under the laws of this state.

(e) "Foreign company" means a company incorporated or organized under the laws of the United States or of any jurisdiction within the United States other than this state.

(f) "Alien company" means a company incorporated or organized under the laws of any jurisdiction outside of the United States.

(g) "Person" includes an individual, aggregation of individuals, corporation, company, association and partnership.

(h) The singular form shall include the plural, and the masculine form shall include the feminine wherever appropriate. (Rev., s. 4678; 1899, c. 54, s. 1; 1945, c. 383; C. S. 6261.)

Editor's Note.—The 1945 amendment rewrote this section.

§ 58-3. Contract of insurance.—A contract of insurance is an agreement by which the insurer is bound to pay money or its equivalent or to do some act of value to the insured upon, and as an indemnity or reimbursement for, the destruction, loss, or injury of something in which the other party has an interest. (Rev., s. 4679; 1899, c. 54, s. 2; 1945, c. 383; C. S. 6262.)

Editor's Note.—The 1945 amendment substituted the words "the insurer is bound" for the words "one party for a consideration promises," and inserted the words "or reimbursement."

Art. 2. Commissioner of Insurance.

§ 58-6. Salary of commissioner.—The salary of the commissioner of insurance shall be seven thousand five hundred dollars a year, payable monthly. (Rev., s. 2756; 1899, c. 54, ss. 3, 8; 1901, c. 710; 1903, c. 42; 1903, c. 771, s. 3; 1907, c. 830, s. 10; 1907, c. 994; 1909, c. 839; 1913, c. 194; 1915, cc. 158, 171; 1917, c. 70; 1919, c. 247, s. 4; 1921, c. 25, s. 1; 1933, c. 282, s. 5; 1935, c. 293; 1937, c. 342; 1945, c. 383; 1947, c. 1041; C. S. 3874.)

Editor's Note.—The 1945 amendment increased the salary from six thousand to six thousand and six hundred dollars.

The 1947 amendment increased the salary to seven thou-

sand five hundred dollars. And Session Laws 1949, c. 1278, effective April 23, 1949, provides that the salary, from and after the expiration of the present term of office of the commissioner, shall be nine thousand dollars per year, payable in equal monthly installments.

§ 58-7.1. Chief deputy commissioner.—The commissioner shall appoint and may remove at his discretion a chief deputy commissioner, who, in the event of the absence, death, resignation, disability or disqualification of the commissioner, or in case the office of commissioner shall for any reason become vacant, shall have and exercise all the powers and duties vested by law in the commissioner. He shall receive such compensation as fixed and provided by the Budget Bureau. (1945, c. 383.)

§ 58-7.2. Chief actuary.—The commissioner shall appoint and may remove at his discretion a chief actuary, who shall receive such compensation as fixed and provided by the Budget Bureau. (1945, c. 383.)

§ 58-7.3. Other deputies, actuaries, examiners and employees.—The commissioner shall appoint or employ and may remove at his discretion such other deputies, actuaries, examiners, clerks and other employees as may be found necessary for the proper execution of the work of the Insurance Department, at such compensation as shall be fixed and provided by the Budget Bureau. (1945, c. 383.)

§ 58-9. Powers and duties of commissioner.—The commissioner shall:

(1) See that all laws of this state governing insurance companies, associations, orders or bureaus relating to the business of insurance are faithfully executed, and to that end he shall have power and authority to make rules and regulations, not inconsistent with law, to enforce, carry out and make effective the provisions of this chapter, and to make such further rules and regulations not contrary to any provision of this chapter which will prevent practices injurious to the public by insurance companies, fraternal orders and societies, agents and adjusters. The commissioner may likewise, from time to time, withdraw, modify or amend any such regulation.

(2) Furnish to the companies, associations, orders or bureaus required by this chapter to report to him, the necessary blank forms for the statements required, which forms may be changed by him from time to time when necessary to secure full information as to the standing, condition and such other information desired of companies, associations, orders or bureaus under the Insurance Department.

(3) Receive and thoroughly examine each annual statement required by this chapter and prepare an abstract of each annual statement at the expense of the company, association, order or bureau making the same and receive therefor the sum of four dollars. If the annual statement is made in compliance with the laws of this state, the commissioner shall publish the abstract of the same, at the expense of the company, association, order or bureau making it, in one of the newspapers of the state, which newspaper may be selected by the company, association, order or bureau making the statement, if within thirty days after the filing of the statement, the commissioner is notified in writing of the name of the paper selected.

(4) Report in detail to the Attorney General any violations of the laws relative to insurance companies, associations, orders and bureaus or the business of insurance, and he shall have power to institute civil actions or criminal prosecutions either by the Attorney General or such other attorney as the Attorney General may select, for any violation of the provisions of this chapter.

(5) Upon a proper application by any citizen of this state, give a statement or synopsis of the provisions of any insurance contract offered or issued to such citizen.

(6) Administer by himself or by his deputy all oaths required in the discharge of his official duty. (Rev., s. 4689; 1899, c. 54, s. 8; 1905, c. 430, s. 3; 1945, c. 383; 1947, c. 721; C. S. 6269.)

Editor's Note.—The 1945 amendment rewrote this section. The 1947 amendment added to the first sentence of subsection (1) the provision as to rules and regulations, struck out former subsection (4) and renumbered the remaining subsections.

§ 58-9.1. Orders of commissioner; when writing required.—Whenever by any provision of this chapter, the commissioner is authorized to grant any approval, authorization or permission or to make any other order affecting any insurer, insurance agent, insurance broker or other person or persons subject to the provisions of this chapter, such order shall not be effective unless made in writing and signed by the commissioner or by his authority. (1945, c. 383.)

§ 58-9.2. Examinations, investigations and hearings; notice of hearing.—All examinations, investigations and hearings provided for by this chapter may be conducted by the commissioner personally or by one or more of his deputies, actuaries, examiners or employees designated by him for the purpose. All hearings shall, unless otherwise specially provided, be held at such time and place as shall be designated in a notice which shall be given by the commissioner in writing to the person cited to appear, at least ten days before the date designated therein. The notice shall state the subject of inquiry and the specific charges, if any. It shall be sufficient to give such notice either by delivering it to such person or by depositing the same in the United States mail, postage prepaid, and addressed to the last known place of business of such person. (1945, c. 383.)

§ 58-9.3. Court review of orders and decisions.—(1) Any order or decision made, issued or executed by the commissioner, except an order to make good an impairment of capital or surplus or a deficiency in the amount of admitted assets, shall be subject to review in the Superior Court of Wake County on petition by any person aggrieved filed within thirty days from the date of the delivery of a copy of the order or decision made by the commissioner upon such person. A copy of such petition for review as filed with and certified to by the clerk of said court shall be served upon the commissioner or in his absence upon some one in active charge of the department within five days after the filing thereof. If such petition for review is not filed within the said thirty days the parties aggrieved shall be deemed to have waived the right to have the merits of the order or decision reviewed and there shall be no trial of the merits thereof by any court to which application may be made by petition or

otherwise, to enforce or restrain the enforcement of the same.

(2) The commissioner shall within thirty days, unless the time be extended by order of court, after the service of the copy of the petition for review as provided in paragraph (1) of this section, prepare and file with the clerk of the superior court of Wake county a complete transcript of the record of the hearing, if any, had before him, and a true copy of the order or decision duly certified. The order or decision of the commissioner if supported by substantial evidence shall be presumed to be correct and proper. The court may change the place of hearing, (a) upon consent of the parties; or (b) when the convenience of witnesses and the ends of justice would be promoted by the change; or (c) when the judge has at any time been interested as a party or counsel. The cause shall be heard by the trial judge as a civil case upon transcript of the record for review of findings of fact and errors of law only. It shall be the duty of the trial judge to hear and determine such petition with all convenient speed and to this end the cause shall be placed on the calendar for the next succeeding term for hearing ahead of all other cases except those already given priority by law. If on the hearing before the trial judge it shall appear that the record filed by the commissioner is incomplete, he may by appropriate order direct the commissioner to certify any or all parts of the record so omitted.

(3) The trial judge shall have jurisdiction to affirm or to set aside the order or decision of the commissioner and to restrain the enforcement thereof.

(4) Appeals from all final orders and judgments entered by the Superior Court in reviewing the orders and decisions of the commissioner may be taken to the Supreme Court of North Carolina by any party to the action as in other civil cases.

(5) The commencement of proceedings under this section shall not operate as a stay of the commissioner's order or decision, unless so ordered by the court, except orders increasing or reducing rates and orders affecting the continuation of the license of a rating organization. (1945, c. 383; 1947, c. 721.)

Editor's Note.—The 1947 amendment rewrote subsection (2) and substituted "trial judge" for "court" in line one of subsection (3). For comment on the amendment, see 25 N. C. Law Rev. 439.

§ 58-11. Office of commissioner a public office; records, etc., subject to inspection.—The office of the commissioner shall be a public office and the records, reports, books and papers thereof on file therein shall be accessible to the inspection of the public, except as the commissioner, for good reason, may decide otherwise, or except as may be otherwise provided in this chapter. (Rev., s. 4683; 1899, c. 54, ss. 9, 77; 1907, c. 1000, s 1; 1945, c. 383; C. S. 6271.)

Editor's Note.—The 1945 amendment rewrote this section.

§ 58-14. Reports of commissioner to the governor and general assembly.—The commissioner shall biennially submit to the general assembly, through the governor, a report of his official acts, including a summary of official rulings and regulations. The commissioner shall, from time to time, report to the general assembly any change which in his opinion should be made in the laws relating to insurance and other subjects pertaining to his department. On or before the first day of February of each year in which the general assembly is in session he shall make to the governor the recommendations called for in this section, to be transmitted to the general assembly, with the last annual report of this department, including receipts and disbursements. (Rev., ss. 4687, 4688; 1899, c. 54, ss. 6, 7, 10; 1901, c. 391, s. 2; 1911, c. 211, s. 2; 1927, c. 217, s. 5; 1945, c. 383; C. S. 6273.)

Editor's Note.—

The 1945 amendment added at the end of the first sentence the words "including a summary of official rulings and regulations."

§ 58-15. Authority over all insurance companies; no exemptions from license.—Every insurance company must be licensed and supervised by the commissioner of insurance, and must pay all licenses, taxes, and fees as prescribed in the insurance laws of the state for the class of company, association, or order to which it belongs. No provision in any statute, public or private, may relieve any company, association, or order from the supervision prescribed for the class of companies, associations, or orders of like character, or release it from the payment of the licenses, taxes, and fees prescribed for companies, associations, and orders of the same class; and all such special provisions or exemptions are hereby repealed. It is unlawful for the commissioner of insurance to grant or issue a license to any company, association, or order, or agent for them, claiming such exemption from supervision by his department and release for the payment of license, fees, and taxes. (Rev., s. 4691; 1903, c. 594, ss. 1, 2, 3; 1945, c. 383; C. S. 6274.)

Editor's Note. — The 1945 amendment struck out the words "association or order, as well as every bond, investment, dividend, guarantee, registry, title guarantee, debenture, or such other like company (not strictly an insurance company, as defined in the general insurance laws)." The stricken words formerly appeared after the word "company" in line two.

§ 58-16. Examinations to be made. — Before granting certificates of authority to an insurance company to issue policies or make contracts of insurance the commissioner shall be satisfied, by such examination and evidence as he sees fit to make and require, that the company is otherwise duly qualified under the laws of the state to transact business therein. As often as once in three years he shall personally or by his deputy visit each domestic insurance company and thoroughly inspect and examine its affairs, especially as to its financial condition and ability to fulfill its obligations and whether it has complied with the laws. He shall also make an examination of any such company whenever he deems it prudent to do so, or upon the request of five or more of the stockholders, creditors, policyholders, or persons pecuniarily interested therein, who shall make affidavit of their belief, with specifications of their reasons therefor, that the company is in an unsound condition. Whenever the commissioner deems it prudent for the protection of policyholders in this state he shall in like manner visit and examine, or cause to be visited and examined by some competent person appointed by him for that purpose, any foreign insurance company applying for admission or already admitted to do business in this state, and such company shall pay the

proper charges incurred in this examination, including the expenses of the commissioner or his deputy and the expenses and compensation of his assistants employed therein. The refusal of any insurer to submit to examination or the refusal or failure of an insurer to pay the expenses of examination upon presentation of a bill therefor by the commissioner, shall be grounds for the revocation or refusal of a license. The commissioner is authorized to make public any such revocation or refusal of license as he may determine and to give his reasons therefor. The commissioner shall promptly institute a civil action to recover the expenses of examination against any insurer which refuses or fails to pay. For these purposes the commissioner or his deputy or persons making the examination shall have free access to all the books and papers of the insurance company that relate to its business, and to the books and papers kept by any of its agents, or to the books and papers of any affiliated or subsidiary corporations or partnerships that affect the affairs or financial condition of said company and may summon, administer oaths to, and examine as witnesses, the directors, officers, agents, and trustees of any such company, and any other person, affiliate or subsidiary in relation to its affairs, transactions, and condition. (Rev., s. 4692; 1899, c. 54, s. 13; 1945, c. 383; C. S. 6275.)

Editor's Note.—The 1945 amendment inserted the fifth, sixth and seventh sentences. It also made the last sentence applicable to affiliates and subsidiaries.

§ 58-16.1. Examination dispensed with under certain circumstances.—Before ordering or making the examination provided for in section 58-16 of any foreign or alien company, the commissioner shall first inquire of the insurance department of the state or country (if there be any such department therein), in which is located the principal office of such company, as to the financial and business standing and solvency of such company. If, upon such inquiry, it shall appear that such company is of good financial and business standing, and is solvent, and it be certified, in writing, attested by the seal (if any) of the insurance department of the state or country wherein is located the principal office of such company, that it has been examined by the insurance department of such state or country in the manner prescribed by the laws thereof, and was by such examination found to be in sound condition, that there is no reason to doubt its solvency, and that it is still permitted, under the laws of such state or country, to do business therein, then in the discretion of the commissioner, further examination may be dispensed with, and the information so obtained, and such certificate so furnished, may be accepted as sufficient evidence of the solvency of such company. (1945, c. 383.)

§ 58-16.2. Results of examination not to be made public until company is given opportunity to be heard; exception.—Pending, during and after the examination of any domestic, foreign or alien insurance company neither the commissioner nor his representative or representatives shall make public or allow to be made public the financial statement, findings or report of examination, or any report affecting the status or standing of the company examined until the company has either accepted and approved the final report of examination or has been afforded a reasonable opportunity to be heard thereon and to answer or rebut any statements or findings therein. Such hearing, if requested, shall be informal and private.

If within thirty days after the final report of examination has been submitted to it, the company examined has neither notified the commissioner of its acceptance and approval of the report nor requested to be heard thereon, the report shall thereupon be filed as a public document and shall be open to public inspection.

The provisions of this section shall not, however, prohibit the commissioner from taking any action provided for, or from exercising any power conferred by, any other provision of this chapter to suspend or revoke the license of any insurance company. (1945, c. 383.)

§ 58-18. Investigation of charges.—Upon his own motion or upon complaint being filed by a citizen of this state that a company authorized to do business in the state has violated any of the provisions of this chapter, the commissioner shall investigate the matter, and, if necessary, examine, under oath, by himself or his accredited representatives the president and such other officer or agents of such companies as may be deemed proper; also all books, records, and papers of the same. In case the commissioner shall find upon substantial evidence that any complaint against a company is justified, said company, in addition to such penalties as are imposed for violation of any of the provisions of this chapter, shall be liable for the expenses of the investigation, and the commissioner shall promptly present said company with a statement of such expenses. If the company refuses or neglects to pay, the commissioner is authorized to bring a civil action for the collection of these expenses. (Rev., s. 4694; 1899, c. 54, s. 111; 1903, c. 438, s. 11; 1921, c. 136, s. 4; 1925, c. 275, s. 6; 1945, c. 383; C. S. 6277.)

Editor's Note.—
The 1945 amendment rewrote this section.

§§ 58-19, 58-20: Repealed by Session Laws 1945, c. 383.

§ 58-21. Annual statements to be filed with commissioner.—Every insurance company shall file in the office of the commissioner of insurance, on or before the first day of March in each year, in form and detail as the commissioner of insurance prescribes, a statement showing the business standing and financial condition of such company, association, or order on the preceding thirty-first day of December, signed and sworn to by the chief managing agent or officer thereof, before the commissioner of insurance or some officer authorized by law to administer oaths. The commissioner of insurance shall, in December of each year, furnish to each of the insurance companies authorized to do business in the state two or more blanks adapted for their annual statements. (Rev., s. 4698; 1899, c. 54, ss. 72, 73, 83, 90, 97; 1901, c. 706, s. 2; 1903, c. 438, s. 9; 1945, c. 383; C. S. 6280.)

Editor's Note.—The 1945 amendment struck out the words "association, or order—domestic, through its officers, and foreign, through its general agent—" formerly appearing after the word "company" in line one.

§§ 58-23, 58-24: Repealed by Session Laws 1945, c. 383.

§ 58-25. Record of business kept by companies and agents; commissioner may inspect.—All companies, agents, or brokers doing any kind of insurance business in this state must make and keep a full and correct record of the business done by them, showing the number, date, term, amount insured, premiums, and the persons to whom issued, of every policy or certificate or renewal. Information from these records must be furnished to the commissioner of insurance on demand, and the original books of records shall be open to the inspection of the commissioner when demanded. (Rev., s. 4696; 1899, c. 54, s. 108; 1903, c. 438, s. 11; 1945, c. 383; C. S. 6284.)

Editor's Note.—The 1945 amendment struck out the words "his deputy or clerk" formerly appearing after the word "commissioner" in the last line.

§ 58-25.1. Commissioner may require special reports.—The commissioner may also address to any authorized insurer or its officers any inquiry in relation to its transactions or condition or any matter connected therewith. Every corporation or person so addressed shall reply in writing to such inquiry promptly and truthfully, and such reply shall be verified, if required by the commissioner, by such individual, or by such officer or officers of a corporation, as he shall designate. (1945, c. 383.)

§ 58-26: Repealed by Session Laws 1945, c. 383.

§ 58-27. Books and papers required to be exhibited.—It is the duty of any person having in his possession or control any books, accounts, or papers of any company licensed under this chapter, to exhibit the same to the commissioner of insurance or to any deputy, actuary, accountant, or persons acting with or for the commissioner of insurance. Any person who shall refuse, on demand, to exhibit the books, accounts, or papers, as above provided, or who shall knowingly or wilfully make any false statement in regard to the same, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, at the discretion of the court. (Rev., ss. 3494, 4697; 1899, c. 54, s. 76; 1907, c. 1000, s. 3; 1945, c. 383; C. S. 6286.)

Editor's Note.—The 1945 amendment struck out the words "order, or person" formerly appearing after the word "company" in line three.

§ 58-27.1. Insurance advisory board; organization and powers.—(1) There shall be in the Insurance Department an insurance advisory board which shall consist of seven members. The commissioner shall be a member of the board and its chairman and executive head. The remaining six members shall be appointed by the Governor and any of them may be removed from office by the Governor whenever, in his judgment, the public interest may require. Of the six members appointed, three shall have had experience of such a nature as to make them familiar with the purposes and practices of the insurance business. Three members shall be appointed for two years and three for four years, and thereafter all appointments shall be for a term of four years and until a successor has been appointed; and in case of a vacancy for any reason, the Governor shall appoint a member to fill the unexpired term of office. The members of the insurance advisory board shall receive no salary but shall be paid for their services seven dollars ($7.00) per diem and their expenses. The board shall meet in regular session at least once each three months on call of the chairman. Special meetings may be had at any time upon call of the commissioner, or at the request of any two members of the board. The board may adjourn its meetings from day to day or until a day certain until all its business has been transacted. The commissioner shall keep a record of all proceedings of the board, which records shall be open to the public inspection.

(2) The insurance advisory board shall have power to consider and, by a majority vote of its members present, to make recommendations to the commissioner upon any matter which may be submitted to the board.

(3) The insurance advisory board shall, within three months of the ratification of this subsection promulgate rules and regulations to provide for the holding of public hearings before the commissioner of insurance, or any person employed by the insurance department authorized by the commissioner to act in his stead, on such proposals, to revise an existing rating schedule the effect of which is to increase or decrease the charge for insurance or to set up a new rating schedule, as are subject to the approval of the commissioner and as, in the judgment of the board, are of such nature and importance as to justify and require a public hearing. The board shall have authority to determine by such rules and regulations the circumstances under which such public hearings shall be held and the commissioner of insurance shall hold public hearings in accordance with such rules and regulations. From time to time the board may revise and change its promulgated rules and regulations in such manner as, in its judgment, the public interest may require. (1945, c. 383; 1949, c. 1079, s. 1.)

Editor's Note.—The 1949 amendment, which added subsection (3), became effective on April 21, 1949. See 27 N. C. Law Rev. 460.

§ 58-27.2. Public hearings on revision of existing schedule or establishment of new schedule; publication of notice.—(1) Whenever any statutory or licensed insurance rating bureau or any insurance company making its own rate filings makes any proposal to revise an existing rating schedule the effect of which is to increase or decrease the charge for insurance, or to set up a new rating schedule, and such rating schedules are subject to the approval of the commissioner, such bureau or company shall file its proposed change and supporting data with the commissioner who shall thereafter, before acting upon any such proposal, order a public hearing thereon, if such hearing is required by the rules and regulations adopted by the insurance advisory board and then in accordance therewith, and fix a time and place for such hearing not earlier than twenty days thereafter. The bureau or the company making such proposal shall, not more than ten days prior to the time of such public hearing, cause to be published in a daily newspaper or newspapers published in North Carolina, and in accordance with the rules and regulations of the insurance advisory board, a notice, in the form and content approved by the commissioner, setting forth the nature and effect of such proposal

and the time and place of the public hearing to be held.

(2) The provisions of this section shall be applicable to all rating bureaus operating in North Carolina and all companies making independent filings under the provisions of chapters 58 and 97 of the General Statutes of North Carolina, and shall be in addition to any requirements otherwise made specifically applicable to said bureaus and companies. (1949, c. 1079, s. 1.)

Editor's Note.—As to appropriation for administration of section, see Session Laws 1949, c. 1079, s. 2.

Art. 3. General Regulations for Insurance.

§ 58-29. No insurance contracts except under this chapter.

Applied in Glover v. Rowan Mut. Fire Ins. Co., 228 N. C. 195, 45 S. E. (2d) 45.

§ 58-30. Statements in application not warranties.

Instruction.—The evidence tended to show that in her application for hospital insurance plaintiff inadvertently misrepresented that she did not have hernia, and that subsequent to the issuance of the policy plaintiff was hospitalized for appendicitis. The court held that a charge to the effect that the misrepresentation would bar recovery if the hernia in any way contributed to the hospitalization or materially affected the acceptance of the risk by insurer so that insurer would not have written the policy in the form it was issued if the existence of the hernia had been known, was without error, the question of materiality of the misrepresentation being for the jury upon the evidence. Carroll v. Carolina Cas. Ins. Co., 227 N. C. 456, 42 S. E. (2d) 607, discussed in 26 N. C. Law Rev. 78.

§ 58-30.1. Additional or coinsurance clause.—No insurance company or agent licensed to do business in this state may issue any policy or contract of insurance covering property in this state which shall contain any clause or provision requiring the insured to take or maintain a larger amount of insurance than that expressed in such policy, nor in any way provide that the insured shall be liable as a coinsurer with the company issuing the policy for any part of the loss or damage to the property described in such policy, and any such clause or provision shall be null and void, and of no effect: Provided, the coinsurance clause or provision may be written in or attached to a policy or policies issued when there is printed or stamped on the filing face of such policy or on the form containing such clause the words "coinsurance contract," and the commissioner may, in his discretion, determine the location of the words "coinsurance contract" and the size of the type to be used. If there be a difference in the rate for the insurance with and without the coinsurance clause the rates for each shall be furnished the insured upon request. (1915, c. 109, s. 5; 1925, c. 70, s. 4; 1945, c. 377; 1947, c. 721; C. S. 6441.)

Cross Reference.—See § 58-177 and notes thereto.

Editor's Note.—The 1945 amendment rewrote § 58-181 as this section.

The 1947 amendment added the latter part of the proviso and made other changes therein.

§ 58-30.2. Group plans other than life, annuity or accident and health.—No policy of insurance other than life, annuity or accident and health may be written in North Carolina on a group plan which insures a group of individuals under a master policy at rates lower than those charged for individual policies covering similar risks. The master policy and certificates, if any, shall be first approved by the commissioner and the rate, premiums or other essential information shall be shown on the certificate. (1945, c. 377.)

§ 58-31.1. Proof of loss forms required to be furnished.—When any company under any insurance policy requires a written proof of loss after notice of such loss has been given by the insured or beneficiary, the company or its representative shall furnish a blank to be used for that purpose. If such forms are not so furnished within fifteen days after the receipt of such notice the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss, upon submitting within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, character, and extent of the loss for which claim is made. (1945, c. 377.)

§ 58-33. Companies must do business in own name.—Every insurance company must conduct its business in the state in, and the policies and contracts of insurance issued by it shall be headed or entitled only by, its proper or corporate name. (Rev., s. 4811; 1899, c. 54, s. 18; 1945, c. 377; C. S. 6292.)

Editor's Note.—The 1945 amendment struck out the words "foreign or domestic" formerly appearing after the word "company" in line one.

§ 58-33.1. Must not pay death benefits in services.—No insurance company now doing business in this state or that may hereafter be authorized to do business in this state issuing contracts providing benefits in the event of death shall issue any contract providing for the payment of benefits in merchandise or service to be rendered to such policyholder or his beneficiary. (1945, c. 377.)

§ 58-35. Unearned premium reserves.—Every insurance company other than life and real estate title insurance shall maintain unearned premium reserves equal to the unearned portions of the gross premiums charged on unexpired or unterminated risks and policies, provided, that excluding commissions thereon, unmatured installment premiums on such risks and policies may be treated as admitted assets or allowed as deductions from liabilities in computing the necessary reserves therefor, subject to regulations issued by the commissioner. No deductions may be made from the gross premiums in force except for original premiums cancelled on risks terminated or reduced before expiration, or except for premiums paid or credited for risks reinsured with other solvent assuming insurers. Premiums charged for bulk or portfolio reinsurance assumed from other insurers shall be included as premiums in force on the basis of the original premiums and the original terms of the policies of the ceding insurer. Reinsurance ceded to such an assuming insurer may be deducted on the basis of original premiums and original terms except in the case of excess loss or catastrophe reinsurance which may be deducted only on the basis of actual reinsurance premiums and actual reinsurance terms. The commissioner of insurance may accept the valuation made by the company upon such evidence of its correctness as the commissioner may require.

If in the opinion of the commissioner the above method does not produce an adequate reserve he may require the company to calculate its un-

earned premium reserve upon the monthly pro rata fractional basis, or, if necessary, on each respective risk from the date of the issuance of the policy, and in case of premiums covering indefinite terms he may prescribe special regulations. (Rev., s. 4704; 1899, c. 54, s. 67; 1901, c. 391, s. 5; 1907, c. 1000, s. 4; 1945, c. 377; 1947, c. 721; C. S. 6294.)

Editor's Note.—The 1945 amendment repealed the former section and inserted in lieu thereof the present section and sections 58-35.1 and 58-35.2.

The 1947 amendment substituted in lines five and six the word "unterminated" for the word "undetermined", and added the proviso to the first sentence.

For comment on 1947 amendment, see 25 N. C. Law Rev. 440.

§ 58-35.1. Loss reserves of fire and marine insurance companies.—In any determination of the financial condition of any fire or marine or fire and marine insurance company authorized to do business in this state, such company shall be charged, in addition to its unearned premium liability as prescribed in section 58-35, with a liability for loss reserves in an amount equal to the aggregate of the estimated amounts payable on all outstanding claims reported to it which arose out of any contract of insurance or reinsurance made by it, and in addition thereto an amount fairly estimated as necessary to provide for unreported losses incurred on or prior to the date of such determination, and including, both as to reported and unreported claims, an amount estimated as necessary to provide for the expense of adjusting such claims, and there shall be deducted, in determining such liability for loss reserves, the amount of reinsurance recoverable by such company, in respect to such claims, from assuming insurers. (1945, c. 377.)

§ 58-35.2. Loss and loss expense reserves of casualty insurance and surety companies. — 1. In determining the financial condition of any casualty insurance or surety company and in any financial statement or report of any such company, there shall be included in the liabilities of such company loss reserves and loss expense reserves at least equal to the amounts required under the provisions of this section, and the amount of such reserves shall be diminished by allowance or credit for reinsurance recoverable from assuming insurers. The date as of which such determination, statement or report is made is hereinafter referred to as the date of determination.

2. For all outstanding losses, other than those incurred under policies of workmen's compensation, employer's liability or personal injury liability insurance, such loss reserves shall include the following:

(a) The aggregate estimated amounts due or to become due on account of all losses and claims incurred but not paid, including the estimated liability on any notice received by the company of the occurrence of any event which may result in a loss.

(b) The aggregate amounts of liability for all losses incurred but on which no notice has been received, estimated in accordance with the company's prior experience, if any, otherwise in accordance with the experience of similar companies under similar contracts of insurance. The estimated liabilities for such losses under all its bonds, policies or contracts of, or covering any of the risks of, fidelity insurance, shall be not less than ten per cent of the net premiums in force thereon, and the estimated liabilities for all such losses under all its surety contracts shall be not less than five per cent of the net premium in force thereon.

In any loss reserves computed in accordance with rules or regulations prescribed by the commissioner under the provisions of subsections seven or eight there shall be included, for liability upon all losses incurred but on which no notice has been received, an amount not less than that indicated by the company's experience.

3. The reserves for outstanding losses and loss expenses under policies of personal injury liability insurance and under policies of employer's liability insurance, except as provided in subsections seven and eight, shall be computed as follows:

(a) For all liability suits being defended under policies written:

(1) Ten years or more prior to the date of determination, one thousand five hundred dollars for each suit.

(2) Five or more and less than ten years prior to the date of determination, one thousand dollars for each suit.

(3) Three or more and less than five years prior to the date of determination, eight hundred fifty dollars for each suit. In any event the total loss and loss expense reserves for all such liability policies written more than three years prior to the date of determination shall be not less than the aggregate of the estimated unpaid losses and loss expenses under such policies computed on an individual case basis.

(b) For all such liability policies written during the three years immediately preceding the date of determination, such reserves shall be the sum of the reserves for each such year, which shall be sixty per cent of the earned premiums on liability policies written during such year less all loss and loss expense payments made under such policies written in such year. In any event such reserves for each of such three years shall be not less than the aggregate of the estimated unpaid losses and loss expense for claims incurred under liability policies written in the corresponding year computed on an individual case basis.

4. The reserves for outstanding losses and loss expenses under policies of workmen's compensation insurance, except as provided in subsections seven and eight, shall be computed as follows:

(a) For all such compensation policies written more than three years prior to the date of determination, such reserves shall be the present values, at three and one-half per cent interest per annum, of the determined and estimated future loss and loss expense payments under such policies computed on an individual case basis.

(b) For all such compensation policies written during the three years immediately preceding the date of determination, such reserve shall be the sum of the reserves for each such year, which shall be sixty-five per cent of the earned premiums on such compensation policies written during such year less all loss and loss expense payments made under such policies written in such year. In any event such reserves for each of such three years shall be not less than the present values at three

and one-half per cent interest per annum, of the determined and estimated unpaid losses and loss expenses in connection with claims incurred under compensation policies written in the corresponding year computed on an individual basis.

5. The earned premiums referred to in this section shall be computed as follows: Determine the gross premiums charged on all such policies written or assumed, including all determined excess and additional premiums thereon; then deduct return premiums thereon other than premiums returned to policyholders as dividends, and deduct premiums for reinsurance ceded thereon to assuming insurers, and from such net premiums deduct the unearned premiums on such policies in force. The policy year basis as used in this section means the year in which a policy is written and all premiums, losses and loss expenses relating to policies written in such year shall be credited or charged to such year.

The terms "loss payments" and "loss expense payments" as used in this section shall be determined by including all payments to claimants under such policies, payments for medical and surgical attendance, legal expenses, salaries and expenses of investigators, adjusters and field men, apportionable salaries and expenses of the home office and branch offices and all other payments made by such insurer on account of claims under such policies, whether such payments shall be allocated to specific claims or unallocated. Loss and loss expense payments shall be reduced by the amount of reinsurance recovered therefor from any assuming insurer.

6. All unallocated payments of liability loss expenses on policies referred to in subsection three, made in a given calendar year subsequent to the first four years in which an insurer has been issuing liability policies shall be distributed by policy years as follows: Thirty-five per cent shall be charged to that year, forty per cent to the preceding year, ten per cent to the second year preceding, ten per cent to the third year preceding and five per cent to the fourth year preceding. Such payments made in each of the first four calendar years in which an insurer issued liability policies shall be distributed by policy years as follows: In the first calendar year one hundred per cent shall be charged to that year, in the second calendar year fifty per cent to that year and fifty per cent to the preceding year, in the third calendar year forty per cent to that year and forty per cent to the preceding year and twenty per cent to the second year preceding, and in the fourth calendar year thirty-five per cent to that year and forty per cent to the preceding year and fifteen per cent to the second year preceding and ten per cent to the third year preceding. A schedule showing such distribution shall be included in the annual statement.

All unallocated payments of compensation loss expenses on policies referred to in subsection four, made in a given calendar year subsequent to the first three years in which an insurer has been issuing compensation policies shall be distributed by policy years as follows: Forty per cent shall be charged to that year, forty-five per cent to the preceding year, ten per cent to the second year preceding and five per cent to the third year preceding. Such payments made in each of the first three calendar years in which an insurer issues compensation policies shall be distributed by policy years as follows: In the first calendar year one hundred per cent shall be charged to that year, in the second calendar year fifty per cent to that year and fifty per cent to the preceding year, in the third calendar year forty-five per cent to that year, and forty-five per cent to the preceding year and ten per cent to the second year preceding. A schedule showing such distribution shall be included in the annual statement.

7. Whenever in the judgment of the commissioner the loss and loss expense reserves of any casualty or surety company doing business in this state calculated in accordance with the foregoing provisions are inadequate, he may, in his discretion, modify the formulas hereinbefore set forth or prescribe any other basis which will produce adequate reserves. Each insurer that writes liability or compensation policies shall include in the annual statement required by law a schedule of its experience thereunder in such form as the commissioner may prescribe.

8. For the purpose of determining loss reserves every casualty insurance and every surety company doing business in this state shall keep a complete and itemized record showing all losses and claims on which it has received notice, including all notices received by it of the occurrence of any event which may result in a loss. (1945, c. 377.)

§ 58-39. Revocation, suspension and refusal to renew license.—The license of any insurer, including fraternal orders and societies, may in the discretion of the commissioner be suspended or revoked or its renewal refused, (1) whenever it fails or refuses to comply with any law, order or regulation applicable to it; (2) whenever its condition is unsound, or its assets above its liabilities, exclusive of capital, are less than the amount of its capital or required minimum surplus; (3) whenever it has published or made to the department or to the public any false statement or report; (4) whenever it refuses to submit to any examination authorized by law; (5) whenever it is found to make a practice of unduly engaging in litigation, or delaying the investigation of claims or the adjustment or payment of valid claims.

Any such suspension, revocation or refusal to renew a license may also be made applicable to the license of an agent who is a party to such default or improper practice. (Rev., ss. 4703, 4705; 1899, c. 54, ss. 66, 75, 112; 1901, c. 391, s. 5; 1947, c. 721; C. S. 6297.)

Editor's Note.—The 1947 amendment rewrote this section.

§ 58-39.1. Limitation of risk.—Except as otherwise provided in this chapter, no insurer doing business in this state shall expose itself to any loss on any one risk in an amount exceeding ten per cent of its surplus to policyholders. Any risk or portion of any risk which shall have been reinsured shall be deducted in determining the limitation of risk prescribed in this section. This section shall not apply to life insurance or to the insurance of marine risks, or marine protection and indemnity risks, or workmen's compensation or employer's liability risks, or to certificates of title or guaranties of title or policies of title insurance. For the purpose of determining the lim-

itation of risk under any provision of this chapter, "surplus to policyholders" shall (a) be deemed to include any voluntary reserves, or any part thereof, which are not required by or pursuant to law, and (b) be determined from the last sworn statement of such insurer on file with the commissioner pursuant to law, or by the last report on examination filed by the commissioner, whichever is more recent at the time of assumption of such risk. In applying the limitation of risk under any provision of this chapter to alien insurers, such provision shall be deemed to refer to the exposure to risk and to the surplus to policyholders of the United States branch of such alien insurer. (1945, c. 377.)

§ 58-39.2. Limitation of liability assumed.—No company transacting fidelity or surety business in this state shall expose itself to any loss on any one fidelity or surety risk or hazard in an amount exceeding ten per centum of its policyholders' surplus, unless it shall be protected in excess of that amount by

(a) Reinsurance in such form as to enable the obligee or beneficiary to maintain an action thereon against the company reinsured jointly with such reinsurer and, upon recovering judgment against such reinsured, to have recovery against such reinsurer for payment to the extent in which it may be liable under such reinsurance and in discharge thereof; or

(b) The co-suretyship of such a company similarly authorized; or

(c) By deposit with it in pledge or conveyance to it in trust for its protection of property; or

(d) By conveyance or mortgage for its protection; or

(e) In case a suretyship obligation was made on behalf or on account of a fiduciary holding property in a trust capacity, by deposit or other disposition of a portion of the property so held in trust that no future sale, mortgage, pledge or other disposition can be made thereof without the consent of such company; except by decree or order of a court of competent jurisdiction;

Provided: (1) That such company may execute what are known as transportation or warehousing bonds for United States Internal Revenue taxes to an amount equal to fifty per centum of its policyholders' surplus; (2) that, when the penalty of the suretyship obligation exceeds the amount of a judgment described therein as appealed from and thereby secured, or exceeds the amount of the subject matter in controversy or of the estate in the hands of the fiduciary for the performance of whose duties it is conditioned, the bond may be executed if the actual amount of the judgment or the subject matter in controversy or estate not subject to the supervision or control of the surety is not in excess of such limitation; and (3) that, when the penalty of the suretyship obligation executed for the performance of a contract exceeds the contract price, the latter shall be taken as the basis for estimating the limit of risk within the meaning of this section.

No such company shall, anything to the contrary in this section notwithstanding, execute suretyship obligations guaranteeing the deposits of any single financial institution in an aggregate amount in excess of ten per centum of the policyholders' surplus of such surety, unless it shall be protected in excess of that amount by credits in accordance with sub-divisions (a), (b), (c) or (d) of this section: Provided, nothing in this section shall be construed to make invalid any contract entered into by such company with another person, firm, corporation or municipal corporation, notwithstanding any provisions of this section. (1911, c. 28; 1931, c. 285; 1945, c. 377; C. S. 6382.)

The 1945 amendment rewrote former § 58-119 and transferred it to this section.

§ 58-39.3. Reinsurance, when permitted; effect on reserves.—1. Every insurer authorized to do an insurance business in this state, hereinafter called the "ceding insurer" may, subject to the limitations of this chapter, reinsure its risks and policy liabilities in any other solvent insurer, hereinafter called the "assuming insurer", with the effects herein prescribed; but no prohibition or limitation herein contained shall invalidate any such contract of reinsurance as between the parties thereto. The commissioner shall have authority to make investigations and call for information relating to all contracts of reinsurance and when in his judgment such reinsurance contracts are not satisfactory he may disallow credit therefor as an admitted asset or as a deduction from loss and unearned premium reserve.

2. For the purpose of determining the financial condition of a ceding insurer, it shall, in addition to any credit allowed against its loss reserves, receive credit for such reinsurance calculated in the following manner:

(a) In the case of reinsurance of the whole or any part of any risk other than as specified in paragraph (b) following, the ceding insurer shall receive credit for such reinsurance by way of deduction from its unearned premium liability calculated in accordance with the provisions of section 58-35.

(b) In the case of reinsurance of the whole or any part of any life insurance or annuity or noncancellable disability risk, the ceding insurer shall receive credit, by way of deduction from its reserve liability, in an amount not exceeding the amount of the reserve on the reinsured portion of such risk which the ceding insurer would have maintained if such portion had not been reinsured.

Nothing contained in this section shall be deemed to permit the ceding insurer to receive through the cession of the whole or any part of any risk or risks any advantage whereby its unearned premium reserve, or the net amount of its valuation reserves, as the case may be, is reduced below the required amount thereof by the provisions of this chapter.

3. For the purpose of determining the financial condition of any assuming insurer, such insurer shall be charged with an amount in its unearned premium liability equal to the amount of the deduction specified in paragraph (a) of subsection two, and in its valuation reserve liability with an amount at least equal to the amount which it would be required to maintain in accordance with the provisions of this chapter if it were the direct insurer of such assumed risks on the basis specified in the reinsurance agreement.

4. The commissioner may revoke or suspend the license of any company violating the provisions of this section. (1945, c. 377.)

§ 58-39.4. Definitions.—1. An "insurance agent" is hereby defined to be an individual designated in writing by any insurance company lawfully licensed to do business in this state, to act as its agent, with authority to solicit, negotiate and effect contracts of insurance in its behalf, to collect the premiums thereon, or to do any of such acts.

2. An "insurance broker" is hereby defined to be an individual who being a licensed agent, procures insurance through a duly authorized agent of an insurer for which the broker is not authorized to act as agent.

3. A "general agent" is hereby defined to be an individual designated in writing by an insurance company lawfully licensed to do business in this state to act for it as agent or manager and with additional authority to appoint, designate or supervise local agents within a specified territory.

4. A "special agent" is hereby defined to be an individual other than an officer, manager, or general agent of the insurer, employed by an insurer or general agent to work with and assist agents in soliciting, negotiating, and effectuating insurance in such insurer or in the insurers represented by the general agent.

5. An "insurance adjuster" is hereby defined to be any person who for compensation, fee or commission as an employee of an insurance company, so designated by such company on forms furnished by the commissioner, investigates or reports to his principal relative to claims arising under insurance contracts other than life, annuities, health or accident on behalf solely of the insurer.

6. An "independent adjuster" is hereby defined to be any person who for compensation, fee or commission as an independent contractor, or as an employee of an independent contractor, investigates or reports to an insurer relative to claims arising under contracts other than life, annuities, health or accident on behalf solely either of the insurer or the insured.

7. An attorney at law who adjusts insurance losses from time to time incidental to the practice of his profession, an adjuster of marine losses, or a special agent who adjusts for companies for which he is licensed as agent is not deemed to be an "adjuster" for the purposes of this chapter. A person who investigates and reports on claims arising under the terms of a hail insurance policy shall be deemed to be an employee of an insurance company for the purposes of this section. (1947, c. 922; 1949, c. 958, s. 1.)

Editor's Note. — The 1949 amendment struck out former subsection 5 and inserted in lieu thereof subsections 5, 6 and 7.

For changes made by the 1947 act in the laws relating to insurance agents, brokers and adjusters, see 25 N. C. Law Rev. 441.

§ 58-39.5. Independent insurance adjuster to obtain license.—Every independent insurance adjuster shall obtain annually from the commissioner a license under the seal of his office showing that he is authorized to act as an independent adjuster for companies licensed to do business in this state. Every such independent adjuster shall on demand exhibit his license to any representative of the insurance department or to any person interested in a loss under adjustment. (1949, c. 958, s. 1.)

Editor's Note. — For act relating to licenses of insurance adjusters for the current year and to chapter 958 of the Session Laws of 1949, see Session Laws 1949, c. 1244.

§ 58-39.6. Companies to file authorization for independent adjusters.—Every insurance company licensed to do business in this state who uses for adjustment purposes the services of an independent adjuster shall be required to file in the office of the commissioner a statement of authorization containing the names of those independent adjusters who are authorized, on its behalf, to investigate and report on claims arising under insurance contracts, other than life, annuities, health or accident, issued by such companies. No independent adjuster shall make any investigation, report or settlement of any claim on behalf of any company which has not filed in the office of the commissioner a written statement authorizing the licensee to act on its behalf as provided herein. (1949, c. 958, s. 1.)

§ 58-40.1. Insurance brokers must procure license.—Every insurance broker shall be required to obtain annually from the commissioner a license under the seal of his office, showing that he is authorized to procure insurance through duly authorized agents of insurers for which he is not authorized to act as agent. Such license shall be issued to cover only those kinds of insurance authorized by his agent's license. Every such broker shall, on demand, exhibit his license to any representative of the insurance department or to any person from whom he shall solicit insurance. (1947, c. 922.)

§ 58-40.2. Bond required of brokers.—1. Every applicant for a resident broker's license or for the renewal thereof shall file with the application and shall thereafter maintain in force while so licensed a bond in favor of the State of North Carolina for the use of aggrieved parties, executed by an authorized corporate surety approved by the commissioner, in the amount of five thousand dollars. The bond may be continuous in form, and total aggregate liability on the bond may be limited to the payment of five thousand dollars. The bond shall be conditioned on the accounting by the broker to any person requesting the broker to obtain insurance, for moneys or premiums collected in connection therewith.

2. Any such bond shall remain in force until the surety is released from liability by the commissioner, or until the bond is canceled by the surety. Without prejudice to any liability accrued prior to such cancellation, the surety may cancel the bond upon thirty days' advance notice in writing filed with the commissioner. (1947, c. 922.)

§ 58-40.3. Broker's authority and commissions.—1. A broker, as such, is not an agent or other representative of an insurer, and does not have power, by his own act, to bind an insurer for which he is not agent upon any risk or with reference to any insurance contract.

2. An insurer or agent shall have the right to pay to a broker licensed under this chapter, and such broker shall have the right to receive from the insurer or agent, the customary commissions upon insurance placed in the insurer by the broker. (1947, c. 922.)

§ 58-41. Agent's and adjuster's qualifications.—Before a license is issued to an insurance agent, general agent, independent adjuster or adjuster in this state, the agent, general agent, independent

adjuster or adjuster shall apply for license on forms to be prescribed by the commissioner; in all cases where application is made for the license mentioned herein except those licenses of independent adjusters, the company for which the agent, general agent, or adjuster desires to act shall also apply for the license on forms to be prescribed by the commissioner; and before he issues a license to such agent, general agent, independent adjuster or adjuster, the commissioner shall satisfy himself that such license, if issued. shall serve the public interest and that the person applying for license as an agent, general agent, independent adjuster, or adjuster:

(a) Be twenty-one years of age or over;

(b) Be a bona fide resident of and actually reside in this state, except as provided in §§ 58-43 and 58-51.2;

(c) Successfully pass an examination as required under § 58-41.1;

(d) Be a trustworthy person;

(e) Has not wilfully violated any of the insurance laws of this state;

(f) Has had special education, training or experience of sufficient duration and extent reasonably to satisfy the commissioner that he possess the competence necessary to fulfill the responsibilities of an agent, general agent, independent adjuster or adjuster.

No license may be issued to any agent whose premium writings represented by the premiums on contracts of insurance signed, countersigned, issued or sold by him for the general public during the preceding year, shall not exceed those on insurance signed, countersigned, issued or sold by him covering his own property or life and the property and lives of members of his immediate family, his employer and his employees; but this limitation shall not be deemed to apply to agents originally licensed and duly qualified prior to the ratification of this law. (1913, c. 79, s. 1; 1915, 109, ss. 6, 7, c. 166, s. 7; 1931, c. 185; 1945, c. 458; 1947, c. 922; 1949, c. 958, s. 1; C. S. 6299.)

Editor's Note.—
The 1945 amendment added the second paragraph.
The 1947 amendment rewrote the rest of the section.
The 1949 amendment made the first paragraph apply to "independent adjusters," and inserted "independent adjuster" in subsection (f).

§ 58-41.1. Examinations for license.—1. Each applicant for license as agent, general agent, independent adjuster or adjuster shall, prior to the issuance of any such license, personally take and pass to the satisfaction of the commissioner an examination in writing given by the commissioner as a test of his qualifications and competence; but this requirement shall not apply to:

(a) Applicants for license under section 58-41.2 and as agents for companies or associations specified in section 58-131.9;

(b) Applicants who have, within the three year period next preceding the date of application, not including time spent in military service of the United States during war, been licensed in this state in the same capacity and to engage in the same kinds of insurance for which they were previously licensed;

(c) Applicants for an agent's, general agent's, independent adjuster's or adjuster's license covering the same kinds of insurance as authorized by the license then held by them except as provided in paragraph 2 of this section:

(d) Applicants for license to write ocean marine insurance whenever the commissioner deems the applicant to be qualified by past experience to deal in such insurance.

2. The commissioner may require any licensed agent, general agent, independent adjuster or adjuster to taker and successfully pass an examination in writing, testing his competence and qualifications as a condition to the continuance or renewal of his license, if the licensee has been guilty of any violation of any provision of this chapter. If a person fails to pass such an examination, the commissioner shall revoke all licenses issued in his name and no license shall be issued until such person has successfully passed an examination as provided in this chapter.

3. Each examination shall be as the commissioner prescribes and shall be of sufficient scope to test the applicant's knowledge of the terms and provisions of the policies or contracts of insurance he proposes to effect or types of claims or losses he proposes to adjust, and of the duties and responsibilities of and the laws of this state applicable to such a license.

4. The answers of the applicant to any such examination shall be written by the applicant under the commissioner's supervision. The commissioner shall give examinations at such times and places within this state as he deems necessary reasonably to serve the convenience of both the commissioner and applicants. The commissioner shall require a waiting period of at least ninety days' duration before giving a new examination to an applicant who has failed to pass a previous similar examination.

5. The commissioner shall collect in advance the examination fee provided in section 105-228.7. (1947, c. 922; 1949, c. 958, s. 1.)

Editor's Note.—The 1949 amendment inserted references to "independent adjuster" in the first paragraph and paragraph (c) of subsection 1. It also made the same insertion in subsection 2.

§ 58-41.2. Limited license.—1. The commissioner may issue limited licenses as travel insurance agents to employees of common carriers of persons, or to individuals or employees of persons engaged in selling transportation on such common carriers.

2. Travel insurance agents are restricted to the sale of insurance to individuals entitled to transportation on a common carrier, as follows:

(a) Transportation ticket policies of accident insurance;

(b) Baggage insurance on the personal effects of such individuals while in transit. (1947, c. 922.)

§ 58-41.3. Temporary license.—1. The commissioner may issue an agent's, general agent's or broker's temporary license in the following circumstances:

(a) To applicants for licensing as agent of a life insurer pending the passing of the examination provided for in section 58-41.1;

(b) To the personal representative of a deceased licensed agent, general agent or broker, or to his surviving spouse or to some other proper person in case the personal representative or surviving spouse does not apply or is not qualified therefor;

(c) To an employee, legal guardian or spouse

of a licensed agent, general agent or broker becoming disabled because of sickness, insanity or injury, or to some other proper person.

2. An individual to be eligible for any such temporary license must be qualified as for a permanent license except as to experience, training or the taking of the examination.

3. The fee paid to the commissioner for issuance of a temporary license as specified in section 105-228.7 shall be credited toward the fee required for a permanent license which is issued to replace the temporary license prior to the expiration of such temporary license.

4. No such temporary license shall be effective for more than ninety days in any twelve month period and shall automatically terminate upon such licensee's failing the examination required in section 58-41.1. The commissioner may refuse so to license again any person who has previously held a temporary license.

5. An individual requesting a temporary license on account of death or disability of an agent, general agent or broker shall not be so licensed for any insurer as to which such agent, general agent or broker was not licensed at the time of death or commencement of disability. (1947, c. 922.)

§ 58-42. Revocation of license.—When the commissioner is satisfied that any insurance agent, general agent, special agent, independent adjuster, adjuster, broker or nonresident broker licensed by this state has wilfully violated any of the insurance laws of this state, or has wilfully over-insured property or has wilfully misrepresented any policy of insurance, or has dealt unjustly with or wilfully deceived any person in regard to any insurance policies, or has exercised coercion in obtaining an application for or in selling insurance, or, on demand, has failed or refused to pay over or deliver to the company which he represents, or has represented, any money or property in his hands belonging to the company, or has become in any way disqualified according to any of the provisions necessary for obtaining or holding such license as set out in this chapter, or has obtained or attempted to obtain any license through wilful misrepresentation or fraud, the commissioner may immediately suspend his license or licenses and shall forthwith give to such licensee ten days' notice of the charge or charges and of a hearing thereon, and if the commissioner finds there has been any of the violations hereinbefore set forth, he shall specifically set out such finding and shall revoke the license of such agent, general agent, special agent, independent adjuster, adjuster, broker or nonresident broker for all the companies which he represents in this state. Such agent, general agent, special agent, independent adjuster, adjuster, broker, or nonresident broker shall have the right to have such revocation reviewed as provided in section 58-9.3. For the purposes of investigation under this section the commissioner shall have all the power conferred upon him by section 58-44.4. (1913, c. 79, §§ 2, 3; 1915, c. 166, § 7; 1929, c. 301, § 1; 1943, c. 434; 1945, c. 458; 1947, c. 922; 1949, c. 958, s. 1; C. S. 6300.)

Editor's Note.—
The 1945 amendment substituted, in the second sentence, the words "as provided in § 58-9.3" for the words "by any judge of the superior court of Wake county upon appeal."

The 1947 amendment, effective Jan. 1, 1948, rewrote the section.

The 1949 amendment inserted the words "independent adjuster" at three places in this section.

§ 58-43. Nonresident agents forbidden; exception.—No nonresident of the state shall be licensed as an agent to do business in the state, except as a special agent or organizer, and except as a representative of a life insurance company, and then only when he reports his business for record as North Carolina business to some general or district agent of his company in the state, or having territory within the state. No such nonresident shall be licensed to represent a life insurance company in this state unless he is licensed to represent the same company in his home state and meets the licensing requirements of this chapter. (Rev., s. 4707; 1899, c. 54, s. 108; 1903, c. 438, s. 11; 1945, c. 458; 1947, c. 922; C. S. 6301.)

Editor's Note.—The 1945 amendment added the second sentence and inserted in the first sentence the words "and except as a representative of a life insurance company."

The 1947 amendment inserted the words "as an agent" in line two.

§ 58-44. Resident agents required.—All business done in this state by insurance companies doing the business of insurance as defined in subsections 3 to 22 inclusive of section 58-72 shall be transacted by their regularly authorized agents residing in this state, or through applications of such agents; and all policies so issued must be countersigned by such agents. It shall be unlawful for any salaried officer, manager or other representative of any such company to transact for his company any of the business of a licensed agent unless he himself shall be a bona fide resident licensed agent. (Rev., s. 4810; 1899, c. 54, ss. 107, 108; 1903, c. 438, s. 11; 1911, c. 196, s. 5; 1913, c. 140, s. 3; 1921, c. 136, s. 3; 1925, c. 70, s. 1; 1945, c. 458; C. S. 6302.)

Editor's Note.—
The 1945 amendment repealed the former section and inserted in lieu thereof the present section and the three following sections, which were rewritten from former sections 58-170 and 58-171.

§ 58-44.1. Agents not to pay commissions to nonresidents or unlicensed persons.—No licensed agent of any insurer shall pay directly or indirectly, any commission or brokerage or other valuable consideration on account of any policy of insurance on any risk in this state to any person not licensed in this state to act as agent for the same kind of insurance, provided however that with respect to the kinds of insurance as defined in subsections 3 to 22 inclusive of section 58-72 an agent may pay to a licensed nonresident broker not exceeding fifty per centum of the regular commissions allowed upon the issuance of such policies. (Rev., s. 4766; 1903, c. 488, s. 2; 1905, c. 170, s. 2; 1923, c. 4, s. 70; 1925, c. 70, s. 6; 1945, c. 458; 1947, c. 922; C. S. 6430.)

Editor's Note.—The 1945 amendment rewrote § 58-170 as this and the two succeeding sections.

The 1947 amendment, effective Jan. 1, 1948, rewrote this section.

§ 58-44.2. Licensing non-resident brokers. — The commissioner may license a non-resident as an insurance broker to represent companies doing the business of insurance as defined in subsections 3 to 22 inclusive of section 58-72, upon application made in the form prescribed by the commissioner, and upon such applicant's filing an affidavit set-

ting forth that he will not during the period of the license place, directly or indirectly, any insurance on any risk located in this state except through licensed agents of companies licensed to do business in this state, that he is a bona fide broker, and proposes to hold himself out as such. The fee for such license shall be as fixed in the Revenue Act. For any violation of the terms on which such license is issued the commissioner may revoke the same. (Rev., s. 4766; 1903, c. 488, s. 2; 1905, c. 170, s. 2; 1923, c. 4, s. 70; 1925, c. 70, s. 6; 1945, c. 458; C. S. 6430.)

§ 58-44.3. Discrimination forbidden.—No company doing the business of insurance as defined in subsections 3 to 22 inclusive of section 58-72, nor its agents, shall make any discrimination in favor of any person, and all provisions of this chapter prohibiting discrimination by companies doing the business of insurance as defined in subsections 1 and 2 of section 58-72, shall equally apply to the companies referred to herein and to their agents. (Rev., s. 4766; 1903, c. 488, s. 2; 1905, c. 170, s. 2; 1923, c. 4, s. 70; 1925, c. 70, s. 6; 1945, c. 458; C. S. 6430.)

§ 58-44.4. Revocation of license for violation; power of commissioner.—When the commissioner has information of a violation of any of the provisions of sections 58-169, 58-44, 58-44.1, 58-44.2, and 58-44.3, he shall immediately investigate or cause to be investigated such violation, and if any such insurance company has violated any of said provisions he may immediately revoke its license for not less than three nor more than six months for a first offense, and for each offense thereafter for not less than one year. If a licensed insurance agent violates or causes to be violated any of the provisions of said sections, he may for the first offense have his license revoked for all companies for which he has been licensed for not less than three nor more than six months, and for the second offense he shall have his license revoked for all companies for which he is licensed, and he shall not thereafter be licensed for any company for one year from the date of the revocation. For the purpose of enforcing the provisions of said sections the commissioner is authorized and empowered to examine persons, administer oaths, and require production of papers and records. A failure or refusal on the part of any such insurance company, licensed to do business in this state, or representative thereof, to appear before the commissioner when requested to do so, or to produce records and papers, or answer under oath, subjects such company, or representative, to the penalties of this section. (Rev., s. 4767; 1903, c. 488, ss. 3, 4; 1945, c. 458; C. S. 6431.)

Editor's Note.—The 1945 amendment rewrote § 58-171 as this section.

§ 58-45. Agents personally liable, when.—Any agent representing an insurer is personally liable on all contracts of insurance unlawfully made by or through him, directly or indirectly, for any company not authorized to do business in the state. A person or citizen of the state who fills up or signs any open policy, certificate, blank or coupon of, or furnished by, an unlicensed company, agent, or broker, the effect of which is to bind any insurance in an unlicensed company on property in this state, is the agent of such company, and personally liable for all licenses and taxes due on account of such transaction. (Rev., s. 4813; 1899, c. 54, s. 70; 1903, c. 438, s. 7; 1947, c. 922; C. S. 6303.)

Editor's Note.—The 1947 amendment substituted at the beginning of the section the words "Any agent representing an insurer" for the words "An insurance agent."

§ 58-46. Payment of premium to agent valid; obtaining by fraud a crime.—Any agent or broker who acts for a person other than himself negotiating a contract of insurance is, for the purpose of receiving the premium therefor, the company's agent, whatever conditions or stipulations may be contained in the policy or contract. Such agent or broker knowingly procuring by fraudulent representations payment, or the obligation for the payment, of a premium of insurance, shall be punished by a fine of not less than one hundred nor more than five hundred dollars, or be imprisoned for not more than one year. (Rev., ss. 3486, 4814; 1899, c. 54, s. 69; 1947, c. 922; C. S. 6304.)

Editor's Note.—The 1947 amendment substituted "Any" for "An insurance" in line one.

What Constitutes Payment to Company.—Payment of the initial premium on a policy of life insurance to one who is a soliciting agent or broker of the company to solicit the insurance and deliver the policy, constitutes payment to the company by virtue of this section. Creech v. Sun Life Assur. Co., 224 N. C. 144, 29 S. E. (2d) 348.

§ 58-47. Representing unlicensed company prohibited; penalty.—If any person shall unlawfully solicit, negotiate for, collect or transmit a premium for a contract of insurance or act in any way in the negotiation or transaction of any unlawful insurance with an insurance company not licensed to do an insurance business in North Carolina, he shall be guilty of a misdemeanor and upon conviction shall pay a fine of not less than two hundred dollars nor more than five hundred dollars, or be imprisoned for not less than one nor more than two years, or both, at the discretion of the court. (Rev., s. 3484; 1899, c. 54, s. 94; 1907, c. 1000, s. 8; 1945, c. 458; C. S. 6305.)

Editor's Note.—The 1945 amendment increased the minimum fine from one hundred to two hundred dollars, added the provision as to imprisonment, and rewrote the section generally.

§ 58-48. Agent failing to exhibit license.—If any agent representing an insurer or any broker shall, on demand of any person from whom he shall solicit insurance, fail to exhibit a certificate from the commissioner of insurance bearing the seal of his office, and dated within one year from such demand, he shall be fined five dollars or imprisoned ten days for each offense. (Rev., s. 3485; 1899, c. 54, s. 81; 1947, c. 922; C. S. 6306.)

Editor's Note.—The 1947 amendment struck out in line two the words "of any insurance company," and inserted in lieu thereof the words "representing an insurer or any broker".

§ 58-49. Agents making false statements.—If any agent, examining physician, or other person shall knowingly or willfully make any false or fraudulent statement or representation in or with reference to any application for insurance or publication with reference to any or shall make any such statement for the purpose of obtaining any fee, commission, money or benefit from any company engaged in the business of insurance in this state, he shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine

of not less than one hundred ($100.00) dollars nor more than five hundred ($500.00) dollars, or imprisonment in the county jail for not less than thirty days nor more than one year, or by both fine and imprisonment, at the discretion of the court. (Rev., s. 3487; 1899, c. 54, s. 60; 1945, c. 458; 1947, c. 922; C. S. 6307.)

Editor's Note.—The 1945 amendment substituted "application" for "publication" in line five and inserted the reference to publication.

The 1947 amendment struck out "solicitor" formerly appearing after the word "any" in line two.

§ 58-50. Agents signing certain blank policies.—No agent shall sign any blank contract or policy of insurance, and any agent guilty of violating this section shall, upon conviction, be fined for each offense not less than one hundred ($100.00) dollars nor more than two hundred ($200.00) dollars; provided, however, that transportation ticket policies of accident insurance and baggage insurance policies may be countersigned in blank for issuance only through coin operated machines, subject to regulations prescribed by the commissioner. (Rev., s. 3488; 1899, c. 54, ss. 108, 109; 1911, c. 196, s. 6; 1945, c. 458; 1947, c. 922; C. S. 6308.)

Editor's Note.—The 1945 amendment rewrote this section. The 1947 amendment added the proviso.

§ 58-51. Adjuster acting for unauthorized company.—If any person shall act as independent adjuster or adjuster on a contract made otherwise than as authorized by the laws of this state, or by any insurance company or other person not regularly licensed to do business in the state, or shall adjust or aid in the adjustment, either directly or indirectly, of a claim arising under a contract of insurance not authorized by the laws of the state, he shall be deemed guilty of a misdemeanor and shall, upon conviction, be fined not less than two hundred dollars nor more than five hundred dollars, or imprisoned not less than six months nor more than two years, or both, in the discretion of the court. (Rev., s. 3482; 1899, c. 54, s. 114; 1945, c. 458; 1949, c. 958, s. 1; C. S. 6309.)

Editor's Note.—The 1945 amendment substituted the words "claim arising under a contract of insurance" for the words "loss by fire on property located in this state, incurred on a contract."

The 1949 amendment made this section applicable to independent adjusters.

§ 58-51.1. Agent may adjust.—On behalf and on request of an insurer for which he is licensed, any agent may from time to time act as an adjuster and investigate and report upon claims without being required to be licensed as an adjuster. (1947, c. 922.)

§ 58-51.2. Nonresident adjusters.—The commissioner may license a nonresident as an insurance adjuster upon his compliance with all the requirements of this chapter applicable to resident adjusters. No license shall be required of an adjuster licensed as such in another state for the adjustment in this state of a single loss, or of losses arising out of a catastrophe common to all such losses. (1947, c. 922.)

§ 58-51.3. Companies and agents to transact business through licensed agents.—No insurance company, nor any agent of any insurance company shall on behalf of such company or agent knowingly permit any person not licensed as an insurance agent as provided by law to solicit insurance, negotiate for, collect or transmit a premium for a contract of insurance or to act in any way in the negotiation for any contract or policy of insurance; provided, no license shall be required of a person making and transmitting deductions for premiums under pay roll deduction plans for life, accident and/or health insurance. (1949, c. 1120.)

Editor's Note.—For brief comment on this section, see 27 N. C. Law Rev. 461.

§ 58-52. Agent acting without a license or violating insurance law.—If any person shall assume to act either as principal, agent, broker, independent adjuster or adjuster without license as is required by law, or pretending to be a principal, agent, broker, independent adjuster or adjuster, shall solicit, examine, or inspect any risk, or shall examine into, adjust, or aid in adjusting any loss, or shall receive, collect, or transmit any premium of insurance, or shall do any other act in the soliciting, making or executing any contract of insurance of any kind otherwise than the law permits, or as principal or agent shall violate any provision of law contained in this chapter, the punishment for which is not elsewhere provided for, he shall be deemed guilty of a misdemeanor, and on conviction shall pay a fine of not less than one hundred ($100.00) dollars nor more than five hundred ($500.00) dollars, or be imprisoned for not less than one nor more than two years, or both, at the discretion of the court. (Rev., s. 3490; 1899, c. 54, s. 115; 1945, c. 458; 1949, c. 958, s. 1; C. S. 6310.)

Editor's Note.—The 1945 amendment reduced the minimum fine from two hundred to one hundred dollars and made other changes.

The 1949 amendment made this section applicable to independent adjusters.

§ 58-52.1. Process against nonresident licensees.—1. Each licensed nonresident agent, adjuster or broker shall by the act of acquiring such license thereby be deemed to appoint the commissioner as his attorney to receive service of legal process issued against the agent, adjuster or broker in this state upon causes of action arising within this state.

2. The appointment shall be irrevocable for as long as there could be any cause of action against the agent, adjuster or broker arising out of his insurance transactions in this state.

3. Duplicate copies of such legal process against such agent, adjuster or broker shall be served upon the commissioner either by a person competent to serve a summons, or through registered mail. At the time of such service the plaintiff shall pay to the commissioner a fee of one dollar, taxable as costs in the action to defray the expense of such service.

4. Upon receiving such service, the commissioner shall forthwith send one of the copies of the process, by registered mail with return receipt requested, to the defendant agent, adjuster or broker at his last address of record with the commissioner.

5. The commissioner shall keep a record of the day and hour of service upon him of all such legal process. No proceedings shall be had against the defendant agent, adjuster or broker, and such defendant shall not be required to appear, plead or answer until the expiration of forty days after

the date of service upon the commissioner. (1947, c. 922.)

§ 58-53. Informer to receive half of penalty.—The person, if other than the commissioner of insurance or his deputy, upon whose complaint a conviction is had for violation of the law prohibiting insurance in or by companies not authorized to do business in the state, or for soliciting, examining, inspecting any risk, or receiving, collecting, or transmitting any premium, or adjusting or aiding in the adjustment of a loss, under a contract made otherwise than as authorized by the laws of this state, is entitled to one-half of the penalty recovered therefor. (Rev., s. 4831; 1899, c. 54, s. 93; 1945, c. 377; C. S. 6311.)

Editor's Note.—The 1945 amendment struck out 'foreign" formerly appearing before "companies" in line four.

§ 58-53.1. Citizens authorized to procure policies in unlicensed foreign companies.—(1) What Applicant Must Show.—The commissioner, upon the annual payment of a fee of twenty dollars, may issue licenses to citizens of this state, subject to revocation at any time, permitting the person named therein to procure policies of insurance on property in this state in foreign or alien insurance companies not authorized to transact business in the state. Before the person named in such a license may procure any insurance in such companies or on any property in this state, he must execute and file with the commissioner an affidavit that he is unable to procure in companies admitted to do business in the state the amount of insurance necessary to protect such property, and may only procure insurance under such license after he has procured insurance in companies admitted to do business in this state to the full amount which those companies are willing to write on the property. If the person licensed under the provisions of this section procures insurance on property of others in such nonadmitted companies he shall stamp or write upon the filing face and the first page of each policy so issued the words "This company is not licensed to do business in North Carolina."

(2) Account and Report.—Each person so licensed must keep a separate account of the business done under the license, a certified copy of which account he shall forthwith file with the commissioner, showing the exact amount of such insurance placed by any person, firm or corporation, the gross premium charged thereon, the companies in which the same is placed, the date and terms of the policies, and also a report in the same detail of all such policies canceled and the gross return premium thereon.

(3) Bond Filed.—Before receiving such license the applicant therefor shall execute and deliver to the commissioner a bond in the penal sum of one thousand dollars, with such sureties as the commissioner may approve, with a condition that the licensee will faithfully comply with all the requirements of sections 58-53.1, 58-53.2 and 58-53.3, and will file with the commissioner in January of each year, a sworn statement of the gross premiums charged for insurance procured or placed, and the gross returned premiums on such insurance canceled under such license during the year ending on the thirty-first day of December next preceding, and at the time of filing such statement will pay into the treasury of the state a sum equal to five per centum of such gross premiums, less return premiums, so reported, or pay such tax at the time of taking out and delivering such policy or policies. (Rev., ss. 4715, 4769; 1899, c. 54, ss. 68, 95; 1903, c. 438, s. 7, c. 680; 1945, c. 378; C. S. 6425.)

Editor's Note.—The 1945 amendment rewrote former § 58-165 as this section.

§ 58-53.2. Punishment for failure to file affidavit and statements.—If any person licensed to procure insurance in an unauthorized foreign or alien company shall procure, or act in any manner in the procurement or negotiation of, insurance in any unauthorized foreign or alien company, and shall neglect to make and file the affidavit and statements required by the preceding section, he shall forfeit his license and be punished by a fine of not less than one hundred nor more than five hundred dollars, or by imprisonment for not more than one year, or by both. (Rev., ss. 3483, 4769; 1899, c. 54, ss. 68, 95; 1945, c. 378; C. S. 6426.)

Editor's Note.—The 1945 amendment transferred this section from section 58-166 and inserted the words "or alien."

§ 58-53.3. Tax deducted from premium; reports filed.—When any person procures insurance on any property located in this state with an insurance company not licensed to do business in this state, it shall be the duty of such person to deduct from the premium charged on the policy or policies issued for such insurance five per centum of the premium and remit the same to the commissioner of insurance of the state, at the same time reporting to the commissioner of insurance the name of the company or companies issuing the policy or policies, the location of the property insured, and the premium charged. The commissioner of insurance shall pay the said amounts to the treasurer of the state. If such report is not made on or before the thirtieth days of July and January of each year for the business done prior to July first and January first preceding, there shall be added to the amount of taxes thereon the sum of one per centum on the first day of each month thereafter. (1915, c. 109, s. 8; 1945, c. 378; C. S. 6427.)

Editor's Note.—The 1945 amendment struck out the words "or corporation" formerly appearing after the word "person" in lines one and five and substituted in lines one and two the words "procures insurance on" for the words "shall insure." This section formerly appeared as § 58-167.

§ 58-54. Forms to be approved by commissioner of insurance.—It is unlawful for any insurance company doing business in this state to issue, sell, or dispose of any policy, contract, or certificate, or use applications in connection therewith, until the forms of the same have been submitted to and approved by the commissioner of insurance of North Carolina, and copies filed in the insurance department. (1907, c. 879; 1913, c. 139; 1945, c. 377; C. S. 6312.)

Editor's Note.—The 1945 amendment struck out the words "association, order or society" formerly appearing after the word "company" in line two.

Art. 3A. Unfair Trade Practices.

§ 58-54.1. Declaration of purpose.—The purpose of this article is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of

Congress of March 9, 1945 (Public Law 15, 79th Congress), by defining, or providing for the determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined. (1949, c. 1112.)

Editor's Note.—For brief discussion of this article, see 27 N. C. Law Rev. 461.

§ 58-54.2. Definitions.—When used in this article: (a) "Person" shall mean any individual, corporation, association, partnership, reciprocal exchange, inter-insurer, Lloyds insurer, fraternal benefit society, and any other legal entity engaged in the business of insurance, including agents, brokers and adjusters. (b) "Commissioner" shall mean the commissioner of insurance of this state. (1949, c. 1112.)

§ 58-54.3. Unfair methods of competition or unfair and deceptive acts or practices prohibited.—No person shall engage in this state in any trade practice which is defined in this article as or determined pursuant to this article to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance. (1949, c. 1112.)

§ 58-54.4. Unfair methods of competition and unfair or deceptive acts or practices defined.—The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:

(1) Misrepresentations and false advertising of policy contracts.—Making, issuing, circulating, or causing to be made, issued or circulated, any estimate, illustration, circular or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby or the dividends or share of the surplus to be received thereon, or making any false or misleading statement as to the dividends or share or surplus previously paid on similar policies, or making any misleading representation or any misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates, or using any name or title of any policy or class of policies misrepresenting the true nature thereof, or making any misrepresentation to any policyholder insured in any company for the purpose of inducing or tending to induce such policyholder to lapse, forfeit, or surrender his insurance.

(2) False information and advertising generally.—Making, publishing, disseminating, circulating, or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio station, or in any other way, an advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any person in the conduct of his insurance business, which is untrue, deceptive or misleading.

(3) Defamation.—Making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abetting or encouraging the making, publishing, disseminating or circulating of any oral or written statement or any pamphlet, circular, article or literature which is false, or maliciously critical of or derogatory to the financial condition of an insurer, and which is calculated to injure any person engaged in the business of insurance.

(4) Boycott, coercion and intimidation.—Entering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance.

(5) False financial statements.—Filing with any supervisory or other public official, or making, publishing, disseminating, circulating or delivering to any person, or placing before the public, or causing directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public, any false statement of financial condition of an insurer with intent to deceive.

Making any false entry in any book, report or statement of any insurer with intent to deceive any agent or examiner lawfully appointed to examine into its condition or into any of its affairs, or any public official to whom such insurer is required by law to report, or who has authority by law to examine into its condition or into any of its affairs, or, with like intent, wilfully omitting to make a true entry of any material fact pertaining to the business of such insurer in any book, report or statement of such insurer.

(6) Stock operations and insurance company advisory board contracts.—Issuing or delivering or permitting agents, officers, or employees to issue or deliver, agency company stock or other capital stock, or benefit certificates or shares in any common-law corporation, or securities or any special or any insurance company advisory board contracts or other contracts of any kind promising returns and profit as an inducement to insurance.

(7) Unfair discrimination.—(a) Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract. (b) Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees, or rates charged for any policy or contract of accident or health insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever.

(8) Rebates.—(a) Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any contract of life insurance, life annuity or accident and health insurance, or agreement as to such contract other than as plainly expressed in the contract issued thereon, or paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as inducement to such insurance, or annuity, any rebate of premiums payable on the contract, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract; or giving, or selling, or purchasing or offering to give, sell, or purchase

as inducement to such insurance or annuity or in connection therewith, any stocks, bonds, or other securities of any insurance company or other corporation, association, or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the contract. (b) Nothing in clause 7 or paragraph (a) of clause 8 of this section shall be construed as including within the definition of discrimination or rebates any of the following practices: (i) in the case of any contract of life insurance or life annuity, paying bonuses to policyholders or otherwise abating their premiums in whole or in part out of surplus accumulated from nonparticipating insurance, provided, that any such bonuses or abatement of premiums shall be fair and equitable to policyholders and for the best interests of the company and its policyholders; (ii) in the case of life insurance policies issued on the industrial debit plan, making allowance to policyholders who have continuously for a specified period made premium payments directly to an office of the insurer in an amount which fairly represents the saving in collection expense; (iii) readjustment of the rate of premium for a group insurance policy based on the loss or expense experienced thereunder, at the end of the first or any subsequent policy year of insurance thereunder, which may be made retroactive only for such policy year. (c) No insurer or employee thereof, and no broker or agent shall pay, allow, or give, or offer to pay, allow, or give, directly or indirectly, as an inducement to insurance, or after insurance has been effected, any rebate, discount, abatement, credit or reduction of the premium named in a policy of insurance, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement whatever, not specified in the policy of insurance. Nothing herein contained shall be construed as prohibiting the payment of commissions or other compensation to regularly appointed and licensed agents and to brokers duly licensed by this state; nor as prohibiting any participating insurer from distributing to its policyholders dividends, savings or the unused or unabsorbed portion of premiums and premium deposits. (1949, c. 1112.)

§ 58-54.5. Power of commissioner.—The commissioner shall have power to examine and investigate into the affairs of every person engaged in the business of insurance in this state in order to determine whether such person has been or is engaged in any unfair method of competition or in any unfair or deceptive act or practice prohibited by § 58-54.3 of this article. (1949, c. 1112.)

§ 58-54.6. Hearings, witnesses, appearances, production of books and service of process.—(a) Whenever the commissioner shall have reason to believe that any such person has been engaged or is engaging in this state in any unfair method of competition or any unfair or deceptive act or practice defined in § 58-54.4, and that a proceeding by him in respect thereto would be to the interest of the public, he shall issue and serve upon such person a statement of the charges in that respect and a notice of the hearing thereon to be held at the time and place fixed in the notice, which shall not be less than ten days after the date of the service thereof.

(b) At the time and place fixed for such hearing, such person shall have an opportunity to be heard and to show cause why an order should not be made by the commissioner requiring such person to cease and desist from the acts, methods or practices so complained of. Upon good cause shown, the commissioner shall permit any person to intervene, appear and be heard at such hearing by counsel or in person.

(c) Nothing contained in this article shall require the observance at any such hearing of formal rules of pleading or evidence.

(d) The commissioner, upon such hearing, may administer oaths, examine and cross-examine witnesses, receive oral and documentary evidence, and shall have the power to subpoena witnesses, compel their attendance, and require the production of books, papers, records, correspondence, or other documents which he deems relevant to the inquiry. The commissioner, upon such hearing, may, and upon the request of any party shall, cause to be made a stenographic record of all the evidence and all the proceedings had at such hearing. If no stenographic record is made and if a judicial review is sought, the commissioner shall prepare a statement of the evidence and proceeding for use on review. In case of a refusal of any person to comply with any subpoena issued hereunder or to testify with respect to any matter concerning which he may be lawfully interrogated, the superior court of Wake county, on application of the commissioner, may issue an order requiring such person to comply with such subpoena and to testify; and any failure to obey any such order of the court may be punished by the court as a contempt thereof.

(e) Statements of charges, notices, orders, and other processes of the commissioner under this article may be served by anyone duly authorized by the commissioner, either in the manner provided by law for service of process in civil actions, or by registering and mailing a copy thereof to the person affected by such statement, notice, order, or other process at his or its residence or principal office or place of business. The verified return by the person so serving such statement, notice, order, or other process, setting forth the manner of such service, shall be proof of the same, and the return postcard receipt for such statement, notice, order, or other process, registered and mailed as aforesaid, shall be proof of the service of the same. (1949, c. 1112.)

§ 58-54.7. Cease and desist orders and modifications thereof.—(a) If, after such hearing, the commissioner shall determine that the method of competition or the act or practice in question is defined in § 58-54.4 and that the person complained of has engaged in such method of competition, act or practice in violation of this article, he shall reduce his findings to writing and shall issue and cause to be served upon the person charged with the violation an order requiring such person to cease and desist from engaging in such method of competition, act or practice.

(b) Until the expiration of the time allowed under § 58-54.8 (a) of this article for filing a petition for review (by appeal) if no such petition has been duly filed within such time or, if a petition for reveiw has been filed within such time, then until the transcript of the record in the proceeding has been filed in the superior court, as hereinafter

provided, the commissioner may at any time, upon such notice and in such manner as he shall deem proper, modify or set aside in whole or in part any order issued by him under this section.

(c) After the expiration of the time allowed for filing such a petition for review if no such petition has been duly filed within such time, the commissioner may at any time, after notice and opportunity for hearing, reopen and alter, modify or set aside, in whole or in part, any order issued by him under this section, whenever in his opinion conditions of fact or of law have so changed as to require such action or if the public interest shall so require. (1949, c. 1112.)

§ 58-54.8. Judicial review of cease and desist orders.—(a) Any person required by an order of the commissioner under § 58-54.7 to cease and desist from engaging in any unfair method of competition or any unfair or deceptive act or practice defined in § 58-54.4 may obtain a review of such order by filing in the superior court of Wake county, within thirty days from the date of the service of such order, a written petition praying that the order of the commissioner be set aside. A copy of such petition shall be forthwith served upon the commissioner, and thereupon the commissioner forthwith shall certify and file in such court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the commissioner. Upon such filing of the petition and transcript such court shall have jurisdiction of the proceeding and of the question determined therein, shall determine whether the filing of such petition shall operate as a stay of such order of the commissioner, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree modifying, affirming or reversing the order of the commissioner, in whole or in part. The findings of the commissioner as to the facts, if supported by substantial evidence, shall be conclusive.

(b) To the extent that the order of the commissioner is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the commissioner. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commissioner, the court may order such additional evidence to be taken before the commissioner and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commissioner may modify his findings of fact, or make new findings by reason of the additional evidence so taken, and he shall file such modified or new findings which, if supported by substantial evidence shall be conclusive, and his recommendations, if any, for the modification or setting aside of his original order, with the return of such additional evidence.

(c) A cease and desist order issued by the commissioner under § 58-54.7 shall become final:

(1) Upon the expiration of the time allowed for filing a petition for review if no such petition has been duly filed within such time; except that the commissioner may thereafter modify or set aside his order to the extent provided in § 58-54.7 (b); or

(2) Upon the final decision of the court if the court directs that the order of the commissioner be affirmed or the petition for review dismissed.

(d) No order of the commissioner under this article or order of a court to enforce the same shall in any way relieve or absolve any person affected by such order from any liability under any other laws of this state. (1949, c. 1112.)

§ 58-54.9. Procedure as to unfair methods of competition and unfair or deceptive acts or practices which are not defined.—(a) Whenever the commissioner shall have reason to believe that any person engaged in the business of insurance is engaging in this state in any method of competition or in any act or practice in the conduct of such business which is not defined in § 58-54.4, that such method of competition is unfair or that such act or practice is unfair or deceptive and that a proceeding by him in respect thereto would be to the interest of the public, he may issue and serve upon such person a statement of the charges in that respect and a notice of a hearing thereon to be held at a time and place fixed in the notice, which shall not be less than ten days after the date of the service thereof. Each such hearing shall be conducted in the same manner as the hearings provided for in § 58-54.6. The commissioner shall, after such hearing, make a report in writing in which he shall state his findings as to the facts, and he shall serve a copy thereof upon such person.

(b) If such report charges a violation of this article and if such method of competition, act or practice has not been discontinued, the commissioner may, through the attorney general of this state, at any time after ten days after the service of such report cause a petition to be filed in the superior court of this state of the county wherein the person resides or has his principal place of business, to enjoin and restrain such person from engaging in such method, act or practice. The court shall have jurisdiction of the proceeding and shall have power to make and enter appropriate orders in connection therewith and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public pendente lite. To the extent that the order of the commissioner is affirmed, the court shall thereupon issue its order commanding obedience to the terms of such order of the commissioner.

(c) A transcript of the proceedings before the commissioner including all evidence taken and the report and findings shall be filed with such petition. If either party shall apply to the court for leave to adduce additional evidence and shall show, to the satisfaction of the court, that such additional evidence is material and there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commissioner the court may order such additional evidence to be taken before the commissioner and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commissioner may modify his findings of fact or make new findings by reason of the additional evidence so taken, and he shall file such modified or new findings with the return of such additional evidence.

(d) If the court finds that the method of competition complained of is unfair or that the act or practice complained of is unfair or deceptive, that the proceeding by the commissioner with respect thereto is to the interest of the public and that the findings of the commissioner are supported by the weight of the evidence, it shall issue its order enjoining and restraining the continuance of such method of competition, act or practice. (1949, c. 1112.)

§ 58-54.10. Judicial review by intervenor.—If the report of the commissioner does not charge a violation of this article, then any intervenor in the proceedings may within ten days after the service of such report, cause a notice of appeal to be filed in the superior court of Wake county for a review of such report. Upon such review, the court shall have authority to issue appropriate orders and decrees in connection therewith, including, if the court finds that it is to the interest of the public, orders enjoining and restraining the continuance of any method of competition, act or practice which it finds, notwithstanding such report of the commissioner, constitutes a violation of this article. (1949, c. 1112.)

§ 58-54.11. Penalty.—Any person who wilfully violates a cease and desist order of the commissioner under § 58-54.7, after it has become final, and while such order is in effect, shall forfeit and pay to the commissioner for the use of the public schools of the county or counties in which the act or acts complained of occurred a sum to be determined by the commissioner not to exceed $1,000 for each violation, which if not paid may be recovered in a civil action instituted in the name of the commissioner in a court of competent jurisdiction in Wake county. (1949, c. 1112.)

§ 58-54.12. Provisions of article additional to existing law.—The powers vested in the commissioner by this article shall be additional to any other powers to enforce any penalties, fines or forfeitures authorized by law with respect to the methods, acts and practices hereby declared to be unfair or deceptive. (1949, c. 1112.)

§ 58-54.13. Immunity from prosecution.—If any person shall ask to be excused from attending and testifying or from producing any books, papers, records, correspondence or other documents at any hearing on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture, and shall notwithstanding be directed to give such testimony or produce such evidence, he must none the less comply with such direction, but he shall not thereafter be prosecuted or subjected to any penalty of forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence pursuant thereto, and no testimony so given or evidence produced shall be received against him upon any criminal action, investigation or proceeding, provided, however, that no such individual so testifying shall be exempt from prosecution or punishment for any perjury committed by him while so testifying and the testimony or evidence so given or produced shall be admissible against him upon any criminal action, investigation or proceeding concerning such perjury, nor shall he be exempt from the refusal, revocation or suspension of any license, permission or authority conferred, or to be conferred, pursuant to the insurance law of this state. Any such individual may execute, acknowledge and file in the office of the commissioner a statement expressly waiving such immunity or privilege in respect to any transaction, matter or thing specified in such statement and thereupon the testimony of such person or such evidence in relation to such transaction, matter or thing may be received or produced before any judge or justice, court, tribunal, grand jury or otherwise, and if so received or produced such individual shall not be entitled to any immunity or privilege on account of any testimony he may so give or evidence so produced. (1949, c. 1112.)

Art. 4. Deposit of Securities.

§§ 58-55 to 58-61: Transferred to be §§ 58-188.1 to 58-188.7 by Session Laws 1945, c. 384.

Art. 5. License Fees and Taxes.

§ 58-63. Schedule of fees and charges.—The commissioner of insurance shall collect and pay into the state treasury fees and charges as follows:

1. For filing and examining statement preliminary to admission, twenty dollars; for filing and auditing annual statement, ten dollars; for filing any other papers required by law, one dollar; for each certificate of examination, condition, or qualification of company or association, two dollars; for each seal when required, one dollar; for filing charter and other papers of a fraternal order, preliminary to admission, twenty-five dollars.

2. To be paid to the publisher, for the publication of each financial statement, nine dollars.

3. The commissioner shall receive for copy of any record or paper in his office ten cents per copy sheet and one dollar for certifying same, or any fact or data from the records of his office; for examination of any foreign company, twenty-five dollars per diem and all expenses, and for examining any domestic company, actual expenses incurred; for the examination and approval of charters of companies, five dollars. The traveling and other expenses of accountants, and other examiners when engaged in the work of examination shall be paid by the companies, associations, or orders under investigation. For the investigation of tax returns and the collection of any delinquent taxes disclosed by such investigation, the commissioner may, in lieu of the above per diem charge, assess against any such delinquent company the expense of the investigation and collection of such delinquent tax, a reasonable percentage of such delinquent tax, not to exceed ten per centum (10%) of such delinquency, and in addition thereto.

4. He shall collect all other fees and charges due and payable into the state treasury by any company, association, order, or individual under his department. (Rev., s. 4715; 1899, c. 54, ss. 50, 68, 80, 81, 82, 87, 90, 92; 1901, c. 391, s. 7; c. 706, s. 2; 1903, c. 438, ss. 7, 8; 1903, c. 536, s. 4; 1903, cc. 680, 774; 1905, c. 588, s. 68; 1913, c. 140, s. 1; 1919, c. 186, s. 6; 1921, c. 218; 1935, c. 334; 1939, c. 158, s. 208; 1945, c. 386; 1947, c. 721; C. S. 6318.)

Editor's Note.—The 1945 amendment struck out, at the end of the first sentence of subsection 3, the words "also, to defray the expense of computing the value of the poli-

cies of domestic life insurance companies, one cent for every thousand dollars of the whole amount insured by its policies so valued."

The 1947 amendment struck out of subsection 3 the words "for making and mailing abstracts to the clerks of the superior courts in the counties of the state, four dollars."

§ 58-64: Repealed by Session Laws 1945, c. 386.

SUBCHAPTER II. INSURANCE COMPANIES.

Art. 6. General Domestic Companies.

§ 58-72. Kinds of insurance authorized.—The kinds of insurance which may be authorized in this state, subject to the other provisions of this chapter, are set forth in the following paragraphs. Nothing herein contained shall require any insurer to insure every kind of risk which it is authorized to insure. The power to do any kind of insurance against loss of or damage to property shall include the power to insure all lawful interests in such property and to insure against loss of use and occupancy, rents and profits resulting therefrom; but no kind of insurance shall be deemed to include life insurance or insurance against legal liability for personal injury or death unless specified herein. In addition to any power to engage in any other kind of business than an insurance business which is specifically conferred by the provisions of this chapter, any insurer authorized to do business in this state may engage in such other kind or kinds of business to the extent necessarily or properly incidental to the kind or kinds of insurance business which it is authorized to do in this state. Each of the following paragraphs indicates the scope of the kind of insurance business specified therein;

1. "Life insurance," meaning every insurance upon the lives of human beings and every insurance appertaining thereto. The business of life insurance shall be deemed to include the granting of endowment benefits; additional benefits in the event of death by accident or accidental means; additional benefits operating to safeguard the contract from lapse, or to provide a special surrender value, in the event of total and permanent disability of the insured, including industrial sick benefit; and optional modes of settlement of proceeds.

2. "Annuities," meaning all agreements to make periodical payments where the making or continuance of all or of some of a series of such payments, or the amount of any such payment, is dependent upon the continuance of human life, except payments made under the authority of subsection one.

3. "Accident and health insurance," meaning (a) insurance against death or personal injury by accident or by any specified kind or kinds of accident and insurance against sickness, ailment or bodily injury except as specified in paragraph (b) following; and (b) non-cancellable disability insurance, meaning insurance against disability resulting from sickness, ailment or bodily injury, (but not including insurance solely against accidental injury) under any contract which does not give the insurer the option to cancel or otherwise terminate the contract at or after one year from its effective date or renewal date.

4. "Fire insurance," meaning insurance against loss of or damage to any property resulting from fire, including loss or damage incident to the extinguishment of a fire or to the salvaging of property in connection therewith.

5. "Miscellaneous property insurance," meaning loss of or damage to property resulting from

(a) lightning, smoke or smudge, windstorm, tornado, cyclone, earthquake, volcanic eruption, rain, hail, frost and freeze, weather or climatic conditions, excess or deficiency of moisture, flood, the rising of the waters of the ocean or its tributaries, or

(b) insects, or blights, or from disease of such property other than animals, or

(c) electrical disturbance causing or concomitant with a fire or an explosion in public service or public utility property, or

(d) bombardment, invasion, insurrection, riot, civil war or commotion, military or usurped power, any order of a civil authority made to prevent the spread of a conflagration, epidemic or catastrophe, vandalism or malicious mischief, strike or lockout, or explosion; but not including any kind of insurance specified in subsection nine, except insurance against loss or damage to property resulting from

(1) explosion of pressure vessels (except steam boilers of more than fifteen pounds pressure) in buildings designed and used solely for residential purposes by not more than four families,

(2) explosion of any kind originating outside of the insured building or outside of the building containing the property insured,

(3) explosion of pressure vessels which do not contain steam or which are not operated with steam coils or steam jackets,

(4) electrical disturbance causing or concomitant with an explosion in public service or public utility property.

6. "Water damage insurance," meaning insurance against loss or damage by water or other fluid or substance to any property resulting from the breakage or leakage of sprinklers, pumps or other apparatus erected for extinguishing fires or of water pipes or other conduits or containers, or resulting from casual water entering through leaks or openings in buildings or by seepage through building walls, but not including loss or damage resulting from flood or the rising of the waters of the ocean or its tributaries; and including insurance against accidental injury of such sprinklers, pumps, fire apparatus, conduits or containers.

7. "Burglary and theft insurance," meaning

(a) Insurance against loss of or damage to any property resulting from burglary, theft, larceny, robbery, forgery, fraud, vandalism, malicious mischief, confiscation or wrongful conversion, disposal or concealment by any person or persons, or from any attempt at any of the foregoing, and

(b) Insurance against loss of or damage to moneys, coins, bullion, securities, notes, drafts, acceptances or any other valuable papers or documents, resulting from any cause, except while in the custody or possession of and being transported by any carrier for hire or in the mail.

8. "Glass insurance," meaning insurance against loss of or damage to glass and its appurtenances resulting from any cause.

9. "Boiler and machinery insurance," meaning insurance against loss of or damage to any property of the insured, resulting from the explosion

of or injury to (a) any boiler, heater or other fired pressure vessel; (b) any unfired pressure vessel; (c) pipes or containers connected with any of said boilers or vessels; (d) any engine, turbine, compressor, pump or wheel; (e) any apparatus generating, transmitting or using electricity; (f) any other machinery or apparatus connected with or operated by any of the previously named boilers, vessels or machines; and including the incidental power to make inspections of and to issue certificates of inspection upon, any such boilers, apparatus, and machinery, whether insured or otherwise.

10. "Elevator insurance," meaning insurance against loss of or damage to any property of the insured, resulting from the ownership, maintenance or use of elevators, except loss or damage by fire.

11. "Animal insurance," meaning insurance against loss of or damage to any domesticated or wild animal resulting from any cause.

12. "Collision insurance," meaning insurance against loss of or damage to any property of the insured resulting from collision of any other object with such property, but not including collision to or by elevators, or to or by vessels, craft, piers or other instrumentalities of ocean or inland navigation.

13. "Personal injury liability insurance," meaning insurance against legal liability of the insured, and against loss, damage or expense incident to a claim of such liability, and including an obligation of the insurer to pay medical, hospital, surgical and funeral benefits to injured persons, irrespective of legal liability of the insured, arising out of the death or injury of any person, or arising out of injury to the economic interests of any person as the result of negligence in rendering expert, fiduciary or professional service, but not including any kind of insurance specified in subsection fifteen.

14. "Property damage liability insurance," meaning insurance against legal liability of the insured, and against loss, damage or expense incident to a claim of such liability, arising out of the loss or destruction of, or damage to, the property of any other person, but not including any kind of insurance specified in subsection thirteen or fifteen.

15. "Workmen's compensation and employer's liability insurance," meaning insurance against the legal liability, whether imposed by common law or by statute or assumed by contract, of any employer for the death or disablement of, or injury to, his or its employee.

16. "Fidelity and surety insurance," meaning

(a) Guaranteeing the fidelity of persons holding positions of public or private trust;

(b) Becoming surety on, or guaranteeing the performance of, any lawful contract except the following: (1) A contract of indebtedness secured by title to, or mortgage upon, or interest in, real or personal property; (2) any insurance contract except reinsurance.

(c) Becoming surety on, or guaranteeing the performance of, bonds and undertakings required or permitted in all judicial proceedings or otherwise by law allowed, including surety bonds accepted by states and municipal authorities in lieu of deposits as security for the performance of insurance contracts;

(d) Guaranteeing contracts of indebtedness secured by any title to, or interest in, real property, only to the extent required for the purpose of refunding, extending, refinancing, liquidating or salvaging obligations heretofore lawfully made and guaranteed;

(e) Indemnifying banks, bankers, brokers, financial or monied corporations or associations against loss resulting from any cause of bills of exchange, notes, bonds, securities, evidences of debts, deeds, mortgages, warehouse receipts, or other valuable papers, documents, money, precious metals and articles made therefrom, jewelry, watches, necklaces, bracelets, gems, precious and semi-precious stones, including any loss while the same are being transported in armored motor vehicles, or by messenger, but not including any other risks of transportation or navigation; also against loss or damage to such an insured's premises, or to his furnishings, fixtures, equipment, safes and vaults therein, caused by burglary, robbery, theft, vandalism or malicious mischief, or any attempt thereat.

17. "Credit insurance," meaning indemnifying merchants or other persons extending credit against loss or damage resulting from the nonpayment of debts owed to them; and including the incidental power to acquire and dispose of debts so insured, and to collect any debts owed to such insurer or to any person so insured by him.

18. "Title insurance," meaning insuring the owners of real property and chattels real and other persons lawfully interested therein against loss by reason of defective titles and encumbrances thereon and insuring the correctness of searches for all instruments, liens or charges affecting the title to such property, including the power to procure and furnish information relative thereto, and such other incidental powers as are specifically granted in this chapter.

19. "Motor vehicle and aircraft insurance," meaning insurance against loss of or damage resulting from any cause to motor vehicles or aircraft and their equipment, and against legal liability of the insured for loss or damage to the property of another resulting from the ownership, maintenance or use of motor vehicles or aircraft and against loss, damage or expense incident to a claim of such liability.

20. "Marine insurance," meaning insurance against any and all kinds of loss or damage to:

(a) Vessels, craft, aircraft, cars, automobiles and vehicles of every kind, as well as all goods, freights, cargoes, merchandise, effects, disbursements, profits, moneys, bullion, precious stones, securities, choses in action, evidences of debt, valuable papers, bottomry and respondentia interests and all other kinds of property and interests therein, in respect to, appertaining to or in connection with any and all risks or perils of navigation, transit, or transportation, including war risks, on or under any seas or other waters, on land or in the air, or while being assembled, packed, crated, baled, compressed or similarly prepared for shipment or while awaiting the same or during any delays, storage, transshipment, or reshipment incident thereto, including marine builder's risks and all personal property floater risks, and

(b) Person or to property in connection with

or appertaining to a marine, inland marine, transit or transportation insurance, including liability for loss of or damage to either, arising out of or in connection with the construction, repair, operation, maintenance or use of the subject matter of such insurance (but not including life insurance or surety bonds nor insurance against loss by reason of bodily injury to the person arising out of the ownership, maintenance or use of automobiles), and

(c) Precious stones, jewels, jewelry, gold, silver and other precious metals, whether used in business or trade or otherwise and whether the same be in course of transportation or otherwise, and

(d) Bridges, tunnels and other instrumentalities of transportation and communication (excluding buildings, their furniture and furnishings, fixed contents and supplies held in storage) unless fire, tornado, sprinkler leakage, hail, explosion, earthquake, riot and/or civil commotion are the only hazards to be covered; piers, wharves, docks and slips, excluding the risks of fire, tornado, sprinkler leakage, hail, explosion, earthquake, riot and/or civil commotion; other aids to navigation and transportation, including dry docks and marine railways against all risks.

21. "Marine protection and indemnity insurance," meaning insurance against, or against legal liability of the insured for, loss, damage or expense arising out of, or incident to, the ownership, operation, chartering, maintenance, use, repair or construction of any vessel, craft or instrumentality in use in ocean or inland waterways, including liability of the insured for personal injury, illness or death or for loss of or damage to the property of another person.

22. "Miscellaneous insurance," meaning insurance against any other casualty authorized by the charter of the company, not included in subsections 1 to 21 inclusive of this section, which is a proper subject of insurance. No corporation so formed may transact any other business than that specified in its charter and articles of association. (Rev., s. 4726; 1899, c. 54, ss. 24, 26; 1903, c. 438, s. 1; 1911, c. 111, s. 1; 1945, c. 386; 1947, c. 721; C. S. 6327.)

Editor's Note.—The 1945 amendment rewrote this section. The amendatory act, which amended, inserted or repealed a large number of sections in this chapter, provides: "This act shall not apply to common carriers having relief departments, pension or annuity plans, or other organizations or associations for the benefit of their employees or former employees; or to associations of such common carriers administering such departments, plans or organizations."

The 1947 amendment struck out in subsection 16, paragraph (b), the clause reading "(2) a bond or undertaking of the kind specified in paragraph (c)", and renumbered former clause (3) as (2).

§ 58-76: Repealed by Session Laws 1945, c. 386.

§ 58-77. Amount of capital and/or surplus required.—The amount of capital and/or surplus requisite to the formation and organization of companies under the provisions of this chapter shall be as follows:

1. Stock Life Insurance Companies.—(a) A stock corporation may be organized in the manner prescribed in this chapter and licensed to do the business of life insurance, only when it shall have a paid-in capital of at least two hundred thousand dollars and a paid-in initial surplus of an amount at least equal to fifty per cent of its capital, and it may in addition do any one or more of the kinds of business specified in subsections two and three of section 58-72, without having additional capital or surplus. Every such company shall at all times thereafter maintain a minimum capital of not less than two hundred thousand dollars.

(b) If the commissioner, after such investigation as he may deem it expedient to make, finds that a corporation may be organized to do the business of life insurance, or the writing of annuities or both, that its operations are restricted solely to one state, and that the organization of such corporation is in the public interest, he may permit the organization of a stock corporation to do on such restricted plan either or both of the kinds of business specified in subsections one and two of section 58-72, with the minimum paid-in capital and a minimum paid-in surplus in an amount to be prescribed by him, but in no event to be less than a paid-in capital of one hundred thousand dollars and a paid-in surplus of fifty thousand dollars. Every such company shall at all times thereafter maintain such prescribed minimum capital.

2. Stock Accident and Health Insurance Companies.—(a) A stock corporation may be organized in the manner prescribed in this chapter and licensed to do only the kind of insurance specified in subsection three (a) of section 58-72, when it shall have a paid-in capital of not less than one hundred thousand dollars, and a paid-in surplus at least equal to fifty per cent of such capital. Every such company shall at all times thereafter maintain a minimum capital of not less than one hundred thousand dollars.

(b) Any company organized under the provisions of paragraph (a) of this subsection may, by the provisions of its original charter or any amendment thereto, acquire the power to do the kind of business specified in paragraph (b) of subsection three of section 58-72, if it has a paid-in capital at least equal to one hundred and fifty thousand dollars, and a paid-in initial surplus at least equal to fifty per cent of such capital. Every such company shall at all times maintain a minimum capital of not less than one hundred and fifty thousand dollars.

3. Stock Fire and Marine Companies.—A stock corporation may be organized in the manner prescribed in this chapter and licensed to do one or more of the kinds of insurance specified in subsections 4, 5, 6, 7, 8, 11, 12, 19, 20, 21 and 22 of section 58-72 only when it shall have a paid-in capital of not less than two hundred thousand dollars and a contributed surplus equivalent to not less than fifty per cent of such paid-in capital. Every such company shall at all times thereafter maintain a minimum capital of not less than two hundred thousand dollars, provided that, any such corporation may do all the kinds of insurance authorized for casualty, fidelity and surety companies, as set out in subsection four hereof where its charter so permits, when and if it meets all additional requirements as to capital and surplus as fixed in said section, and maintains the same.

4. Stock Casualty and Fidelity and Surety Companies.—A stock corporation may be organized in the manner prescribed in this chapter and licensed

to do one or more of the kinds of insurance specified in subsections 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21 and 22 of section 58-72 only when it shall have a paid-in capital of not less than three hundred thousand dollars and a contributed surplus equivalent to not less than fifty per cent of such paid-in capital. Every such company shall at all times thereafter maintain a minimum capital of not less than three hundred thousand dollars. If the commissioner, after such investigation as he may deem it expedient to make, finds that a corporation may be organized to do one or more of such kinds of insurance, that its operations are restricted solely to one state, and that the organization of such corporation is in the public interest, he may permit such corporation to be organized and licensed to write the lines set out in this section with a paid-in capital of not less than two hundred thousand dollars and a contributed surplus equivalent to not less than fifty per cent of such paid-in capital, and every such company shall hereafter maintain a minimum capital of not less than two hundred thousand dollars, provided that, any casualty, fidelity and surety corporation may do all the kinds of insurance authorized for fire and marine companies, as set out in subsection three hereof where its charter so permits, when and if it meets all additional requirements as to capital and surplus as fixed in said section, and maintains the same.

5. Mutual Fire and Marine Companies.—(a) Limited assessment companies.—A limited assessment mutual company may be organized in the manner prescribed in this chapter and licensed to do one or more of the kinds of insurance specified in subsections 4, 5, 6, 7, 8, 11, 12, 19, 20, 21 and 22 of section 58-72 only when it has no less than two hundred and fifty thousand dollars of insurance in not fewer than two hundred and fifty separate risks subscribed with a contributed initial surplus of at least fifty thousand dollars, which surplus shall at all times be maintained. The assessment liability of a policyholder of a company organized in accordance with the provisions of this paragraph shall not be limited to less than five annual premiums; provided, such limited assessment company may reduce the assessment liability of its policyholders from five annual premiums as set out herein to one additional annual premium when the free surplus of such company amounts to not less than one hundred thousand dollars, which surplus shall at all times be maintained.

(b) Assessable mutual companies.—An assessable mutual company may be organized in the manner prescribed in this chapter and licensed to do one or more of the kinds of insurance specified in subsections 4, 5 and 6 of section 58-72 with an unlimited assessment liability of its policyholders only when it shall have not less than two hundred and fifty thousand dollars of insurance in not fewer than two hundred and fifty separate risks subscribed with contributed surplus equal to twice the amount of the maximum net retained liability under the largest policy of insurance issued by such company; but not less than ten thousand dollars, which surplus shall at all times be maintained. Provided such company, when its charter so permits, in addition may be licensed to do one or more of the kinds of insurance specified in subsections 7, 8, 11, 12, 19, 20, 21 and 22 of section 58-72, with an unlimited assessment liability of its policyholders, when its free surplus amounts to not less than twenty-five thousand dollars, which surplus shall at all times be maintained.

(c) Non-assessable mutual companies.—A non-assessable mutual company may be organized in the manner prescribed in this chapter and licensed to do one or more of the kinds of insurance specified in subsections 4, 5, 6, 7, 8, 11, 12, 19, 20, 21 and 22 of section 58-72 and may be authorized to issue policies under the terms of which a policyholder is not liable for any assessments in addition to the premium set out in the policy only when it shall have not less than two hundred and fifty thousand dollars of insurance in not fewer than two hundred and fifty separate risks subscribed with a contributed initial surplus of not less than two hundred thousand dollars, which surplus shall at all times be maintained.

(d) Town or county mutual insurance companies.—A town or county mutual insurance company, with unlimited assessment liability, may be organized in the manner prescribed in this chapter and licensed to do the kinds of insurance specified in subsection 4 of section 58-72 only when it shall have not less than twenty-five thousand dollars of insurance in not fewer than twenty-five separate risks subscribed with a contributed surplus at all times not less than the maximum liability under the largest policy issued or to be issued. A town or county mutual insurance company may, in addition to writing the business specified in subsection 4 of section 58-72, cover in the same policy the hazards usually insured against under an extended coverage endorsement when such company has and at all times maintains in addition to the surplus hereinbefore required, an additional surplus of not less than five thousand dollars or not less than an amount equivalent to one per cent of the total amount of insurance in force, whichever is the larger sum. Provided that such company may not operate in more than three adjacent counties in this state.

6. Mutual Life, Accident and Health Insurance Companies.—(a) A non-assessable mutual insurance company may be organized in the manner prescribed in this chapter, and licensed to do only one or more of the kinds of insurance specified in subsections one, two and three of section 58-72 when it has complied with the requirements of this chapter and with those hereinafter set forth in paragraphs (1) to (4) inclusive, of this subsection, whichever shall be applicable.

(1) If organized to do only the kinds of insurance specified in subsections 1 and 2 of section 58-72, such company shall have not less than two hundred and fifty bona fide applications for life insurance in an aggregate amount not less than two hundred and fifty thousand dollars, and shall have received from each such applicant in cash the full amount of one annual premium on the policy applied for by him, in an aggregate amount at least equal to seven thousand and five hundred dollars, and shall in addition have a contributed surplus of seventy-five thousand dollars, and shall have and maintain at all times a minimum surplus of fifty thousand dollars.

(2) If organized to do only the kind of insurance specified in paragraph (a) of subsection three

of section 58-72 such company shall have not less than one hundred and twenty-five bona fide applications for such insurance, and shall have received from each such applicant in cash the full amount of one annual premium on the policy applied for by him in an aggregate amount of at least six thousand dollars, and shall have a contributed surplus of seventy-five thousand dollars and shall have and maintain at all times a minimum surplus of fifty thousand dollars.

(3) If organized to do the kinds of insurance specified in subsection one and in paragraph (a) of subsection three of section 58-72, such company shall have complied with the provisions of both paragraph (1) and paragraph (2) hereof.

(4) If organized to do the kind of insurance specified in paragraph (b) of subsection three of section 58-72, in addition to the kind or kinds of insurance designated in any one of the foregoing paragraphs of this subsection, such company shall have a contributed surplus, and shall maintain a minimum surplus, each in an amount of at least fifty thousand dollars in excess of the respective amounts required by paragraphs (1), (2) and (3) hereof where applicable.

7. Organization of Mutual Casualty, Fidelity and Surety Companies.—(a) Non-assessable mutual companies.—A mutual insurance company with no assessment liability provided for its policyholders may be organized in the manner prescribed in this chapter and licensed to do one or more of the kinds of insurance specified in subsections 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21 and 22 of section 58-72 when it has a minimum contributed surplus of three hundred thousand dollars and not less than two hundred and fifty thousand dollars of insurance subscribed in not less than two hundred and fifty separate risks. The surplus of such company shall at all times be maintained at or above the amount required herein above for organization of such company.

(b) Assessable mutual companies.—A mutual insurance company with assessment liability provided for its policyholders may be organized in the manner prescribed in this chapter and licensed to do one or more of the kinds of insurance specified in subsections 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21 and 22 of section 58-72 when it has a minimum contributed surplus of one hundred thousand dollars and not less than two hundred and fifty thousand dollars of insurance subscribed in not less than two hundred and fifty separate risks. Such company shall at all times maintain a surplus in an amount not less than one hundred thousand dollars. The assessment liability of a policyholder of such company shall not be limited to less than one annual premium.

8. (a) A company may do all the kinds of insurance authorized to be done by a company organized under the provisions of paragraph (a) of subsection 5, and paragraph (b) of subsection 7 where its charter so permits when and if it meets the combined maximum requirements of said paragraphs. The assessment liability of policyholders of such a company shall not be limited to less than one annual premium within any one policy year.

(b) A company may do all the kinds of insurance authorized to be done by a company organized under the provisions of paragraph (c) of subsection 5, and paragraph (a) of subsection 7 where its charter so permits when and if it meets the combined maximum requirements of said paragraphs. The policyholders of such a company shall not be subject to any assessment liability.

9. Any domestic, foreign or alien company licensed to do business in North Carolina on January 1, 1945, shall be permitted to continue to do the same kinds of business which it was authorized to do on such date without being required to increase its capital and/or surplus, but the requirements of this section as to capital and surplus shall apply to such companies as a prerequisite to writing additional lines of business. (Rev., s. 4729; 1899, c. 54, s. 26; 1903, c. 438, s. 4; 1907, c. 1000, s. 5; 1913, c. 140, s. 2; 1929, c. 284, s. 1; 1945, c. 386; 1947, c. 721; C. S. 6332.)

The 1945 amendment rewrote this section.

The 1947 amendment inserted "21" in subsection 3 and in paragraphs (a), (b) and (c) of subsection 5.

§ 58-78. Capital stock fully paid in cash.—The capital stock shall be paid in cash within twelve months from the date of the charter or certificate of organization, and no certificate of full shares and no policies may be issued until the whole capital is paid in. A majority of the directors shall certify on oath that the money has been paid by the stockholders for their respective shares and is held as the capital of the company invested or to be invested as required by § 58-77. (Rev., s. 4730; 1899, c. 54, s. 27; 1945, c. 386; C. S. 6333.)

Editor's Note.—The 1945 amendment changed the number referred to at the end of the section from 58-79 to 58-77.

§ 58-79. Investments; life.—I. Investments Specified.—Every domestic stock and mutual life insurance company must have and continually keep to the extent of an amount equal to its entire reserves, as hereinafter defined, and entire capital, if any, and minimum required surplus, invested in:

(a) Coin or currency of the United States of America, on hand or on deposit in a national or state bank or trust company or invested in the shares of any building and loan or savings and loan association, or invested in the shares of any federal savings and loan association.

(b) Interest bearing bonds, notes, certificates of indebtedness, bills or other direct interest bearing obligations of the United States of America or of the Dominion of Canada or other interest bearing obligations fully guaranteed both as to principal and interest by the United States of America, or by the Dominion of Canada.

(c) Interest bearing bonds of any state, District of Columbia, territory or possession of the United States of America, or of any province of the Dominion of Canada, or of any county, or incorporated city of any state, District of Columbia, territory or possession of the United States of America.

(d) Interest bearing bonds of any commission, authority or political subdivision having legal authority to issue the same of any state, District of Columbia, territory or possession of the United States of America or of any county or incorporated city of any state, District of Columbia, territory or possession of the United States of America.

(e) Federal farm loan bonds issued by federal land banks organized under the provisions of the act of congress known as the Federal Farm Loan Act. Interest bearing bonds, notes or other interest bearing obligations of any solvent corporation organized under the laws of the United States of America or of the Dominion of Canada, or under the laws of any state, District of Columbia, territory or possession of the United States of America. Equipment trust obligations or certificates or other secured instruments evidencing an interest in transportation equipment wholly or in part within the United States of America and a right to receive determined portions of rental, purchases or other fixed obligatory payments for the use or purchase of such transportation equipment.

(f) Dividend paying stocks or shares of any corporation created or existing under the laws of the United States of America or of any state, District of Columbia, territory or possession of the United States of America; notwithstanding any provisions in this section to the contrary no company may invest more than ten per cent (10%) of its total admitted assets in stocks; and further provided, that no company may invest more than three per cent (3%) of its admitted assets in the stock or shares of any one corporation. The restrictions in this section do not apply to shares of building and loan or savings and loan associations or federal savings and loan associations.

(g) Loans secured by first mortgages, or deeds of trust, on unencumbered fee simple or improved leasehold real estate in the District of Columbia or in any state, territory or possession of the United States of America, to an amount not exceeding sixty-six and two-thirds per cent (66⅔%) of the fair market value of such fee simple or improved leasehold real estate. No loan may be made on leasehold real estate unless the lease has at least thirty years to run before its termination and the loan matures at least twenty years before expiration of the lease. Whenever such loans are made upon fee simple, or improved leasehold real estate which is improved by a building or buildings, the said improvements shall be insured against loss by fire, and the fire insurance policies shall contain a standard mortgage clause and shall be delivered to the mortgagee as additional security for the said loan.

Loans secured by first mortgages which the Federal Housing Administrator has insured or has made a commitment to insure, or invested in mortgage notes or bonds so insured, and neither the limitations of this section nor any other law of this state requiring security upon which loans shall be made, or prescribing the nature, amount or forms of such security, or limiting the interest rates upon loans, shall be deemed to apply to such insured mortgage loans.

Loans secured by first mortgages, or deeds of trust, on unencumbered fee simple real estate in connection with which the Veterans Administration of the United States has guaranteed, or has made a commitment to guarantee, a portion of the loan pursuant to the Service Men's Readjustment Act of 1944, and amendments thereto, provided the amount of any such loan, less the portion thereof guaranteed by said Veterans Administration, shall not exceed sixty-six and two-thirds per cent (66⅔%) of the fair market value of such real estate.

In all investments made upon mortgages, the evidence of the debt, if any, shall accompany the mortgage or deed of trust.

(h) Ground rents in the District of Columbia or any state of the United States of America, provided, that in the case of unexpired redeemable ground rents the premiums paid, if any, shall be amortized over the period between date of acquisition and earliest redemption date or charged off at any time prior to redemption date; and in the case of expired redeemable ground rents the premium paid, if any, shall be charged off at the time of acquisition. Redeemable ground rents purchased at a discount shall be carried at an amount not greater than the cost of acquisition.

(i) Collateral loans secured by pledge of any security named in sub-paragraphs (a), (b), (c), (d), (e), (f), (g) and (h); provided that the current market value of such pledged securities shall be at all times during the continuance of such loans at least twenty-five per cent (25%) more than the unpaid balance of the amount loaned on them.

(j) Loans upon the policies of the company; provided that the total indebtedness against any policy shall not be greater than the loan value of such policy.

(k) No domestic company may directly or indirectly acquire or hold real property except as follows:

(1) Such land and buildings thereon in which it has its principal office and such real estate as shall be requisite for the convenient transaction of its own business; the amount invested in such real property shall not exceed ten per centum of the investing company's admitted assets, but the commissioner may grant permission to the company to invest in real property for such purpose in such increased amount as he may deem proper upon a hearing held before him.

(2) Property mortgaged to it in good faith as security for loans previously contracted for for money due.

(3) Property conveyed to it in satisfaction of debts previously contracted in the course of its dealings, or purchased at sales upon judgments, decrees, or mortgages obtained or made for such debts.

(4) Additional real property and equipment incident to real property, if necessary or convenient for the purpose of enhancing the sale value of real property previously acquired or held by it under subsections (2) and (3) of this section and subject to the prior written approval of the commissioner.

(5) (A) Real estate acquired for the purpose of leasing the same to any person, firm, or corporation, or real estate already leased under the following conditions:

a. (1) where there has already been erected on said property a building or other improvements satisfactory to the purchaser, or (2) where the lessee shall at its own cost erect thereon, free of liens, a building or other improvements satisfactory to the lessor, or (3) where the lessor under the terms and conditions of a lease executed and entered into simultaneously with the purchase of

the property agrees to erect a building or other improvements on said property;

b. that the said improvements shall remain on the said property during the period of the lease, and in cases where the said improvements are put upon said property at the cost of the lessee the said improvements at the termination of the lease shall vest, free of liens, in the owner of the real estate;

c. that during the term of the lease the tenant shall keep and maintain the said improvements in good repair. Real estate acquired pursuant to the provisions of this subsection (A) shall not be treated as an admitted asset unless and until the improvements herein required shall have been constructed and the lease agreement entered into in accordance with the terms of this subsection, nor shall real estate acquired pursuant to this subsection (A) be treated as an admitted asset in an amount exceeding the amount actually invested reduced each year by equal decrements sufficient to write off at least seventy-five per cent (75%) of the investment at the normal termination of the lease or at the end of thirty years should the term of the lease be for a longer period. The total investments of any company under this subsection (A) shall not exceed four per cent of its assets, nor more than fifty per cent (50%) of its capital and surplus whichever is less.

(B) Subject to approval of the commissioner, real estate for recreation, hospitalization, convalescent and retirement purposes of its employees. Such investment under this subsection (B) shall not exceed five per cent (5%) of the company's surplus.

(C) No investment shall be made by any company pursuant to this subsection (5) which will cause such company's investment in all real property owned or held by it directly or indirectly to exceed ten per cent (10%) of its assets.

(6) It is unlawful for any such incorporated company to purchase or hold real estate in any other case or for any other purpose. Real estate acquired under subsections (1) and (5)(B) of this section which has ceased to be used or to be necessary for the purposes stated therein shall be sold within five years thereafter, unless the company procures a certificate from the commissioner that the interest of the company will materially suffer by a forced sale of such real estate in which event the time for the sale may be extended to such a time as the commissioner may direct in the certificate. Any real estate acquired under subsections (2), (3) and (4) of this subsection (k) shall be sold within five years after the company has acquired title thereto; provided, that the commissioner may in his discretion extend the five year period as provided herein above. Any real estate acquired under subsection (5)(A) of this section shall within five years after the termination or expiration of such lease be sold or released for an additional term pursuant to the provisions of subsection (5)(A); provided, that the commissioner may in his discretion extend the five year period as provided herein above. Nothing contained herein prevents any insurance company from improving or conveying its real estate, notwithstanding the lapse of five years without having procured such certificate from the commissioner.

(l) Interest, rents or other fixed income due and accrued on any of the investments named in sub-paragraphs (a), (b), (c), (d), (e), (g), (h), (i), (j) and (k) pursuant to regulations promulgated by the commissioner.

(m) To the extent necessary to satisfy the investment requirements as to reserves and entire capital, if any, and minimum required surplus, no company shall make any investment in or loan on any of the securities mentioned in this section, which are in default as to principal or interest or as to which the dividend on the last preceding dividend date has been passed.

II. General Provisions.—(a) The entire reserves of a domestic life insurance company, as used in this section, shall be the sum of:

Net present value of all outstanding policies in force (less reinsurance); reserves for accidental death benefits and total and permanent disability benefits (less reinsurance); present value of supplementary contracts and including dividends left with the company to accumulate at interest; liability on policies cancelled and not included in "net reserve" upon which a surrender value may be demanded, and policy claims and losses outstanding, less amount of net uncollected and deferred premiums.

(b) No investment or loan, except loans made on the company's own policies, shall be made by any domestic insurer unless the same be authorized or approved by the board of directors, or by a committee appointed by the board and charged with the duty of supervising or making such investment or loan. The minutes of any such committee shall be recorded and a report shall be submitted to the board of directors.

(c) No life insurance company doing business in this state shall make any loan to any director or officer of such insurer, either directly or indirectly; nor shall such insurer make any loan to any other corporation or business unit in which such officer or director is substantially interested; nor shall any such director or officer accept any such loan directly or indirectly.

No director or officer of any such insurance company doing business in this state shall receive any money or valuable thing either directly or indirectly, or through any substantial interest in any other corporation or business unit, for negotiating, procuring, recommending or aiding in any purchase or sale of property or loan from such insurer nor be pecuniarily interested either as principal, co-principal, agent or beneficiary, in any such purchase, sale or loan, nor shall any financial obligation of any such director or officer be guaranteed by such insurer.

Nothing contained in this section shall be construed as prohibiting a director or officer of any such insurance company or fraternal benefit society from receiving the usual salary, compensation or emoluments for services rendered in the ordinary course of his duties as a director or officer, if such salary, compensation or emoluments be authorized by vote of the board of directors of such insurer, nor as prohibiting the payment to a director or officer of any such insurer who is a licensed attorney at law of a fee or fees in connection with loans made by any such insurer if and when such fees are paid by the borrower and do not constitute a charge against any such in-

surer; and, provided, that nothing herein contained shall prevent a life insurance corporation from making a loan upon a policy held therein by the borrower not in excess of the net value thereof.

A substantial interest in any corporation or business unit is defined to mean an interest equivalent to ownership or control by a director or officer or the aggregate ownership or control by all directors and officers of the same insurance or surety company or fraternal benefit society, of ten per centum or more of the stock of such corporation or business unit.

(d) When any of the investments mentioned in this section and held by any domestic insurer are of doubtful value, or without ascertainable value on a public exchange, unless the company by placing some of them upon the market and obtaining a bona fide offer therefor shall so establish a value, the commissioner shall have the authority to cause the same to be appraised and such appraisement shall be taken to be the true value thereof. In such case, the appraisement shall be made by two disinterested and competent persons, one to be appointed by the commissioner and one to be appointed by the company; in the event these two fail to agree, they shall appoint a third disinterested and competent person and the estimate of the value of such investment as arrived at by these three shall be taken to be the true value thereof.

(e) When any of the investments mentioned in this section shall default in the payment of interest or dividends after having been purchased by the company, such investments shall thereafter be carried at their respective market values or at valuations fixed in accordance with regulations promulgated by the commissioner.

(f) The investments made by domestic companies on and after the effective date of this act shall be in accordance with the provisions of this section, and any investments made prior to the effective date of this act shall be made to conform to the requirements of this article by not later than three years after the effective date of this section, but the commissioner may, on application by the company extend the time for such conformance for each period or periods as he may deem proper on the showing made, if he is satisfied that such company will suffer materially by the forced sale of any securities or property not conforming; and the commissioner shall grant a hearing to the company upon request.

(g) Notwithstanding any provision of this chapter to the contrary, domestic insurance companies may be authorized by their charter to own, maintain and operate radio and television stations; provided, no such company may make any investment in the ownership, maintenance and operation of such stations in an amount greater than fifty per cent (50%) of the excess of its surplus over the minimum surplus required for the organization of such company.

III. Other Investments; Investments Unlawfully Acquired.—After satisfying the requirements hereinbefore set forth any funds of any domestic company in excess of its entire capital, if any, and minimum required surplus and reserves as defined in subdivision II (a) of this section shall be invested in such other securities or in any such safe manner as may be approved by the commissioner.

Whenever it appears by examination as authorized by law that an insurance company organized under the laws of this state has acquired any investments in violation of the law in force at the date of such acquisition it is the duty of the commissioner to disallow the amount of such investments, if wholly ineligible, or the amount of the value thereof in excess of any limitation prescribed in the law and to deduct such amount as a non-admitted asset of such company. In any determination of the financial condition of any such company such amount shall be deducted as a non-admitted asset of such company.

IV. Investments of Foreign and Alien Companies.—1. The commissioner may refuse a new or renewal license to any foreign company if he finds that its investments do not comply in substance with the investment requirements and limitations imposed by this section upon like domestic companies wherever authorized to do the same kind or kinds of insurance business.

2. No alien company shall be authorized to do business in this state unless its general state deposits and its trusteed assets comply in substance with the requirements and limitations of this section applicable to like domestic companies wherever authorized to do the same kind or kinds of insurance business, except that foreign investments shall be allowed to the following extent only:

(a) Bonds, notes or other evidences of indebtedness issued or guaranteed by the government of the country in which such alien company was organized or by any province or other major political subdivision thereof and not in default as to principal or interest in an amount not exceeding the minimum capital required of a domestic stock company wherever authorized to do the same kind or kinds of insurance business.

(b) Bonds, notes or other valid and legally authorized obligations issued, assumed or guaranteed by the Dominion of Canada or any province thereof or other political subdivisions, and such securities of corporations of the Dominion of Canada as may be approved by the commissioner which are not in default as to principal or interest not exceeding ten per cent of the total admitted assets of the United States branch of such company. (Rev., s. 4731; 1899, c. 54, s. 27; 1907, c. 798; 1907, c. 998; 1911, c. 32; 1913, c. 200; 1923, c. 73; 1925, c. 187; 1945, c. 386; 1947, c. 721; C. S. 6334.)

Editor's Note.—The 1945 amendment effective March 6, 1945, repealed the former section and inserted in lieu thereof this and the following section.

The 1947 amendment substituted "entire capital" for "minimum required capital" in paragraph (m) of subsection I; and in subsection III, line three, it substituted the words "its entire" for the words "the amount of such necessary minimum".

§ 58-79.1. Investments; fire, casualty and miscellaneous. — I. Minimum Capital Investments.—Before investing any of its funds in any other classes of securities or types of investments, every domestic stock insurance company other than a life insurance company or a fraternal benefit association, shall to the extent of an amount equal in value to the minimum capital required by law for a domestic stock corporation authorized to

transact the same kinds of insurance, invest its funds only in securities of the classes described in this section and which are not in default as to principal or interest. Every domestic mutual insurance company, other than a life insurance company, before investing any of its funds in any other classes of securities or types of investment, shall invest its funds only in such securities to the extent of an amount equal in value to the minimum assets or surplus required of such company by the laws of North Carolina. Investments equal in value to such an amount and of the kind or kinds hereinafter prescribed in this section shall at all times be maintained free and clear from any lien or pledge other than as impressed upon a deposit with any government within the United States or upon trusteed assets held in trust for the security of all its policyholders and creditors. Minimum capital investments of such an insurer shall consist of the following classes of securities and not less than sixty per cent of the total amount of the required minimum capital investments shall consist of the classes specified in sub-paragraphs (a) and (b) following:

(a) Bonds, or other evidences of indebtedness of the United States of America or of any of its agencies when such obligations are guaranteed as to principal and interest by the United States of America.

(b) Bonds, or stocks or other evidences of indebtedness which are direct obligations of the state of North Carolina or of any county, district or municipality thereof.

(c) Bonds, or other evidences of indebtedness which are direct obligations of any state of the United States.

(d) Mortgage loans or deeds of trust as specified in sub-paragraphs (a) or (c) of subdivision 6 of subsection III on property located in this state.

(e) Ground rents as specified in subdivision 7 of subsection III.

II. Reserve Investments Required. — 1. After satisfying requirements for minimum capital investments specified in subsection I, any domestic stock or mutual insurance company other than a life insurance company or a fraternal benefit association, may invest its funds in, or otherwise acquire, or loan upon, only the classes of reserve investments as specified in subsection III, unless it shall at all times have and maintain cash and such reserve investments (including its minimum capital investments), free from any lien or pledge, which, when valued in accordance with the provisions of this act, shall be at least equal in amount to fifty per centum of the aggregate amount of its unearned premium and loss reserves as shown by its last sworn statement, annual or quarterly on file with the commissioner. The term "lien or pledge" as used in this subsection shall not include any deposit of securities or cash with any government, nor trusteed assets, held in trust for the benefit or protection of all or any class of the policyholders, or policyholders and creditors, of such insurer.

2. No securities or other investments shall be eligible for purchase or acquisition under this section unless they are interest bearing or income paying, but defaults in interest or income occurring subsequent to such purchase or acquisition shall not affect the allowance thereof as an admitted asset at the market value thereof unless otherwise specifically provided in this act.

3. Nothing contained in this subsection shall prohibit the acquisition by an insurer of other securities of property if distributed to it as a dividend or if acquired by it pursuant to a lawful plan of reorganization, or if acquired by it pursuant to a lawful and bona fide agreement of bulk reinsurance or consolidation.

4. Any domestic stock or mutual insurance company other than a life insurance company or a fraternal benefit association, which has investments fully complying with the requirements of subdivision 1 of this subsection may acquire investments eligible under the provisions of subsection IV. Any such insurer whose investments do not fully comply with such requirements may, during a period of ten years from the effective date of this act, acquire such additional kinds of securities if acquired in substitution for other securities heretofore lawfully acquired by it and if such substitution results in a net reduction in the aggregate amount of the insurer's investments in securities not eligible under subsection III.

III. Classes of Reserve Investments.— The reserve investments of every domestic stock and mutual insurance company, other than a life insurance company or a fraternal benefit association, shall consist of the following:

1. Bonds or other evidences of indebtedness, not in default as to principal or interest, which are valid and legally authorized obligations issued, assumed or guaranteed by the United States of America or by any state thereof or by any territory or possession of the United States or by the District of Columbia, or by any county, city, town, village, municipality or district therein or by any political subdivision thereof or by any civil division or public instrumentality of one or more of the foregoing, if by statutory or other legal requirements applicable thereto, such obligations are payable, as to both principal and interest, from taxes levied or by such law required to be levied upon all taxable property or all taxable income within the jurisdiction of such governmental unit or from adequate special revenues pledged or otherwise appropriated or by such law required to be provided for the purpose of such payment, but not including any obligations payable solely out of special assessments on properties benefited by local improvements.

2. Obligations, other than those eligible for investment under subdivision 6, issued, assumed, or guaranteed by any solvent institution created or existing under the laws of the United States or of any state, district or territory thereof, which are not in default as to principal or interest, and which are qualified under any of the following paragraphs:

(a) Obligations which are secured by adequate collateral security and bear fixed interest and if during each of any three, including the last two, of the five fiscal years next preceding the date of acquisition by such insurer, the net earnings of the issuing, assuming or guaranteeing institution available for its fixed charges, as hereinafter defined, shall have been not less than one and one-quarter times the total of its fixed charges for

such year, or obligations which, at the date of acquisition by such insurer, are adequately secured and have investment qualities and characteristics wherein the speculative elements are not predominant. In determining the adequacy of collateral security, not more than one-third of the total value of such required collateral shall consist of stock other than stock meeting the requirements of subdivision III.

(b) Fixed interest bearing obligations, other than those described in paragraph (a) if the net earnings of the issuing, assuming or guaranteeing institution available for its fixed charges for a period of five fiscal years next preceding the date of acquisition by such insurer shall have averaged per year not less than one and one-half times its average annual fixed charges applicable to such period and if during the last year of such period such net earnings shall have been not less than one and one-half times its fixed charges for such year.

(c) Adjustment, income or other contingent interest obligations if the net earnings of the issuing, assuming or guaranteeing institution available for its fixed charges for a period of five fiscal years next preceding the date of acquisition by such insurer shall have averaged per year not less than one and one-half times the sum of its average annual fixed charges and its average annual maximum contingent interest applicable to such period and if during each of the last two years of such period such net earnings shall have been not less than one and one-half times the sum of its fixed charges and maximum contingent interest for such year.

Within the meaning of this act the term "obligation" shall include bonds, debentures, notes or other evidences of indebtedness; the term "institution" shall include a corporation, a joint stock association and a business trust. The term "net earnings available for fixed charges" shall mean net income after deducting operating and maintenance expenses, taxes other than federal and state income taxes, depreciation and depletion, but excluding extraordinary non-recurring items of income or expense appearing in the regular financial statements of the issuing, assuming or guaranteeing institutions. The term "fixed charges" shall include interest on funded and unfunded debt amortization of debt discount, and rentals for leased properties. If net earnings are determined in reliance upon consolidated earnings statements of parent and subsidiary institutions, such net earnings shall be determined after provision for income taxes of subsidiaries and after proper allowance for minority stock interest, if any; and the required coverage of fixed charges shall be computed on a basis including fixed charges and preferred dividends of subsidiaries other than those payable by such subsidiaries to the parent corporation or to any other of such subsidiaries, except that if the minority common stock interest in the subsidiary corporation is substantial, the fixed charges and preferred dividends may be apportioned in accordance with regulations prescribed by the commissioner.

In applying the earnings tests under this act to any issuing, assuming or guaranteeing institution, whether or not in legal existence during the whole of such five years next preceding the date of investment by such insurer, which has at any time or times during such five year period acquired the assets of any other institution or institutions by purchase, merger, consolidation or otherwise, substantially as an entirety, or has been reorganized pursuant to the bankruptcy law, the earnings of such other predecessor or constituent institutions, or of the institution so reorganized, available for interest and dividends for such portion of such period as shall have preceded such acquisition, or such reorganization may be included in the earnings of such issuing, assuming or guaranteeing institution for such portion of such period as may be determined in accordance with adjusted or pro forma consolidated earnings statements covering such portion of such period and giving effect to all stocks or shares outstanding and all fixed charges existing, immediately after such acquisition, or such reorganization.

3. Preferred or guaranteed stocks or shares of any solvent institution, created or existing under the laws of the United States or of any state, district or territory thereof, if all of the prior obligations, and prior preferred stocks, if any, of such institution at the date of acquisition by such insurer are eligible as investments under this section; and if qualified under paragraph (a) or paragraph (b) following:

(a) Preferred stocks or shares shall be deemed qualified if both of the following requirements are met: (a-1) the net earnings of such institution available for its fixed charges for a period of five fiscal years next preceding the date of acquisition by such insurer shall have averaged per year not less than one and one-half times the sum of its average annual fixed charges, if any, its average annual maximum contingent interest if any, and its average annual preferred dividend requirements applicable to such period; and (a-2) during each of the last two years of such period such net earnings shall have been not less than one and one-half times the sum of its fixed charges, contingent interest and preferred dividend requirements for such year. The term "preferred dividend requirements" shall be deemed to mean cumulative or non-cumulative dividends whether paid or not.

(b) Guaranteed stocks or shares shall be deemed qualified if the assuming or guaranteeing institution meets the requirements of paragraph (b) of subdivision 2 of subsection III construed so as to include as a fixed charge the amount of guaranteed dividends of such issue or the rental covering the guarantee of such dividends.

4. (a) Certificates, notes or other obligations issued by trustees or receivers of any institution created or existing under the laws of the United States or of any state, district or territory thereof, which, or the assets of which, are being administered under the direction of any court having jurisdiction, if such obligation is adequately secured as to principal and interest.

(b) Equipment trust obligations or certificates which are adequately secured or other adequately secured instruments evidencing an interest in transportation equipment wholly or in part within the United States and a right to receive determined portions of rental, purchase or other fixed obligatory payments for the use or purchase of such transportation equipment.

5. Bank and bankers' acceptances and other bills of exchange of the kind and maturities made eligible, pursuant to law, for purchase in the open market by federal reserve banks.

6. (a) Bonds or evidences of indebtedness other than those described in subdivision 2 of subsection III which are secured by first mortgages or deeds of trust upon unencumbered fee simple or improved leasehold real property located in the United States. Real property shall not be deemed to be encumbered within the meaning of this section, by reason of the existence of instruments reserving mineral, oil or timber rights, rights of way, sewer rights, rights in walls, nor by reason of any liens for taxes or assessments not yet due, nor by reason of building restrictions or other restrictive covenants, nor when such real property is subject to lease under which rents or profits are reserved to the owner, if in any event the security for such loan is a first lien upon such real property and if there is no condition or right of re-entry or forfeiture, under which such lien can be cut off, subordinated or otherwise disturbed. No such mortgage loan or loans made or acquired by any insurer on any one property shall, at the time of investment by the insurer, exceed two-thirds of the value of the real property securing the same. No such mortgage loan or loans shall be made or acquired by an insurer except after an appraisal made by an appraiser for the purpose of such investment. No such mortgage loan made or acquired by an insurer which is a participation or a part of a series or issue secured by the same mortgage or deed of trust shall be a lawful investment under this paragraph unless the entire series or issue which is secured by the same mortgage or deed of trust is held by such insurer or unless the insurer holds a senior participation in such mortgage or deed of trust giving it substantially the rights of a first mortgagee. Except as otherwise provided in this act, no domestic stock or mutual insurance company, other than a life insurance company or a fraternal benefit association, shall invest in or loan upon the security of any one property more than twenty-five thousand dollars or more than two per centum of its total admitted assets, whichever is the greater. In no event shall the total investments of any such insurer in the kinds permitted under this subdivision exceed forty per centum of its total admitted assets.

(b) Purchase money mortgages or like securities received by it upon the sale or exchange of real property acquired pursuant to subdivision 8 of this subsection III.

(c) Bonds or notes secured by mortgage or trust deed guaranteed or insured by the Federal Housing Administration under the terms of an act of congress of the United States of June twenty-seventh, nineteen hundred thirty-four, entitled the "National Housing Act," as heretofore or hereafter amended.

7. Ground rents in the District of Columbia or any state of the United States of America, provided, that in the case of unexpired redeemable ground rents the premium paid, if any, shall be amortized over the period between date of acquisition and redemption date; and in the case of expired redeemable ground rents the premium paid, if any, shall be charged off at the time of acquisition. Redeemable ground rents purchased at a discount shall be carried at an amount not greater than the cost of acquisition.

8. Real estate only if acquired or used for the following purposes in the following manner:

(a) The land and the building thereon in which it has its principal office or offices.

(b) Such as shall be requisite for its convenient accommodation in the transaction of its business.

(c) Such as shall have been acquired in satisfaction of loans, mortgages, liens, judgments, decrees or other debts previously owing to such insurer in the course of its business.

(d) Such as shall have been acquired in part payment of the consideration on the sale of real property owned by it, if each such transaction shall have effected a net reduction in the company's investment in real property.

(e) Additional real property and equipment incident to real property, if necessary or convenient for the purpose of enhancing the sale value of real property previously acquired or held by it pursuant to the provisions of paragraph (c) or (d) of this subdivision 8.

All real property acquired pursuant to paragraphs (a) and (b) of this subdivision shall be disposed of within five years after it shall have ceased to be necessary for the convenient accommodation of such insurer in the transaction of its business, and all real property acquired pursuant to paragraphs (c), (d) and (e) of this subdivision shall be disposed of within five years after the date of acquisition, unless in either case the commissioner shall certify that the interests of the insurer will suffer materially by the forced sale thereof, in which event the time for disposal of such real property may be extended for such time as the commissioner shall prescribe in such certificate. No real property shall be acquired by any domestic stock or mutual insurance company other than a life insurance company or a fraternal benefit association, pursuant to paragraphs (a), (b), (d) or (e) of this subdivision 8, except with the approval of the commissioner.

9. (a) Any domestic stock or mutual insurance company, other than a life insurance company or a fraternal benefit association, may invest in, or otherwise acquire or loan upon, bonds, notes or other evidences of indebtedness which are valid and legally authorized obligations issued, assumed or guaranteed by the Dominion of Canada or any province thereof and which are not in default as to principal or interest; but the aggregate amount of such investments which are held at any time by any such insurer, together with all Canadian investments held by it pursuant to the following paragraph (b) shall not exceed ten per cent of its total admitted assets, except where a greater amount is permitted pursuant to the following paragraph (b), in which case the provisions of this subdivision shall not be applicable.

(b) Any domestic stock or mutual insurance company, other than a life insurance company or a fraternal benefit association, which is authorized to do business in a foreign country or possession of the United States or which has outstanding insurance or reinsurance contracts on risks located in a foreign country or possession of the United States, may invest in, or otherwise

acquire or loan upon securities and investments in such foreign country or possession which are substantially of the same kinds, classes and investment grades as those eligible for investment under the foregoing subdivisions of this subsection; but the aggregate amount of such investments in a foreign country or a possession of the United States and of cash in the currency of such country or possession which is at any time held by such insurer shall not, except as provided in the next preceding paragraph (a), exceed one and one-half times the amount of its reserves and other obligations under such contracts or the amount which such insurer is required by law to invest in such country or possession, whichever shall be greater.

10. Stock and debentures, or either, of any housing company organized under the public housing law of this state, to the extent and upon such conditions as may be authorized by the commissioner, provided all of the stock of such housing company has been or is to be originally issued to one or more insurance companies.

IV. Residue and Surplus Fund Investments.—After satisfying the requirements for minimum capital investments, any domestic stock or mutual insurance company, other than a life insurance company or fraternal benefit association, which has accumulated and maintains reserve investments as required in subsection II, may invest any portion of the remainder of its funds in, or otherwise acquire or loan upon, any of the classes of investments eligible under subsection III and any stock or shares, bonds or obligations, including voting trust certificates, certificates of deposit, interim receipts, and other similar instruments representing stock or shares, bonds or obligations eligible hereunder, or in investments in loans made by banks or trust companies secured by the assignment of cash surrender values of at least equal amount, in life insurance policies issued by life insurance companies licensed to do business in the state of North Carolina, except the following prohibited investments:

(1) Obligations, stock or other securities of any corporation, association or other business unit which is insolvent at the time of such acquisition or loan, except securities eligible for investment under subsection III.

(2) Any mortgage or deed of trust, or any real property or any interest therein, which does not come within the class of investments specified in subdivisions 6 and 7 of subsection III.

(3) Any capital stock of the investing insurer.

(4) Stocks, bonds or other securities issued by any corporation, if a majority of the outstanding stock of such corporation, or a majority of the stock having voting powers of such corporation is, or will be after such acquisition, directly or indirectly owned by such insurer or by or through one or more of its officers or directors holding the same, for the benefit of such insurer or of its stockholders, or owned by a parent corporation or subsidiary of such insurer, parent corporation or subsidiary thereof, or owned by any combination of the insurer, its parent corporation, its subsidiaries or its stockholders. Nothing contained in this paragraph shall be deemed to prevent any investment in the stock, bonds or other securities of a corporation organized exclusively to hold and operate real estate acquired by such insurer in accordance with and subject to the provisions of subsection III, nor an investment in the stock of another insurance corporation nor an investment in stocks, bonds or other securities of any corporation which is engaged exclusively in a kind of business properly incidental to the insurance business of such insurer, including an investment in securities of any corporation engaged in the financing of insurance premiums, or in such incidental business and the business of holding and operating real estate.

(5) Stocks, bonds or other securities issued by a corporation, other than an insurance corporation, having more than twenty per centum of its assets invested in insurance company stocks directly or indirectly, including proportionate equities or interest in insurance company stocks held through any intermediate subsidiary or subsidiaries of such issuing corporation.

(6) Stocks, bonds or other securities issued by a corporation, other than an insurance corporation, if a majority of the stock having voting powers of such issuing corporation is owned directly or indirectly by or for the benefit of one or more officers or directors of such insurer.

(7) Foreign investments, meaning stocks or shares, bonds or obligations of any person or governmental or business unit of or in a foreign country or any subdivision thereof, except such as conform substantially with the limitations imposed by this subsection upon like domestic investments; but the aggregate amount of foreign investments held by such insurer under this subdivision of subsection IV and under subdivision 9 of subsection III shall not exceed ten per centum of its total admitted assets or one and one-half times the amount of its reserves and other obligations under such contracts or the amount necessary to enable it to establish and carry on an insurance business in such foreign country, directly or through a subsidiary corporation, whichever shall be greater.

(8) Any investment which is found by the commissioner to be against public policy or designed to evade any prohibition of this act. Nothing contained herein shall be deemed to prohibit any such insurer from accepting securities, otherwise ineligible, which may be distributed pursuant to any plan of reorganization or dissolution.

V. Limitation of Investments.—Except as more specifically provided in this act, no domestic stock or mutual insurance company, other than a life insurance company or fraternal benefit association, shall have more than ten per cent of its total admitted assets invested in, or loaned upon the securities of any one institution; but this restriction shall not apply to the classes of governmental obligations (including those eligible under paragraph (c), subdivision 6 of subsection III) eligible for minimum capital investments of such insurer nor to investments in stocks of other insurance companies. No domestic stock or mutual insurance company, other than a life insurance company or fraternal benefit association shall hereafter acquire any real property of the kind or kinds specified in paragraphs (a) and (b) of subdivision 8 of subsection III, if the value of such real property, together with the value of all such

real property then held by it, exceeds ten per centum of its total admitted assets.

VI. Disposal or Reduction of Investments Unlawfully Acquired.—Every domestic stock and mutual insurance company, other than a life insurance company or fraternal benefit association, shall dispose of any investments acquired in violation of the law in force at the date of such acquisition, and in any determination of the financial condition of any such insurer, the amount of the value of such investments, if wholly ineligible, or the amount of the value thereof in excess of any limitation prescribed in this act, shall be deducted as an unadmitted asset of such insurer.

VII. Investments of Foreign and Alien Insurers.—(1) The commissioner may refuse a new or renewal license to any foreign insurer, if he finds that its investments do not comply in substance with the investment requirements and limitations imposed by this act upon like domestic insurers hereafter organized to do the same kind or kinds of insurance business. The commissioner may recognize like securities of the home state of a foreign insurer as minimum capital investments in lieu of the securities specified in sub-paragraphs (b) and (d) of subsection I.

(2) No alien insurer shall be authorized to do business in this state unless its general state deposits and its trusteed assets comply in substance with the requirements and limitations of this act applicable to like domestic insurers hereafter organized to do the same kind or kinds of insurance business, except that foreign investments shall be allowed to the following extent only:

(a) Bonds, notes or other evidences of indebtedness issued or guaranteed by the government of the country in which such alien insurer was organized or by any province or other major political subdivision thereof and not in default as to principal or interest, may be recognized as reserve investments under subsection III in an amount not exceeding the minimum capital required of a domestic stock insurer hereafter organized to do the same kind or kinds of insurance business.

(b) Bonds, notes or other valid and legally authorized obligations issued, assumed or guaranteed by the Dominion of Canada or any province thereof which are not in default as to principal or interest may be included in the trusteed assets of such alien insurer in an amount not exceeding ten per cent of the total admitted assets of the United States branch of such insurer.

VIII. Valuation of Investments.—(1) The investments of every stock and mutual insurance company, other than a life insurance company or a fraternal benefit association, authorized to do business in this state, except securities subject to amortization and except as otherwise provided in this act, shall be valued, in the discretion of the commissioner, at their market value, or at their appraised value, or at prices determined by him as representing their fair market value. If the commissioner finds that in view of the character of investments of any such insurer authorized to do business in this state it would be prudent for such insurer to establish a special reserve for possible losses or fluctuations in the values of its investments, he may require such insurer to establish such reserve, reasonable in amount, and may require that such reserve be maintained and reported in any statement or report of the financial condition of such insurer. The commissioner may, in connection with any examination or required financial statement of an authorized insurer require such insurer to furnish him a complete financial statement and audited report of the financial condition of any corporation of which the securities are owned wholly or partly by such insurer and may cause an examination to be made of any subsidiary or affiliate of such insurer.

(2) The stock of an insurance company shall be valued at its book value as shown by its last annual statement or the last report on examination, whichever is more recent. The book value of a share of common stock of an insurance company shall be ascertained by dividing (a) the amount of its capital and surplus less the value of all of its preferred stock, if any, outstanding, by (b) the number of shares of its common stock issued and outstanding. Notwithstanding the foregoing provisions, an insurer may, at its option, value its holdings of stock in a subsidiary insurance company in an amount not less than acquisition cost if such acquisition cost is less than the value determined as hereinbefore provided.

(3) Real estate acquired by foreclosure or by deed in lieu thereof, in the absence of a recent appraisal deemed by the commissioner to be reliable, shall not be valued at an amount greater than the unpaid principal of the defaulted loan at the date of such foreclosure or deed, together with any taxes and expenses paid or incurred by such insurer at such time in connection with such acquisition (but not including any uncollected interest on such loan), and the cost of additions or improvements thereafter made by such insurer and any amount or amounts thereafter paid by such insurer on any assessments levied for improvements in connection with the property.

(4) Purchase money mortgages shall be valued in an amount not exceeding the acquisition cost of such real property or ninety per cent of the value of such real property, whichever is less.

(5) The stock of a subsidiary of an insurer shall be valued on the basis of the value of only such of the assets of such subsidiary as would constitute lawful investments for the insurer if acquired or held directly by the insurer.

IX. Interest, Dividends and Rent.—In any determination of the financial condition of every stock and mutual insurance company, domestic or foreign, other than a life insurance company or a fraternal benefit association, authorized to do business in this state, amounts due to such insurer may be allowed as an admitted asset of such insurer as follows:

(1) Interest due or accrued on any bond or evidence of indebtedness qualifying as an admitted asset which is not in default and which is not valued on a basis including accrued interest.

(2) Declared and unpaid dividends on stocks and shares unless such amount has otherwise been allowed as an admitted asset.

(3) Interest due or accrued upon a collateral loan in an amount not to exceed one year's interest thereon.

(4) Interest due or accrued on deposits in solvent banks and trust companies, and interest due

or accrued on other admitted assets if such interest is in the judgment of the commissioner a collectible asset.

(5) Interest due or accrued on any real estate mortgage loan which is an admitted asset, in amount not exceeding in any event the amount, if any, obtained by subtracting the amount of the principal remaining unpaid from the value of the property less delinquent taxes thereon; but if any interest on such loan is in default more than eighteen months, or if any interest on such loan is in default and any taxes or any installment thereof on such property are and have been due and unpaid for more than eighteen months, no allowance shall be made for any interest on such loan.

(6) Rent due or accrued on real property if such rent is not in arrears for more than three months.

X. Application of Section 58-79, Subdiv. II (c). —The provisions of subdivision II (c) of section 58-79 shall apply to all insurance companies doing business in this state. (1945, c. 386.)

§ 58-81. Authority to increase or reduce capital stock.—The commissioner of insurance shall, upon application, examine the proceedings of domestic companies to increase or reduce their capital stock, and when found conformable to law shall issue certificates of authority to such companies to transact business upon such increased or reduced capital: Provided, that in no event shall the said capital stock be reduced to an amount less than that required upon organization of such company in section 58-77. He shall not allow stockholders' obligations of any description as part of the assets or capital of any stock insurance company unless the same are secured by competent collateral. (Rev., s. 4732; 1899, c. 54, s. 15; 1945, c. 386; C. S. 6335.)

Editor's Note.—The 1945 amendment added the proviso to the first sentence.

§ 58-82. Assessment of shares; revocation of license.—When the net assets of a company organized under this article do not amount to more than the amount required in section 58-77 for its original capital, it may make good its capital to the original amount by assessment of its stock. Shares on which such an assessment is not paid within sixty days after demand shall be forfeitable and may be canceled by vote of the directors and new shares issued to make up the deficiency. If such company does not, within three months after notice from the commissioner of insurance to that effect, make good its capital or reduce the same, as allowed by this article, its authority to transact new business of insurance shall be revoked by the commissioner. (Rev., s. 4733; 1899, c. 54, s. 28; 1903, c. 438, s. 4; 1945, c. 386; C. S. 6336.)

Editor's Note.—The 1945 amendment substituted in line three the words "the amount required in § 58-77 for" for the words "three-fourths of."

§ 58-83. Increase of capital stock.—Any company organized under the provisions of this chapter may issue pro rata to its stockholders certificates of any portion of its actual net surplus over and above the minimum required by law it deems fit to divide, which shall be considered an increase of its capital to the amount of such certificates. The company may, at a meeting called for the purpose, vote to increase the amount and number of shares of its capital stock, and to issue certificates therefor when paid for in full. In whichever method the increase is made, the company shall, within thirty days after the issue of such certificates, submit to the commissioner of insurance a certificate setting forth the amount of the increase and the facts of the transaction, signed and sworn to by its president and secretary and a majority of its directors. If the commissioner of insurance finds that the facts conform to the law, he shall endorse his approval thereof; and upon filing such certificate so endorsed with the secretary of state, and the payment of a fee of five dollars for filing the same, the company may transact business upon the capital as increased, and the commissioner of insurance shall issue his certificate to that effect. (Rev., s. 4734; 1899, c. 54, s. 29; 1945, c. 386; C. S. 6337.)

Editor's Note.—The 1945 amendment struck out the words "this article" in line two and inserted in lieu thereof the words "the provisions of this chapter." It also inserted after the word "surplus" in line four the words "over and above the minimum required by law."

§ 58-85. Dividends not payable when capital stock impaired; liability of stockholders for unlawful dividends.—No dividend shall be paid by any company incorporated in this state when its capital stock is impaired, or when such payment would have the effect of impairing its capital stock; and any dividend so paid subjects the stockholders receiving it to a joint and several liability to the creditors of said company to the extent of the dividend so paid. (Rev., s. 4736; 1899, c. 54, s. 31; 1903, c. 536, s. 3; 1945, c. 386; C. S. 6339.)

Editor's Note.—The 1945 amendment struck out the former first sentence which read as follows: "No stock company organized under this article may pay a cash or stock dividend except from its actual net surplus computed as required by law in its annual statements, nor may any such company which has ceased to do new business of insurance divide any portion of its assets, except surplus, to its stockholders, until it has performed or canceled its policy obligations."

§ 58-85.1. Payment of dividends impairing financial soundness of company or detrimental to policyholders.—Each domestic insurance company in North Carolina shall be restricted by the commissioner from the payment of any dividends to its stockholders whenever the commissioner determines from examination of such company's financial condition that the payment of future dividends would impair the financial soundness of the company or be detrimental to its policyholders, and such restrictions shall continue in force until such future date when the commissioner may specifically permit the payment of dividends to stockholders by the company through a written authorization. Nothing contained in this section and no action taken by the commissioner shall in any way restrict the liability of stockholders under the preceding section. (1945, c. 386.)

§ 58-86.1. Certain officers debarred from commissions.—No officer or other person whose duty it is to determine the character of the risk, and upon whose decision the application shall be accepted or rejected by an insurance company, shall receive as any part of his compensation a commission upon the premiums, but his compensation shall be a fixed salary and such share in the

net profits as the directors may determine. Nor shall such officer or person be an employee of any officer or agent of the company. (Rev., s. 4738; 1899, c. 54, s. 32; 1903, c. 438, s. 4; 1945, c. 386; C. S. 6347.)

Editor's Note.—This section was transferred from § 58-93.

Art. 7. Guaranty Fund for Domestic Companies.

§ 58-88. Separate accounts; application of fund.—Every insurance company which establishes a guaranty fund under the provisions of this article must keep a separate account of the same on its books, together with a full and true list of any securities held therefor. The money and securities belonging to the guaranty fund must be invested in the same manner as is now provided by law for the investment of other assets of insurance companies; but any bond or other securities received by any such insurance company as a part of its guaranty fund may be deposited with the commissioner of insurance, as is now allowed by law, subject to the further provisions of this article. An insurance company receiving said money or securities as a part of its guaranty fund, as herein provided, may pay to the person, firm, or corporation from whom the same is received an annual dividend of not more than eight per cent on the amount of said money or securities. The guaranty fund herein provided for shall be applied to the payment of claims of policyholders only when the insurance company has exhausted its cash on hand and the invested assets, exclusive of uncollected premium; and when the guarantee is in any way impaired the directors may make good the whole or any part of such impairment, by assessment upon the contingent funds of the company at the date of such impairment, if any are available. (1909, c. 922, s. 1; 1945, c. 386; C. S. 6342.)

Editor's Note.—The 1945 amendment substituted in the third sentence "an annual dividend" for "a semi-annual dividend" and "eight per cent" for "three and one-half per cent."

Art. 8. Mutual Insurance Companies.

§ 58-92. Mutual insurance companies organized; requisites for doing business.—No policy may be issued by a mutual company until the president and the secretary of the company have certified under oath that every subscription for insurance in the list presented to the commissioner for approval is genuine, and made with an agreement with every subscriber for insurance that he will take the policies subscribed for by him within thirty days after the granting of a license to the company by the commissioner to issue policies. (Rev., s. 4738; 1899, c. 54, ss. 25, 32, 34; 1901, c. 391, s. 3; 1903, c. 438, s. 4; 1911, c. 93; 1945, c. 386; C. S. 6346.)

Editor's Note.—The 1945 amendment struck out the former first sentence and made changes in the second sentence.

§ 58-92.1. Manner of amending charter.—1. A domestic mutual insurance company may hereafter amend its charter in the following manner only:

(a) A meeting of the board of directors shall be called in accordance with the by-laws, specifying the amendment to be voted upon at such meeting;

(b) If at such meeting two-thirds of the directors present vote in favor of the proposed amendment, then the president and secretary shall under oath make a certificate to this effect, which certificate shall set forth the call for such meeting, the service of such call upon all directors, and the minutes of the meeting relating to the adoption of the proposed amendment;

(c) Said officers shall cause said certificate to be published once a week for two consecutive weeks in a newspaper in Raleigh and in the county where the company's principal office is located, or posted at the court house door if no newspaper be published within the county. Said printed or posted notices shall be in such form and of such size as the commissioner may approve, and in addition to setting forth in full the certificate required in paragraph (b) shall state that application for amending the company's charter in the manner specified has been proposed by the board of directors, and shall also state the time set for a meeting of policyholders thereby called to be held at the principal office of the company to take action on the proposed amendment. A true copy of such notice shall be filed with the commissioner, and also with that official who performs the functions of insurance commissioner in each state where the company is licensed to do business. Such publication and filing of notices shall be completed at least thirty days prior to the date set therein for the meeting of policyholders and due proof thereof shall be filed with the commissioner at least fifteen days prior to the date of such meeting. If the meeting at which the proposed amendment is to be considered is a special meeting, rather than a regular annual meeting of policyholders, such special meeting can be called only after the commissioner has given his approval in writing, and the published notice shall show the fact of such approval.

(d) If at such policyholders' meeting two-thirds of those voting in person or by proxy shall vote in favor of any proposed amendment, the president and secretary shall make a certificate under oath setting forth such fact together with the full text of the amendment thus approved. Said certificate shall, within thirty days after such meeting, be submitted to the commissioner for his approval as conforming to the requirements of law, and it shall be the duty of the commissioner to act upon all proposed amendments within ten days after the filing of such certificate with him.

2. All charter amendments heretofore issued upon application of the board of directors of any domestic mutual insurance company are hereby validated, if otherwise legally adopted. (1947, c. 721.)

Editor's Note.—For comment on this section, see 25 N. C. Law Rev. 441.

§ 58-93: Transferred to § 58-86.1 by Session Laws 1945, c. 386.

Editor's Note.—This section was repealed but a part of it was rewritten and transferred as stated above.

§ 58-94. Policyholders are members of mutual companies.—Every person insured by a mutual insurance company is a member while his policy is in force, entitled to one vote for each policy he holds, and must be notified of the time and place of holding its meetings by a written notice or by an imprint upon the back of each policy, receipt, or certificate of renewal, as follows:

The insured is hereby notified that by virtue of

this policy he is a member of the ..... insurance company, and that the annual meetings of the company are held at its home office on the ..... day of ....., in each year, at ..... o'clock.

The blanks shall be duly filled in print and are a sufficient notice. A corporation which becomes a member of such company may authorize any person to represent it, and this representative has all the rights of an individual member. A person holding property in trust may insure it in such company, and as trustee assume the liability and be entitled to the rights of a member, but is not personally liable upon the contract of insurance. Members may vote by proxies, dated and executed within three months, and returned and recorded on the books of the company three days or more before the meeting at which they are to be used; but no person as proxy or otherwise may cast more than twenty votes. (Rev., s. 4739; 1899, c. 54, s. 33; 1945, c. 386; 1947, c. 721; C. S. 6348.)

Editor's Note.—The 1945 amendment struck out the word "fire" from the caption of the section.

The 1947 amendment struck out the word "fire" formerly appearing before the word "insurance" in line two.

§ 58-95. Directors in mutual companies.—Every mutual insurance company shall elect by ballot a board of not less than seven directors, who shall manage and conduct its business and hold office for one year or for such term as the by-laws provide and until their successors are qualified. Two-thirds at least of the directors must be citizens of the state, and after the first election members only are eligible, but no director is disqualified from serving the term he was chosen for by reason of the expiration or cancellation of his policy. In companies with a guaranty capital, one-half of the directors shall be chosen by and from the stockholders. (Rev., s. 4739; 1899, c. 54, s. 33; 1945, c. 386; C. S. 6349.)

Editor's Note.—The 1945 amendment struck out the word "fire" formerly appearing after the word "mutual" in the caption and also in line two.

§ 58-96. Mutual companies with a guaranty capital.—A mutual insurance company formed as provided in this chapter, in lieu of the contributed surplus required for the organization of mutual companies under the provisions of section 58-77, or a mutual insurance company now existing, may establish a guaranty capital or surplus of not less than twenty-five thousand dollars nor more than three hundred thousand dollars, divided into shares of one hundred dollars each, which shall be invested in the same manner as is provided in this subchapter for the investment of the capital stock of insurance companies. The stockholders of the guaranty capital of a company or owners of guaranty surplus are entitled to an annual dividend of not more than eight per centum on their respective shares, if the net profits or unused premiums left after all expenses, losses, and liabilities then incurred, together with the reserve as provided for, are sufficient to pay the same. The guaranty capital or surplus shall be applied to the payment of losses only when the company has exhausted its cash in hand and the invested assets, exclusive of uncollected premiums, and when thus impaired, the directors may make good the whole or any part of it by assessments upon the contingent funds of the company at the date of such impairment. Shareholders and members of such companies are subject to the same provisions of law in respect to their right to vote as apply respectively to shareholders in stock companies and policyholders in purely mutual companies. This guaranty capital or surplus may be reduced or retired by vote of the policyholders of the company and the assent of the commissioner of insurance, if the net assets of the company above its reserve and all other claims and obligations, exclusive of guaranty capital or surplus, for two years immediately preceding and including the date of its last annual statement, is not less than twenty-five per centum of the guaranty capital or surplus. Due notice of such proposed action on the part of the company must be mailed to each policyholder of the company not less than thirty days before the meeting when the action may be taken, and must also be advertised in two papers of general circulation, approved by the commissioner of insurance, not less than three times a week for a period of not less than four weeks before such meeting. No insurance company with a guaranty capital or surplus, which has ceased to do new business, shall divide to its stockholders any part of its assets or guaranty capital or surplus, except income from investments, until it has performed or canceled its policy obligations. (Rev., s. 4740; 1899 c. 54, s. 34; 1911, c. 196, s. 3; 1945, c. 386; C. S. 6350.)

Editor's Note.—The 1945 amendment struck out the word "fire" formerly appearing after the word "mutual" in the caption and in line one. It also struck out the words "article, or a mutual fire" formerly appearing after the word "this" in line two and inserted in lieu thereof the words "chapter, in lieu of the contributed surplus required for the organization of mutual companies under the provisions of section fifty-eight-seventy-seven, or a mutual." It further changed the first sentence by substituting "three" for "two" in line eight and striking out the word "certain" formerly appearing before the word "insurance" in line twelve. In the second sentence the amendment changed the dividend from "a semi-annual" to "an annual" one and the "per centum" from "three and one-half" to "eight," and struck out the words "for reinsurance" formerly appearing after the word "reserve" near the end of the sentence. The amendment struck out after the word "surplus" near the beginning of the fifth sentence the words "shall be retired when the permanent fund of the company equals two per centum of the amount insured upon all policies in force, and." It also struck out the word "reinsurance" formerly appearing before the word "reserve" in the said sentence.

§ 58-97. Dividends to policyholders.—Any participating or dividend paying company, stock or mutual, other than life, may declare and pay a dividend to policyholders from its surplus which shall include only its surplus in excess of any required minimum surplus. No such dividend shall be paid unless fair and equitable and for the best interest of the company and its policyholders. In declaring any dividend to its policyholders, any such company may make reasonable classifications of policies expiring during a fixed period, upon the basis of each general kind of insurance covered by such policies and by territorial divisions of the location of risks by states, except that in fixing the amount of dividends to be paid on each general kind of insurance, which dividends shall be uniform in rate and applicable to the majority of risks within such general kind of insurance, exceptions may be made as to any class or classes of risk and a different rate or

amount of dividends paid on such class or classes if the conditions applicable to such class or classes differ substantially from the condition applicable to the kind of insurance as a whole. Every such company shall have an equal rate of dividend for the same term on all policies insuring risks in the same classification. The payment of dividends to policyholders shall not be contingent upon the maintenance or renewal of the policy. All dividends shall be paid to the policyholder unless a written assignment thereof be executed. Neither the payment of dividends nor the rate thereof may be guaranteed by any company, or its agent, prior to the declaration of the dividend by the board of directors of such company. The holders of policies of insurance issued by a company in compliance with the orders of any public official, bureau or committee, in conformity with any statutory requirement or voluntary arrangement, for the issuance of insurance to risks not otherwise acceptable to the company shall be entitled to dividends at the same rate as other policyholders of the company. (Rev., s. 4741; 1899, c. 54, s. 35; 1935, c. 89; 1945, c. 386; 1947, c. 721; C. S. 6351.)

Editor's Note.—
The 1945 amendment rewrote this section which formerly also applied to assessments and contingent liability of policyholders. Now see §§ 58-97.1 to 58-97.3.
The 1947 amendment inserted in lines two and three the words "stock or mutual".

§ 58-97.1. Contingent liability of policyholders.—Every insurance company shall in its by-laws and policies prescribe the contingent liability, if any, of its members for the payment of losses, reserves and expenses not provided for by its assets, which contingent liability shall be in accordance with the provisions of section 58-77. Each member is liable for the payment of his proportionate share of any assessments made by the company in accordance with the law, his contract and the by-laws of the company on account of losses incurred while he was a member, if he is notified of such assessment within one year after the expiration of his policy. When any reduction is made in the contingent liability of members, it shall apply proportionately to all policies in force. (1945, c. 386.)

§ 58-97.2. Contingent liability printed on policy.—Every insurance company licensed to do business in this state shall print upon the filing face of its policies in clear and explicit language the full contingent liability of its members. (1945, c. 386.)

§ 58-97.3. Non-assessable policies; foreign or alien companies.—No foreign or alien insurance company shall be licensed to issue in this state non-assessable policies unless it has a free surplus equal in amount to that required of a domestic insurance company, writing the same kind or kinds of insurance, and in addition thereto has fully complied with the requirements of the government under which it was organized; and no foreign or alien insurance company may be licensed to do business in this state to issue assessable policies if it issues non-assessable policies in any other state or country unless all policies shall state that any assessment shall be for the exclusive benefit of holders of policies which provide for such contingent liability and the holders of policies subject to assessment shall not be liable to assessment in an amount greater in proportion to the total deficiency than the ratio that the deficiency attributable to the assessable business bears to the total deficiency. (1945, c. 386.)

§ 58-98. Waiver of forfeiture in policies assigned or pledged; notice of assignment; payment of assessment or premium by assignee or mortgagee.—When any policy of insurance is issued by any mutual insurance company or association other than life, organized under the laws of this state and such policy is assigned or pledged as collateral security for the payment of a debt, such company or association, by its president and secretary or other managing officers, may insert in such policy so assigned or pledged, or attach thereto as a rider thereon, a provision or provisions to be approved by the commissioner of insurance, whereby any or all conditions of the policy which work a suspension or forfeiture and especially the provisions of the statute which limits such corporation to insure only property of its members, may be waived in such case for the benefit of the assignee or mortgagee. In case any such company or association shall consent to such assignment of any policy or policies, or the proceeds thereof, it may nevertheless at any time thereafter, by its president and secretary or such other officer as may be authorized by the board of directors, cancel such policy by giving the assignee or mortgagee not less than ten days notice in writing: Provided, however, a longer period may be agreed upon by the company or association and such assignee or mortgagee. And the president and secretary of such company or association, with the approval of the commissioner of insurance, may agree with the assignee or mortgagee upon an assessment or premium to be paid to the insurer in case the insured shall not pay the same, which shall not be less than such a rate or sum of money as may be produced by the average assessments or premiums made or charged by like company or association during a period of five years next preceding the year of such agreement and assignment. When an assignment is made as herein provided the policy or policies so assigned or pledged, subject to the conditions herein, shall remain in full force and effect for the benefit of the assignee or mortgagee, notwithstanding the title or ownership of the assured to the property insured, or to any interest therein, shall be in any manner changed, transferred or encumbered. (Ex. Sess. 1920, c. 79; 1945, c. 386; C. S. 6351(a).)

Editor's Note.—The 1945 amendment inserted in line three the words "other than life."

§ 58-99. Guaranty against assessments prohibited.—If any director, officer or agent of a mutual insurance company, either officially or privately, shall give a guarantee to a policyholder thereof against an assessment to which such policyholder would otherwise be liable, he shall be punished by a fine not exceeding one hundred dollars for each offense. (Rev., s. 3496; 1899, c. 54, s. 100; 1945, c. 386; C. S. 6352.)

Editor's Note.—The 1945 amendment made this section applicable to agents and struck out the word "fire" formerly appearing before the word "insurance" in line two.

§ 58-100. Manner of making assessments; rights and liabilities of policyholders.—When a mutual insurance company is not possessed of cash funds above its reserve sufficient for the payment of insured losses and expenses, it must make an assessment for the amount needed to pay such losses and expenses upon its members liable to assessment therefor in proportion to their several liabilities. The company shall cause to be recorded in a book kept for that purpose the order for the assessment, together with a statement which must set forth the condition of the company at the date of the order, the amount of its cash assets and deposits, notes, or other contingent funds liable to the assessment, the amount the assessment calls for, and the particular losses or liabilities it is made to provide for. This record must be made and signed by the directors who voted for the order before any part of the assessment is collected, and any person liable to the assessment may inspect and take a copy of the same. When, by reason of depreciation or loss of its funds or otherwise, the cash assets of such company, after providing for its other debts, are less than the required premium reserve upon its policies, it must make good the deficiency by assessment in the manner above provided. If the directors are of the opinion that the company is liable to become insolvent they may, instead of such assessment, make two assessments, the first determining what each policyholder must equitably pay or receive in case of withdrawal from the company and having his policy canceled; the second, what further sum each must pay in order to reinsure the unexpired term of his policy at the same rate as the whole was insured at first. Each policyholder must pay or receive according to the first assessment, and his policy shall be canceled unless he pays the sum further determined by the second assessment, in which case his policy continues in force; but in neither case may a policyholder receive or have credited to him more than he would have received on having his policy canceled by a vote of the directors under the by-laws. (Rev., s. 4742; 1899, c. 54, ss. 36, 37; 1945, c. 386; C. S. 6353.)

Editor's Note.—The 1945 amendment struck out the word "fire" formerly appearing before the word "insurance" in line two and also struck out the word "reinsurance" formerly appearing before the word "reserve" in line three.

§§ 58-101, 58-102: Repealed by Session Laws 1945, c. 386.

Art. 10. Assessment Companies.

§ 58-107. "Assessment plan" printed on application and policy; waiver by commissioner.—Every policy or certificate issued to a resident of the state by any corporation transacting in the state the business of life insurance upon the assessment plan, or admitted to do business in this state on the assessment plan, shall print in bold type near the top of the front page of the policy, upon every policy or certificate issued upon the life of any such resident of the state, the words "issued upon the assessment plan"; and the words "assessment plan" shall be printed conspicuously upon every application, circular, card, and any and all printed documents issued, circulated, or caused to be circulated by such corporation within the state. (1913, c. 159, s. 1; 1929, c. 93, s. 1; 1933, c. 34; 1945, c. 386; C. S. 6358.)

Editor's Note.—The 1945 amendment omitted the former requirement of printing in red ink, and also omitted a provision relating to waiver of the requirements of the section by the commissioner of insurance.

§ 58-109. Deposits and advance assessments required.—Every domestic insurance company, association, order, or fraternal benefit society doing business on the assessment plan shall collect and keep at all times in its treasury one regular loss assessment sufficient to pay one regular average loss; and no such company, association, order, or fraternal benefit society shall be licensed by the commissioner of insurance unless it makes and maintains with him for the protection of its obligations at least five thousand dollars in United States or North Carolina bonds, in farm loan bonds issued by federal loan banks, or in the bonds of some city, county, or town of North Carolina to be approved by the commissioner of insurance, or deposit with him a good and sufficient bond, secured by a deed of trust on real estate situated in North Carolina and approved by him, or by depositing with the commissioner of insurance a bond in an amount of not less than five thousand ($5,000) dollars, issued by any corporate surety company authorized to do business in this state. The commissioner of insurance may increase the amount of deposit to the amount of reserve on the contracts of the association or society. The provisions of this section shall not apply to the farmers mutual fire insurance associations now doing business in the state and restricting their activities to not more than three adjacent counties. (Rev., s. 4792; 1913, c. 119, s. 1; 1917, c. 191, s. 2; 1933, c. 47; 1945, c. 386; C. S. 6360.)

The 1945 amendment struck out the former provision permitting deposit with commissioner of insurance to be made in installments, and substituted near the end of the section the word "three" for "two."

§ 58-110. Deposits by foreign assessment companies or order.—Each foreign insurance company, association, order, or fraternal benefit society doing business in this state on the assessment plan shall keep at all times deposited with the commissioner of insurance or in its head office in this state, or in some responsible banking or trust company, one regular assessment sufficient to pay the average loss or losses occurring among its members in this state during the time allowed by it for the collection of assessments and payment of losses. It shall notify the commissioner of insurance of the place of deposit and furnish him at all times such information as he requires in regard thereto; and no such company, association, order, or fraternal benefit society shall be licensed by the commissioner unless it makes and maintains with him for the protection of its obligations at least five thousand dollars in United States or North Carolina bonds, in farm loan bonds issued by federal land banks, or in the bonds of some county, city, or town in North Carolina to be approved by the commissioner of insurance, or a good and sufficient bond or note, secured by deed of trust on real estate situate in North Carolina, and approved by the commissioner. (Rev., s. 4713; 1899, c. 54, s. 84; 1903, c. 438, s. 9;

1913, c. 119, ss. 2, 3; 1917, c. 191, s. 2; 1945, c. 386; C. S. 6361.)

Editor's Note.—The 1945 amendment struck out the former last sentence of this section stating when its provisions should not apply.

§ 58-111: Repealed by Session Laws 1945, c. 377.

§ 58-112.1. Mutual life insurance companies; assessments prohibited.—No domestic mutual life insurance company shall, after the effective date of this article, be organized to issue any policy of life insurance or any annuity contract which provides for the payment of any assessment by any policyholder or member in addition to the regular premium charged for such insurance; nor shall any such company have power to levy or collect any such assessment. No foreign or alien life insurance company shall be permitted to do business in this state if it does business, in this state or elsewhere, on such or any other assessment plan. (1945, c. 386.)

Art. 11. Fidelity Insurance Companies.

§§ 58-113 to 58-118: Repealed by Session Laws 1945, c. 743, s. 2.

Cross References.—
The reference under § 58-113 in original to "§ 58-116" should be to "§ 55-117."

§ 58-119: Repealed by Session Laws 1945, c. 377.

Editor's Note.—
The repealed section was rewritten as § 58-39.2.

Art. 13. Fire Insurance Rating Bureau.

§ 58-125. North Carolina fire insurance rating bureau created.—There is hereby created a bureau to be known as the "North Carolina Fire Insurance Rating Bureau." (1945, c. 380.)

Editor's Note.—The 1945 amendment, effective July 1, 1945, rewrote this article which formerly related to rate-making companies.

§ 58-126. Scope of article.—The provisions of this article shall apply to insurance against loss to property located in this state, or to any valuable interest therein, by fire, lightning, windstorm, explosion, theft of or physical damage to motor vehicles, and all other kinds of insurance which fire insurance companies are authorized to write in this state except (a) marine; (b) transportation risks and such kinds of insurance as are designated by the commissioner as inland marine insurance; (c) aircraft risks; (d) rolling stock of railroad corporations and property of interstate common carriers used or employed by them in their business of carrying freight, merchandise or passengers in interstate commerce; (e) reinsurance. (1945, c. 380.)

§ 58-127. Rating bureau.—Under the supervision of the commissioner of insurance who shall call a meeting for that purpose and within six months after the effective date of this act, insurance companies authorized to effect insurance in this state against the risk of loss by perils within the scope of this act, shall organize a rating bureau for the purpose of making rates and rules and regulations which affect or determine the price which policyholders shall pay for insurance covered by this article, on property or risks located in this state; and all companies now or hereafter authorized to transact such business in this state shall become members of such bureau.

The government of the rating bureau shall be vested in its members, and it shall not be subject to the direction or control of any other bureau, association, corporation, company, individual or group of individuals. Each member shall have one vote.

The governing board, executive committee or other governing body of the rating bureau shall be provided for in the by-laws which shall provide also that at least one member of such governing body shall be an official of a domestic company and shall be a bona fide resident of the state of North Carolina.

The rating bureau shall have power to adopt a constitution and by-laws for its government and to adopt reasonable rules and regulations necessary to carry out its functions, but such constitution, by-laws, rules and regulations shall not be inconsistent with the provisions of this article, and together with any amendments thereto shall be approved by the commissioner before becoming effective. No such constitution, by-laws, rules and regulations shall discriminate against any type of insurer because of its plan of operation or otherwise, nor shall any insurer be prevented from returning any unused or unabsorbed premium deposit, savings or earnings to its policyholders or subscribers.

The rating bureau shall be empowered to subscribe for or purchase any necessary service. Subject to the approval of the commissioner it shall apportion the expenses of its operation among its members equitably in proportion to services rendered by the bureau; provided, however, the bureau may fix a minimum annual charge to be paid by each member, not exceeding fifty dollars, and a reasonable admission fee, not exceeding fifty dollars.

The principal office of the bureau shall be located in the City of Raleigh, North Carolina, where all records shall be kept and all business of the bureau transacted; provided that with the approval of the commissioner branch offices of the bureau may be established within the state. The bureau shall furnish without discrimination its service to its members, and any rating schedule, forms or plans of operation which have been approved by the commissioner and filed with the rating bureau shall be available for inspection at any reasonable time by all members of said bureau.

Any member of the rating bureau may appeal to the commissioner from any decision of such bureau and the commissioner shall, after a hearing held on not less than ten days' written notice to the appellant and to the bureau, issue an order approving the decision of the bureau or directing it to give further consideration to such proposal. In the event the bureau fails to take satisfactory action, the commissioner shall make such order as he may see fit. (1945, c. 380.)

§ 58-128. Power to secure information.—The commissioner, his deputy, or duly authorized examiner is authorized and empowered at all reasonable times and on reasonable notice to examine all records of the said rating bureau covering its operations including its constitution, by-laws, rating schedules, rules, regulations and amendments thereto. (1945, c. 380.)

§ 58-129. Rate information.—Every risk specifically rated in this state shall be rated upon schedule after inspection and a survey of such risk shall be made and filed in the rating bureau office. A copy of such survey shall be furnished upon request to the insured or his duly authorized representative without charge. (1945, c. 380.)

§ 58-130. Statistical reports.—Every insurer shall file annually with the rating bureau or at its option, with a common agency approved by the commissioner and representative of either stock or non-stock insurers, its underwriting experience in this state in accordance with classifications approved by the commissioner. The experience filed with the common agency selected shall be consolidated by such agency and a copy of the consolidated result shall be filed with the rating bureau; provided such insurers shall, if directed by the commissioner, file their individual underwriting experience with such rating bureau. Such data shall be kept and reports made in such manner and on such forms as may be prescribed by the commissioner. (1945, c. 380.)

§ 58-131. Reasonableness of rates.—The rating bureau in making rates shall not unfairly discriminate between risks involving essentially the same construction and hazards, and having substantially the same degree of protection. (1945, c. 380.)

§ 58-131.1. Approval of rates.—No rating method, schedule, classification, underwriting rule, by-law, or regulation shall become effective or be applied by the rating bureau until it shall have been first submitted to and approved by the commissioner. Provided, that a rate or premium used or charged in accordance with a schedule, classification, or rating method or underwriting rule or by-law or regulation previously approved by the commissioner need not be specifically approved by the commissioner. Every rating method, schedule, classification, underwriting rule, by-law or regulation submitted to the commissioner for approval shall be deemed approved, if not disapproved by him in writing within sixty (60) days after submission. (1945, c. 380.)

§ 58-131.2. Reduction or increase of rates.—The commissioner is hereby empowered to investigate at any time the necessity for a reduction or increase in rates. If upon such investigation it appears that the rates charged are producing a profit in excess of what is fair and reasonable he shall order such reduction of rates as will produce a fair and reasonable profit only.

If upon such investigation it appears that the rates charged are inadequate and are not producing a profit which is fair and reasonable, he shall order such increase of rates as will produce a fair and reasonable profit.

In determining the necessity for an adjustment of rates, the commissioner shall give consideration to all reasonable and related factors, to the conflagration and catastrophe hazard, both within and without the state, to the past and prospective loss experience, including the loss trend at the time the investigation is being made, and in the case of fire insurance rates, to the experience of the fire insurance business during a period of not less than five years next preceding the year in which the review is made.

Any reduction or increase of rates ordered by the commissioner shall be applied by the rating bureau subject to his approval within sixty (60) days and shall become effective solely to such insurance as is written having an inception date on and after the date of such approval.

Whenever the commissioner finds, after notice and hearing, that the bureau's application of an approved rating method, schedule, classification, underwriting rule, by-law or regulation is unwarranted, unreasonable, improper or unfairly discriminatory he shall order the bureau to revise or alter the application of such rating method, schedule, classification, underwriting rule, by-law or regulation in the manner and to the extent set out in the order. (1945, c. 380.)

§ 58-131.3. Deviations.—No insurer, officer, agent or representative thereof shall knowingly issue or deliver or knowingly permit the issuance or delivery of any policy of insurance in this state which does not conform to the rates, rating plans, classifications, schedules, rules and standards made and filed by the rating bureau. However, an insurer may deviate from the rates promulgated by the rating bureau provided the insurer has filed the deviation to be applied both with the rating bureau and the commissioner, and provided the said deviation is uniform in its application to all risks in the state of the class to which such deviation is to apply; and provided such deviation is approved by the commissioner as being reasonable under all the circumstances. If approved the deviation shall remain in force for a period of one year from the date of approval by the commissioner. Such deviation may be renewed annually subject to all of the foregoing provisions. A rate in excess of that promulgated by the rating bureau may be charged on any specific risk provided such higher rate is charged with the knowledge and written consent of both the insured and the commissioner. (1945, c. 380.)

§ 58-131.4. Pools, groups or associations.—Any insurer individually or as a member of a pool, group, or association engaged in the business of insuring special types or classes of risks in connection with which a particular inspection or engineering service and set of standards has been maintained to the satisfaction of the commissioner, and with respect only to such types or classes of risks, shall submit loss experience data to the commissioner for approval of its schedule of rates or deposits, forms and plans of operation either directly in its own behalf or through a unified facility of the group created and licensed by the commissioner for that purpose and maintained entirely or in part for such a purpose. In evaluating the forms, schedule of rates or deposits and plan of operation of such an insurer or pool or association of insurers the commissioner shall act with due regard for the previous record of such insurer or group of insurers, and with due appreciation of previous and prospective loss trends in this state and outside of this state, and to any other factors reasonably related to the classes or types of insurance written by such insurer or group of insurers. When so approved

such forms, schedule of rates or deposits and plan of operation shall be filed with the bureau.

Nothing contained in this section shall be construed as exempting any insurer, pool, group or association of insurers from all other provisions of this article and the provisions of Article 13 B with respect to licensing. (1945, c. 380.)

§ 58-131.5. Hearing.—The commissioner shall not make any rule, regulation or order under the provisions of this article without giving the rating bureau and insurers who may be affected thereby reasonable notice and a hearing if hearing is requested. All hearings provided for in this article shall be held at such time and place as shall be designated in a notice which shall be given by the commissioner in writing to the rating bureau and insurer or the officers and agents and representatives thereof which may be affected thereby, at least thirty (30) days before the date designated therein. The notice shall state the subject of the inquiry.

At the conclusion of such hearing, or within thirty (30) days thereafter, the commissioner shall make such order or orders as he may deem necessary in accordance with his finding. Within thirty (30) days after receiving written notice of any such order or finding any person affected thereby may request a rehearing or review thereof before the commissioner by filing a written request setting forth a summary of the reasons therefor. Upon receipt of such request, the commissioner shall set a date for rehearing. Such application for rehearing shall act as a stay of the provisions of such order. The commissioner may modify, change or rescind such order if he finds that the facts shown at the rehearing warrant such modification, change or rescission.

In the conduct of such hearing the commissioner, his deputy or the duly authorized examiner specifically designated by him for such purpose shall have power to administer oaths and to examine any person under oath and in connection therewith to require the production of any books, records, or papers relative to the inquiry. (1945, c. 380.)

§ 58-131.6. Revocation or suspension of license.—If the commissioner shall find, after due notice and hearing that any insurer, officer, agent or representative thereof has violated any of the provisions of this article, he may issue an order revoking or suspending the license of any such insurer, agent, broker or representative thereof. (1945, c. 380.)

§ 58-131.7. Penalties.—Any insurer, officer, agent or representative thereof failing to comply with, or otherwise violating any of the provisions of this article, shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than one hundred ($100.00) dollars nor more than five hundred ($500.00) dollars. (1945, c. 380.)

§ 58-131.8. Review of order of commissioner.—A review of any order made by the commissioner in accordance with the provisions of this article, shall be by appeal to the Superior Court of Wake County in accordance with the provisions of section 58-9.3. (1945, c. 380.)

§ 58-131.9. Limitation.—Nothing in this article shall apply to any town or county farmers mutual fire insurance association restricting their operations to not more than three (3) adjacent counties, or to domestic insurance companies, associations, orders or fraternal benefit societies now doing business in this state on the assessment plan. (1945, c. 380.)

Art. 13A. Casualty Insurance Rating Regulations.

§ 58-131.10. Scope of article.—Every insurer authorized to do the business of casualty insurance in this state, including fidelity and surety business, shall be either a member or a subscriber of a rating bureau licensed under this article by the commissioner or shall for itself make its own rates. No insurer shall be a member of more than one rating bureau for the purpose of rating the same risk. A rating bureau may be a person or persons, corporation, partnership, company, society or association, domestic or foreign, which makes rates for casualty insurance. (1945, c. 380.)

Editor's Note.—The act inserting this article made it effective Jan. 1, 1946.

§ 58-131.11. License.—No rating bureau shall do business or furnish its services for use in this state until it shall have been licensed by the commissioner and has designated a resident of North Carolina as its agent for service of notices and orders. Application for license shall be accompanied by a fee as prescribed in the Revenue Act and shall be in the form the commissioner shall prescribe and shall include the name and address of the applicant; a copy of its constitution, its articles of agreement or association or incorporation, its by-laws or rules governing its business, or such of the foregoing, if any, as the bureau may have; a list of insurers licensed to do business in North Carolina who are or who have agreed to become members or subscribers; the names and addresses of all officers and managers; and such other information as the commissioner may require. If the commissioner finds that the applicant has complied with the provisions of this article, he shall issue to it a license authorizing it to engage in rate making or the furnishing of its services for use in this state. Licenses shall remain in effect until suspended or revoked in the manner prescribed in this article. The license of every rating bureau doing business or furnishing its services for use in this state on the effective date of this act may continue in force, subject to the provisions of this article, pending its application for license hereunder, which application shall be made within six months after the effective date of this act. (1945, c. 380.)

§ 58-131.12. Organization.—The government of a rating bureau shall be vested in its members, or, in the case of a corporation, in its board of directors, and it shall not be subject to the direction or control of any other bureau, association, corporation, company, individual or group of individuals. The bureau shall have power to establish reasonable agreements and by-laws for its government, and to adopt reasonable rules and regulations necessary to carry out its functions; such reasonable agreements, by-laws, rules and regulations shall not be inconsistent with the provisions of this article and shall be first approved by the commissioner. All amendments to such agreements, by-laws, rules and regulations shall before becoming effective, be submitted to and approved

by the commissioner. No such agreements, by-laws, rules and regulations shall discriminate against any type of insurer because of its plan of operation or otherwise nor shall any insurer be prevented from returning any unused or unabsorbed premium, deposit, savings or earnings to its policyholders or subscribers. Every such rating bureau shall furnish its services without discrimination to any licensed insurer applying therefor. Any insurer admitted to membership or furnished service as a subscriber shall pay its reasonable share of the expense of operation of such bureau and shall observe all reasonable rules and regulations of the bureau.

Every rating bureau or insurer which makes its own rates shall, within ten days after written request therefor, and upon payment of such reasonable charges as may be approved by the commissioner, furnish to any person affected by any rate made by it, or to the authorized representative of such person, full information regarding such rate, including the schedule or schedules, if any, pursuant to which such rate was made. Every rating bureau, and every insurer which makes its own rates, shall provide reasonable means within this state, to be approved by the commissioner, whereby any person or persons affected by a rate made by it may be heard.

Any member or subscriber of a rating bureau may appeal to the commissioner from any decision of such bureau and the commissioner shall, after a hearing held on not less than ten days' written notice to the appellant and to the bureau, issue an order approving the decision of the bureau or directing it to give further consideration to such proposal. In the event the bureau fails to take satisfactory action, the commissioner shall make such order as he may see fit. (1945, c. 380.)

§ 58-131.13. Filing of rates; approval.—Every rating bureau or insurer which makes its own rates shall file with the commissioner every rate manual, classification of risks, rating plan, rating schedule, and every other rating rule which is made or used by it, and upon his request, all other information concerning the application and calculation of rates made or used by it. No rate, rate manual, classification of risks, rating plan, rating schedule, or other rating rule shall be effective until approved by the commissioner. The commissioner shall not approve any rate, rate manual, classification of risks, rating plan, rating schedule or other rating rule which is excessive, inadequate, unreasonable or unfairly discriminatory. (1945, c. 380.)

§ 58-131.14. Statistical reports.—Every insurer shall annually on or before October 1, file with the rating bureau of which it is a member or subscriber, or with such other agency as the commissioner of insurance may approve or designate, a statistical report showing a classification schedule of its premiums and losses on all classes of insurance to which this article is applicable, and such other information as the commissioner may deem necessary or expedient for the administration of the provisions of this article. (1945, c. 380.)

§ 58-131.15. Deviation.—Any insurer may make written request to the commissioner for approval of a deviation from a filing approved by him and made by a rating organization of which it is a member or subscriber. The basis for the deviation shall be specified in the request. The commissioner shall hear the insurer and the rating organization and shall give them reasonable notice of the time and place of the hearing. The commissioner shall approve a deviation if he finds it to be justified. He shall not approve a deviation if he finds that the resulting rates would be unreasonable, inadequate or unfairly discriminatory. (1945, c. 380.)

§ 58-131.16. Discrimination; revision of rates.—Whenever the commissioner finds, after notice and hearing, that discrimination exists in the making or application of rates made or used by any rating bureau or insurer, he may order that such discrimination be removed. Such discrimination shall not be removed by increasing the rate on any risk affected by the order unless such increase is approved by the commissioner as reasonable. Before making such order the commissioner shall give notice to the bureau or insurer which made such rate or rates and to all other persons whom he may deem directly affected thereby. Every bureau receiving any such notice shall promptly notify all of its members or subscribers who would be affected by such order and notice to such rating organization shall be deemed notice to such members or subscribers.

Whenever the commissioner shall determine, after notice and a hearing, that the rates charged or filed on any class of risks are excessive, inadequate, unreasonable or unfairly discriminatory, he shall issue an order to the rating bureau or insurer making such rates, directing that such rates be altered or revised in the manner and to the extent stated in such order to produce rates which are reasonable, adequate and not unfairly discriminatory.

Whenever the commissioner finds, after notice and hearing, that a bureau or insurer's application of an approved classification, rating plan, rating schedule or other rating rule is unwarranted, unreasonable, improper or unfairly discriminatory he shall order the bureau or insurer to revise or alter the application of such classification, rating plan, rating schedule, or other rating rule in the manner and to the extent set out in the order. (1945, c. 380.)

§ 58-131.17. Filing rate amendments. — Every rating bureau or insurer which makes its own rates may, from time to time, alter, supplement or amend its rates, rate manuals, schedules of rates, classifications of risks, rating plans and every other rating rule, or any part thereof, by filing with the commissioner copies of such alteration, or amendment, together with a statement of the reason or reasons therefor, none of which shall take effect until approved by the commissioner. (1945, c. 380.)

§ 58-131.18. Restriction on use of rates.—No insurer subject to this article shall enter into any agreement for the purpose of making or establishing rates except in accordance with the provisions hereof. No member or subscriber of any rating bureau or insurer shall charge or receive any rate which deviates from the rates, rating plans, classifications, schedules, rules and standards made and filed by such rating bureau or insurer except as provided in this article. No insurer and no agent or other representative of any

insurer and no insurance broker shall knowingly charge, demand or receive a rate or premium which deviates from the rates, rating plans, classifications, schedules, rules and standards, made and last filed by or on behalf of the insurer, or issue or make any policy or contract involving a violation of such rate filings. A rate in excess of that promulgated by the rating bureau or filed by a company on its own behalf may be charged on any specific risk provided such higher rate is charged with the knowledge and written consent of both the insured and the commissioner. (1945, c. 380.)

§ 58-131.19. Examinations.—The commissioner may, whenever he deems it expedient, but shall at least once in every five years, make or cause to be made an examination of the business, affairs and method of operation of every rating bureau doing business or furnishing its services for use in this state. The reasonable costs of such examination shall be determined and fixed by the commissioner and shall be paid by the rating bureau examined upon presentation to it of a detailed account of such cost. The commissioner may, in his discretion, waive such examination upon proof that such rating bureau has, within a reasonably recent period, been examined by a public official or department of another state, pursuant to the laws of such state, and upon the filing with the commissioner of a copy of the report of such examination. The officers, managers, agents, and employees of such rating bureau shall exhibit all its books, records, documents or agreements governing its method of operation, its rating system, and its accounts for the purpose of such examination. The commissioner may, for the purpose of facilitating and furthering such examination, examine under oath the officers, managers, agents and employees of such rating bureau. (1945, c. 380.)

§ 58-131.20. False information.—No person shall give false or misleading information to any rating bureau of which it is a member or subscriber, to the commissioner or to any person, which will in any manner affect the proper determination of reasonable, adequate and non-discriminatory rates. (1945, c. 380.)

§ 58-131.21. Suspension of license; hearing.—Any rating bureau or insurer which violates any provision of this article shall be subject to suspension of its license. Failure of any rating bureau or insurer to comply with the provisions of any order of the commissioner within the time limited by such order, or any extension thereof as the commissioner may, in his discretion grant, shall, if no appeal has been taken from such order, automatically suspend its license. No order suspending a license shall be made by the commissioner except upon ten days' notice, specifying the particular violation. If such rating bureau or insurer shall make a request therefor in writing within the ten-day period, the commissioner shall name a time and place for a hearing, at which it shall be given opportunity to make its defense. At the conclusion of such hearing or within thirty days thereafter the commissioner shall make such order as in his judgment the evidence shall warrant. A suspension of license shall be effective until modified or rescinded by order of the commissioner upon proof that the violation of the provisions of this article no longer continues, or upon proof that the rating bureau or insurer has complied with the terms of any prior order made by the commissioner, or until the order of the commissioner upon which such suspension is based is reversed or modified upon an appeal therefrom. (1945, c. 380.)

§ 58-131.22. Revocation or suspension of license.—If the commissioner shall find, after due notice and hearing, that any insurer, officer, agent or representative thereof has violated any of the provisions of this article, he may issue an order revoking or suspending the license of any such insurer, agent, broker or representative thereof. (1945, c. 380.)

§ 58-131.23. Penalties. — Any insurer, officer, agent or representative thereof failing to comply with, or otherwise violating any of the provisions of this article, shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00). (1945, c. 380.)

§ 58-131.24. Review of order of commissioner.—A review of any order made by the commissioner, in accordance with the provisions of this article, shall be by appeal to the Superior Court of Wake County in accordance with the provisions of section 58-9.3. (1945, c. 380.)

§ 58-131.25. Exceptions.—The provisions of this article shall not apply to any policy or contract of reinsurance; any policy of insurance against loss or damage to or legal liability in connection with property permanently located outside of this state, or any activity wholly carried on outside this state; insurance against loss of or damage to, or against liability arising out of the ownership, maintenance or use of any aircraft; marine insurance, inland marine insurance, automobile insurance, life, health or accident insurance, workmen's compensation insurance, title insurance, credit insurance, or annuities. The provisions of this article shall not apply to non-profit hospital service or non-profit medical service organizations, mutual benefit associations, or fraternal beneficiary associations. (1945, c. 380.)

Art. 13B. Rate Regulation of Miscellaneous Lines.

§ 58-131.26. Information to be filed with commissioner.—Every corporation, association, board, bureau or person maintaining a bureau or office for the purpose of suggesting, approving or making rates to be used by more than one insurer of property or risks of any kind located in this state other than those regulated under the provisions of Article 2 of Chapter 97, Articles 13, 13A and 25 of Chapter 58 shall be licensed and shall file with the commissioner a copy of the articles of agreement, association or incorporation and the by-laws and all amendments thereto under which such person, association, or bureau operates or proposes to operate, together with his or its business address and a list of the members or insurers represented or to be represented by him or it, as well as such other information concerning such rating organization and its operations as may be required by the commissioner. (1945, c. 380; 1947, c. 721.)

Editor's Note.—The 1947 amendment struck out in lines

4 and 5 the words "underwriter for insurance on" and inserted in lieu thereof the words "insurer of".

§ 58-131.27. Examination by commissioner; reports.—Every such person, corporation, association, or bureau, whether before or after the filing of the information specified in section 58-131.26, shall be subject to the visitation, supervision, and examination of the commissioner, who shall cause to be made an examination thereof as often as he deems it expedient, and at least once in three years, provided, the commissioner may accept in lieu of such examination a report of examination of such bureau made by any other state department of insurance. For such purpose he may appoint as examiners one or more competent persons, and upon such examination he, his deputy, or any examiner authorized by him shall have all the powers given to the commissioner, his deputy, or any examiner authorized by him by law, including the power to examine under oath the officers and agents and all persons deemed to have material information regarding the business or manner of operation by every such person, corporation, association, bureau, or board. The expense of any such examination shall be borne by the party examined. (1945, c. 380.)

§ 58-131.28. Schedule of rates filed.—Every such person, corporation, association, or bureau, as well as every insurance company doing business in the state, shall file with the commissioner any and every schedule of rates or such other information concerning such rates as may be suggested, approved, or made by any such rating organization for the purposes specified in section 58-131.26 or by such company for its own use and such rates shall not become effective until and unless approved by him. (1945, c. 380.)

§ 58-131.29. Certain conditions forbidden; no discrimination.—No such person, corporation, association, or bureau shall fix or make any rate or schedule of rates which is to or may apply to any risk within this state, on the condition that the whole amount of insurance on such risk or any specified part thereof shall be placed at such rates, or with the members of or subscribers to such rating organization; nor shall any such person, association, or corporation authorized to transact the business of insurance within this state, fix or make any rate or schedule of rates or charge a rate which discriminates unfairly between risks within this state of essentially the same hazard. Whenever it is made to appear to the satisfaction of the commissioner that such discrimination exists, he may, after a full hearing, either before himself or before any salaried employee of the insurance department whose report he may adopt, order such discrimination removed; and all such persons, corporations, associations, or bureaus affected thereby shall immediately comply therewith; nor shall such persons, corporations, associations, or bureaus remove such discrimination by increasing the rates on any risk or class of risks affected by such order unless it is made to appear to the satisfaction of the commissioner that such increase is justifiable. (1945, c. 380.)

§ 58-131.30. Record to be kept; hearing on rates.—Every such rating organization shall keep a careful record of its proceedings and shall furnish upon demand to any person upon whose property or risk a rate has been made, or to his authorized agent, full information as to such rate, and, if such property or risk be rated by schedule, a copy of such schedule; it shall also provide such means as may be approved by the commissioner whereby any person affected by such rate may be heard, either in person or by agent, before the governing or rating committee or other proper executive of such rating organization on an application for a change in such rate. (1945, c. 380.)

§ 58-131.31. Hearing on rates before the commissioner.—Any person, firm, or corporation aggrieved by any rating or classification assignment by such company, bureau, or board, may file a complaint in writing with the commissioner stating in detail the grounds upon which the complainant asks relief. The commissioner shall set a time, not earlier than seven days after the date of the notice, and a place for a hearing upon the complaint. After due hearing the commissioner shall make a finding as to whether the established rate or classification assignment made is excessive or unfair and shall make such orders as he deems advisable.

Any member or subscriber of a rating bureau may appeal to the commissioner from any decision of such bureau and the commissioner shall, after a hearing held on not less than ten days' written notice to the appellant and to the bureau, issue an order approving the decision of the bureau or directing it to give further consideration to such proposal. In the event the bureau fails to take satisfactory action, the commissioner shall make such order as he may see fit. (1945, c. 380.)

§ 58-131.32. Review of order of commissioner.—A review of any order made by the commissioner in accordance with the provisions of this article shall be by appeal to the Superior Court of Wake County in accordance with the provisions of section 58-9.3. (1945, c. 380.)

§ 58-131.33. Certain insurance contracts excepted.—This article shall not apply to any contract of life insurance, accident and health insurance or annuities, to any contract of reinsurance, to contracts of insurance upon property or risks permanently located without this state, nor to kinds of insurance for which the commissioner finds in the practice of the industry there are no established rates. (1945, c. 380.)

Art. 14. Real Estate Title Insurance Companies.

§ 58-134.1. Investment of capital.—Any real estate title insurance company having a capital stock of more than fifty thousand dollars, may, with the consent of the commissioner, after investing fifty thousand dollars of the capital, as provided in this chapter, invest not to exceed one-fourth of the total capital stock in abstract or title plants; and no such company shall guarantee or insure in any one risk more than forty per cent of its combined capital and surplus without first having the approval of the commissioner of North Carolina, which approval shall be endorsed upon the policy. (1945, c. 386.)

Art. 16. Reciprocal or Inter-Insurance Exchanges.

§ 58-139. Statement to be filed with commissioner of insurance.

7. That there is on deposit with such attorney and available for payment of losses a sum of not less than one hundred thousand dollars. (1913, c. 183, s. 3; 1945, c. 386; C. S. 6399.)

Editor's Note.—The 1945 amendment substituted in subsection 7 "one hundred" for "twenty-five." As the rest of the section was not affected by the amendment it is not set out.

§ 58-143. Reserve fund.—There shall at all times be maintained as a reserve a sum in cash or convertible securities equal to fifty per centum of the aggregate net annual deposits collected and credited to the accounts of the subscribers on policies having one year or less to run and pro rata on those for longer periods. For the purpose of said reserve, net annual deposits shall be construed to mean the advance payments of subscribers after deducting therefrom the amounts specifically provided in the subscribers' agreements, for expenses. Said sum shall at no time be less than one hundred thousand dollars, and if at any time fifty per cent of the aggregate deposits so collected and credited shall not equal that amount, then the subscribers, or their attorney for them, shall make up any deficiency. (1913, c. 183, s. 7; 1945, c. 386; C. S. 6403.)

Editor's Note.—The 1945 amendment substituted "one hundred" for "twenty-five" in the last sentence.

§ 58-148. Application of other sections.—Except as otherwise provided in this article, and except where the context otherwise requires, all of the provisions of this chapter relating to all insurers and those relating to insurers transacting the same kind or kinds of insurance which reciprocal insurers are permitted to transact, shall be applicable to reciprocal insurers authorized to do business in this state. Where any of such sections refer to a corporation, company or insurer, the same, when read in connection with and applicable to this article shall be deemed to mean a reciprocal insurer. (1913, c. 183, s. 13; 1945, c. 386; C. S. 6409.)

Editor's Note.—The 1945 amendment rewrote this section.

Art. 17. Foreign or Alien Insurance Companies.

§ 58-149. Admitted to do business.—Foreign or alien insurance companies, upon complying with the conditions of this chapter applicable to them, may be admitted to transact in this state, by constituted agents resident herein, any class of insurance authorized by the laws in force relative to the duties, obligations, prohibitions, and penalties of insurance companies, and subject to all laws applicable to the transaction of such business by foreign or alien insurance companies and their agents. (Rev., s. 4746; 1899, c. 54, s. 61; 1945, c. 384; C. S. 6410.)

Editor's Note.—The 1945 amendment, which made this section applicable to alien insurance companies, directed that the words "or alien" be inserted in the caption of the article.

§ 58-150. Conditions of admission.—A foreign or alien insurance company may be admitted and authorized to do business when it:

(1) Deposits with the commissioner a certified copy of its charter or certificate of organization and a statement of its financial condition and business, in such form and detail as he requires, signed and sworn to by its president and secretary or other proper officer, and pays for the filing of this statement the sum required by law.

(2) Satisfies the commissioner that it is fully and legally organized under the laws of its state or government to do the business it proposes to transact, and that it has been successful in the conduct of such business; that it has, if a stock company, a fully paid-up and unimpaired capital, exclusive of stockholders' obligations of any description of an amount not less than that required for the organization of a domestic company writing the same kinds of business; and if a mutual company that its free surplus is not less than that required for the organization of a domestic company writing the same kind of business, and that such capital, surplus, and other funds are invested in substantial accordance with the requirements of this chapter.

(3) By a duly executed instrument filed in his office constitutes and appoints the commissioner and his successor its true and lawful attorney, upon whom all lawful processes in any action or legal proceeding against it may be served, and therein agrees that any lawful process against it which may be served upon such attorney shall be of the same force and validity as if served on the company; and the authority thereof shall continue in force irrevocable so long as any liability of the company remains outstanding in this state. Copies of this instrument, certified by the commissioner, are sufficient evidence thereof, and service upon such attorney is sufficient service upon the principal.

(4) Appoints as its agent or agents in this state some resident or residents thereof.

(5) Files with the commissioner a certificate that it has complied with the laws of the state or government under which it was organized and is authorized to make contracts of insurance. (Rev., s. 4747; 1899, c. 54, s. 62; 1901, c. 391, s. 5; 1903, c. 438, s. 6; 1945, c. 384; C. S. 6411.)

Editor's Note.—The 1945 amendment made changes in subsections (2) and (5).

§ 58-151. Limitation as to kinds of insurance.—Any foreign or alien company admitted to do business in this state shall be limited with respect to doing kinds of insurance in this state in the same manner and to the same extent as are domestic companies, provided that any foreign insurance company which has been licensed to do the business of life insurance in this state continuously during a period of twenty years next preceding the effective date of this act may continue to be licensed, in the discretion of the commissioner, to do the kind or kinds of insurance business which it was authorized to do immediately prior to the taking effect of this act. (Rev., s. 4748; 1899, c. 44, s. 65; 1901, c. 391, s. 5; 1903, c. 438, s. 6; 1911, c. 111, s. 2; 1945, c. 384; C. S. 6412.)

Editor's Note.—The 1945 amendment, effective March 6, 1945, rewrote this section.

§ 58-151.1. Foreign companies; requirements for admission.—A company organized under the laws of any other of these United States for the transaction of life insurance may be admitted to do business in this state if it complies with the other provisions of this chapter regulating the terms and conditions upon which foreign life insurance companies may be admitted and authorized to do business in this state, and, in the opinion of the commissioner of insurance, is in sound financial condition and has policies in force

upon not less than five hundred lives for an aggregate amount of not less than five hundred thousand dollars. Any life company organized under the laws of any other country than the United States, in addition to the above requirements, must make and maintain the deposit required of such companies by article four of this chapter. (Rev., s. 4774; 1899, c. 54, s. 56; 1945, c. 379; C. S. 6456.)

Editor's Note.—The 1945 amendment transferred this section from section 58-196.

§ 58-152. Retaliatory laws.—When, by the laws of any other state or nation, any taxes, fines, penalties, licenses, fees, deposits of money or of securities, or other obligations or prohibitions are imposed upon insurance companies of this state doing business in such other state or nation or upon their agents therein greater than those imposed by this state upon insurance companies of such other state, then, so long as such laws continue in force, the same taxes, fines, penalties, licenses, fees, deposits, obligations and prohibitions, of whatever kind, may in the discretion of the commissioner be imposed upon all such insurance companies of such other state or nation doing business within this state and upon their agents here. Nothing herein repeals or reduces the license, fees, taxes, and other obligations now imposed by the laws of this state or to go into effect with the companies of any other state or nation unless some company of this state is actually doing or seeking to do business in such state or nation. When an insurance company organized under the laws of any state or country is prohibited by the laws of such state or country or by its charter from investing its assets other than capital stock in the bonds of this state, then and in such case the commissioner of insurance is authorized and directed to refuse to grant a license to transact business in this state to such insurance company. (Rev., s. 4749; 1899, c. 54, s. 71; 1903, c. 536, s. 11; 1927, c. 32; 1945, c. 384; C. S. 6413.)

Editor's Note.—
The 1945 amendment substituted for the word "shall" in line twelve the words "may in the discretion of the commissioner."

§ 58-155. Action to enforce compliance with this chapter.—Compliance with the provisions of this chapter as to deposits, obligations, and prohibitions, and the payment of taxes, fines, fees, and penalties by foreign or alien insurance companies, may be enforced in the ordinary course of legal procedure by action brought in the superior court of Wake County by the attorney-general in the name of the state upon the relation of the commissioner of insurance. (Rev., s. 4752; 1899, c. 54, s. 102; 1903, c. 438, s. 10; 1945, c. 384; C. S. 6416.)

Editor's Note.—The 1945 amendment inserted in line four the words "or alien."

Art. 17A. Mergers, Rehabilitation and Liquidation of Insurance Companies.

§ 58-155.1. Merger or consolidation.—1. Subject to the provisions of sections 58-103 and 58-104, relating to the mutualization of stock insurers, a domestic insurer may merge or consolidate with another insurer, subject to the following conditions:

(a) The plan of merger or consolidation must be submitted to and be approved by the commissioner in advance of the merger or consolidation.

(b) The commissioner shall not approve any such plan unless, after a hearing, he finds that it is fair, equitable to policyholders, consistent with law, and will not conflict with the public interest. If the commissioner fails to approve the plan, he shall state his reasons for such failure in his order made on such hearing.

(c) No director, officer, member or subscriber of any such insurer, except as is expressly provided by the plan of merger or consolidation, shall receive any fee, commission, other compensation or valuable consideration whatever, for in any manner aiding, promoting or assisting in the merger or consolidation.

(d) Any merger or consolidation as to an incorporated domestic insurer shall in other respects be governed by the general laws of this state relating to business corporations, except that the merger or consolidation of a domestic mutual insurer may be effected by vote of two-thirds of the members voting thereon pursuant to such notice and procedure as the commissioner may prescribe.

2. Reinsurance of all or substantially all of the insurance in force of a domestic insurer by another insurer under an agreement whereby the reinsuring company succeeds to all of the liabilities of and supplants the domestic insurance company thereon shall be deemed a consolidation for the purposes of this section. (1947, c. 923.)

Editor's Note.—For discussion of this article, see 25 N. C. Law Rev. 429.

§ 58-155.2. Grounds for rehabilitation.—The commissioner may apply for an order directing him to rehabilitate a domestic insurer upon one or more of the following grounds: That the insurer

(a) Is insolvent; or

(b) Has refused to submit its books, records, accounts or affairs to examination by the commissioner; or

(c) Has failed to comply with the commissioner's order to make good an impairment of capital of a stock insurer or an impairment of surplus of a mutual or reciprocal insurer, within the time prescribed; or

(d) Has transferred or attempted to transfer substantially its entire property or business, or has entered into any transaction the effect of which is to merge substantially its entire property or business in that of any other insurer without first having obtained the written approval of the commissioner; or

(e) Is found, after examination, to be in such condition that its further transaction of business will be hazardous to its policyholders, or to its creditors, or to its members, subscribers, or stockholders, or to the public; or

(f) Has wilfully violated its charter; or

(g) Has an officer, director, or manager who has refused to be examined under oath, concerning its affairs; or

(h) Has been the subject of an application for the appointment of a receiver, trustee, custodian or sequestrator of the insurer or of its property, or if a receiver, trustee, custodian, or sequestrator is appointed by a federal court or if such appointment is imminent; or

(i) Has consented to such an order through a

majority of its directors, stockholders, members, or subscribers; or

(j) Has failed to remove from office any officer or director whom the commissioner has found, after notice to and hearing of such insurer and such officer or director, to be a dishonest or untrustworthy person; or

(k) Has failed to pay a final judgment rendered against it in any state upon any insurance contract issued or assumed by it, within thirty days after the judgment became final or within thirty days after time for taking an appeal has expired, or within thirty days after dismissal of an appeal before final determination, whichever date is the later. (1947, c. 923.)

§ 58-155.3. Order of rehabilitation; termination.—1. An order to rehabilitate a domestic insurer shall direct the commissioner forthwith to take possession of the property of the insurer and to conduct the business thereof, and to take such steps toward removal of the causes and conditions which have made rehabilitation necessary as the court may direct.

2. If at any time the commissioner deems that further efforts to rehabilitate the insurer would be useless, he may apply to the court for an order of liquidation.

3. The commissioner, or any interested person upon due notice to the commissioner, at any time may apply for an order terminating the rehabilitation proceeding and permitting the insurer to resume possession of its property and the conduct of its business, but no such order shall be granted except when, after a full hearing, the court has determined that the purposes of the proceeding have been fully accomplished. (1947, c. 923.)

§ 58-155.4. Grounds for liquidation.—The Commissioner may apply for an order directing him to liquidate the business of a domestic insurer or of the United States branch of an alien insurer having trusteed assets in this state, regardless of whether or not there has been a prior order directing him to rehabilitate such insurer, upon any of the grounds specified in section 58-155.2 or upon any one or more of the following grounds: That the insurer

(a) Has ceased transacting insurance for a period of one year; or

(b) Has commenced voluntary liquidation or dissolution, or attempts to commence or prosecute any action or proceeding to liquidate its business or affairs, or to dissolve its corporate charter, or to procure the appointment of a receiver, trustee, custodian, or sequestrator under any law except this chapter; or

(c) Has not organized or completed its organization and obtained a certificate of authority as an insurer. (1947, c. 923.)

§ 58-155.5. Order of liquidation.—An order to liquidate the business of a domestic insurer shall direct the commissioner forthwith to take possession of the property of the insurer, to liquidate its business, to deal with the insurer's property and business in his own name as commissioner or in the name of the insurer as the court may direct, to give notice to all creditors who may have claims against the insurer to present such claims, and to dissolve the insurer. (1947, c. 923.)

§ 58-155.6. Liquidation of alien insurers.—An order to liquidate the business of the United States branch of an alien insurer having trusteed assets in this state shall be in the same terms as those prescribed for domestic insurers, except that only the assets in this state of the business of such United States branch shall be included therein. (1947, c. 923.)

§ 58-155.7. Conservation of assets of foreign insurer.—The commissioner may apply for an order directing him to conserve the assets within this state of a foreign insurer upon any one or more of the following grounds:

(a) Upon any of the grounds specified in paragraphs (a) to (i) inclusive of section 58-155.2, and in paragraph (b) of section 58-155.4.

(b) That its property has been sequestrated in the state of its domicile or in any other jurisdiction. (1947, c. 923.)

§ 58-155.8. Conservation of assets of alien insurer.—The commissioner may apply for an order directing him to conserve the assets within this state of an alien insurer upon any one or more of the following grounds:

(a) Upon any of the grounds specified in paragraphs (a) to (i) inclusive of section 58-155.2, and in paragraph (b) of section 58-155.4; or

(b) That the insurer has failed to comply, within the time designated by the commissioner, with an order of the commissioner pursuant to law to make good an impairment of its trusteed funds; or

(c) That the property of the insurer has been sequestrated in its domiciliary sovereignty or elsewhere. (1947, c. 923.)

§ 58-155.9. Order of conservation or ancillary liquidation of foreign or alien insurers.—1. An order to conserve the assets of a foreign or alien insurer shall direct the commissioner forthwith to take possession of the property of the insurer within this state and to conserve it, subject to the further direction of the court.

2. Whenever a domiciliary receiver is appointed for any such insurer in its domiciliary state which is also a reciprocal state, as defined in section 58-155.10, the court shall on application of the commissioner appoint the commissioner as the ancillary receiver in this state, subject to the provisions of the uniform insurers liquidation act. (1947, c. 923.)

§ 58-155.10. Uniform insurers liquidation act; definitions.—This section and sections 58-155.11 to 58-155.17 inclusive, comprise and may be cited as the uniform insurers liquidation act. For the purposes of this act:

1. "Insurer" means any person, firm, corporation, association or aggregation of persons doing an insurance business and subject to the insurance supervisory authority of, or to liquidation, rehabilitation, reorganization, or conservation by, the commissioner, or the equivalent insurance supervisory official of another state.

2. "Delinquency proceeding" means any proceeding commenced against an insurer for the purpose of liquidating, rehabilitating, reorganizing or conserving such insurer.

3. "State" means any state of the United States, and also the District of Columbia, Alaska, Hawaii and Puerto Rico.

4. "Foreign country" means territory not in any state.

5. "Domiciliary state" means the state in which an insurer is incorporated or organized, or, in the case of an insurer incorporated or organized in a foreign country, the state in which such insurer, having become authorized to do business in such state, has, at the commencement of delinquency proceedings, the largest amount of its assets held in trust and assets held on deposit for the benefit of its policyholders, or policyholders and creditors in the United States; and any such insurer is deemed to be domiciled in such state.

6. "Ancillary state" means any state other than a domiciliary state.

7. "Reciprocal state" means any state other than this state in which in substance and effect the provisions of this act are in force, including the provisions requiring that the insurance commissioner or equivalent supervisory official be the receiver of a delinquent insurer.

8. "General assets" means all property, real, personal, or otherwise, not specifically mortgaged, pledged, deposited, or otherwise encumbered for the security or benefit of specified persons or a limited class or classes of persons, and as to such specifically encumbered property the term includes all such property or its proceeds in excess of the amount necessary to discharge the sum or sums secured thereby. Assets held in trust and assets held on deposit for the security or benefit of all policyholders, or all policyholders and creditors in the United States, shall be deemed general assets.

9. "Preferred claim" means any claim with respect to which the law of a state or of the United States accords priority of payment from the general assets of the insurer.

10. "Special deposit claim" means any claim secured by a deposit made pursuant to statute for the security or benefit of a limited class or classes of persons, but not including any general assets.

11. "Secured claim" means any claim secured by mortgage, trust, deed, pledge, deposit as security, escrow, or otherwise, but not including special deposit claims or claims against general assets. The term also includes claims which more than four months prior to the commencement of delinquency proceedings in the state of the insurer's domicile have become liens upon specific assets by reason of judicial process.

12. "Receiver" means receiver, liquidator, rehabilitator, or conservator as the context may require. (1947, c. 923.)

§ 58-155.11. Conduct of delinquency proceedings against insurers domiciled in this state.—1. Whenever under the laws of this state a receiver is to be appointed in delinquency proceedings for an insurer domiciled in this state, the court shall appoint the commissioner as such receiver. The court shall direct the commissioner forthwith to take possession of the assets of the insurer and to administer the same under the orders of the court.

2. As domiciliary receiver the commissioner shall be vested by operation of law with the title to all of the property, contracts, and rights of action, and all of the books and records of the insurer wherever located, as of the date of entry of the order directing him to rehabilitate or liquidate a domestic insurer, or to liquidate the United States branch of an alien insurer domiciled in this state, and he shall have the right to recover the same and reduce the same to possession; except that ancillary receivers in reciprocal states shall have, as to assets located in their respective states, the rights and powers which are hereinafter prescribed for ancillary receivers appointed in this state as to assets located in this state.

3. The recording of the order directing possession to be taken, or a certified copy thereof, in the record of lis pendens in the office of the clerk of the superior court of the county wherein the property is located shall impart the same notice as would be imparted by a deed, bill of sale, or other evidence of title duly filed or recorded.

4. The commissioner as domiciliary receiver shall be responsible on his official bond for the proper administration of all assets coming into his possession or control. The court may at any time require an additional bond from him or his deputies if deemed desirable for the protection of the assets.

5. Upon taking possession of the assets of an insurer the domiciliary receiver shall, subject to the direction of the court, immediately proceed to conduct the business of the insurer or to take such steps as are authorized by the laws of this state for the purpose of liquidating, rehabilitating, reorganizing or conserving the affairs of the insurer.

6. In connection with delinquency proceedings the commissioner may appoint one or more special deputy commissioners to act for him, and may employ such counsel, clerks, and assistants as he deems necessary. The compensation of the special deputies, counsel, clerks or assistants and all expenses of taking possession of the insurer and of conducting the proceedings shall be fixed by the receiver, subject to the approval of the court, and shall be paid out of the funds or assets of the insurer. Within the limits of the duties imposed upon them special deputies shall possess all the powers given to, and, in the exercise of those powers, shall be subject to all of the duties imposed upon the receiver with respect to such proceedings. (1947, c. 923.)

§ 58-155.12. Conduct of delinquency proceedings against insurers not domiciled in this state.—1. Whenever under the laws of this state an ancillary receiver is to be appointed in delinquency proceedings for an insurer not domiciled in this state, the court shall appoint the commissioner as ancillary receiver. The commissioner shall file a petition requesting the appointment (a) if he finds that there are sufficient assets of such insurer located in this state to justify the appointment of an ancillary receiver, or (b) if ten or more persons resident in this state having claims against such insurer file a petition with the commissioner requesting the appointment of such ancillary receiver.

2. The domiciliary receiver for the purpose of liquidating an insurer domiciled in a reciprocal state, shall be vested by operation of law with the title to all of the property, contracts, and rights of action, and all of the books and records of the insurer located in this state, and he shall have the immediate right to recover balances due from

local agents and to obtain possession of any books and records of the insurer found in this state. He shall also be entitled to recover the other assets of the insurer located in this state except that upon the appointment of an ancillary receiver in this state, the ancillary receiver shall during the ancillary receivership proceedings have the sole right to recover such other assets. The ancillary receiver shall, as soon as practicable, liquidate from their respective securities those special deposit claims and secured claims which are proved and allowed in the ancillary proceedings in this state, and shall pay the necessary expenses of the proceedings. All remaining assets he shall promptly transfer to the domiciliary receiver. Subject to the foregoing provisions the ancillary receiver and his deputies shall have the same powers and be subject to the same duties with respect to the administration of such assets, as a receiver of an insurer domiciled in this state.

3. The domiciliary receiver of an insurer domiciled in a reciprocal state may sue in this state to recover any assets of such insurer to which he may be entitled under the laws of this state. (1947, c. 923.)

§ 58-155.13. Claims of non-residents against domestic insurers.—1. In a delinquency proceeding begun in this state against an insurer domiciled in this state, claimants residing in reciprocal states may file claims either with the ancillary receivers, if any, in their respective states, or with the domiciliary receiver. All such claims must be filed on or before the last date fixed for the filing of claims in the domiciliary delinquency proceedings.

2. Converted claims belonging to claimants residing in reciprocal states may either (a) be proved in this state as provided by law, or (b) if ancillary proceedings have been commenced in such reciprocal states, may be proved in those proceedings. In the event a claimant elects to prove his claim in ancillary proceedings, if notice of the claim and opportunity to appear and be heard is afforded the domiciliary receiver of this state as provided in section 58-155.14 with respect to ancillary proceedings in this state, the final allowance of such claim by the courts in the ancillary state shall be accepted in this state as conclusive as to its amount, and shall also be accepted as conclusive as to its priority, if any, against special deposits or other security located within the ancillary state. (1947, c. 923.)

§ 58-155.14. Claims against foreign insurers.—1. In a delinquency proceeding in a reciprocal state against an insurer domiciled in that state, claimants against such insurer, who reside within this state, may file claims either with the ancillary receiver, if any, appointed in this state, or with the domiciliary receiver. All such claims must be filed on or before the last date fixed for the filing of claims in the domiciliary delinquency proceedings.

2. Controverted claims belonging to claimants residing in this state may either (a) be proved in the domiciliary state as provided by the law of that state, or (b) if ancillary proceedings have been commenced in this state, be proved in those proceedings. In the event that any such claimant elects to prove his claim in this state, he shall file his claim with the ancillary receiver in the manner provided by the law of this state for the proving of claims against insurers domiciled in this state, and he shall give notice in writing to the receiver in the domiciliary state, either by registered mail or by personal service at least forty days prior to the date set for hearing. The notice shall contain a concise statement of the amount of the claim, the facts on which the claim is based, and the priorities asserted, if any. If the domiciliary receiver, within thirty days after the giving of such notice, shall give notice in writing to the ancillary receiver and to the claimant, either by registered mail or by personal service, of his intention to contest such claim, he shall be entitled to appear or to be represented in any proceeding in this state involving the adjudication of the claim. The final allowance of the claim by the courts of this state shall be accepted as conclusive as to its amount, and shall also be accepted as conclusive as to its priority, if any, against special deposits or other security located within this state. (1947, c. 923.)

§ 58-155.15. Priority of certain claims.—1. In a delinquency proceeding against an insurer domiciled in this state, claims owing to residents of ancillary states shall be preferred claims if like claims are preferred under the laws of this state. All such claims whether owing to residents or nonresidents shall be given equal priority of payment from general assets regardless of where such assets are located.

2. In a delinquency proceeding against an insurer domiciled in a reciprocal state, claims owing to residents of this state shall be preferred if like claims are preferred by the laws of that state.

3. The owners of special deposit claims against an insurer for which a receiver is appointed in this or any other state shall be given priority against their several special deposits in accordance with the provisions of the statutes governing the creation and maintenance of such deposits. If there is a deficiency in any such deposit so that the claims secured thereby are not fully discharged therefrom, the claimants may share in the general assets, but such sharing shall be deferred until general creditors, and also claimants against other special deposits who have received smaller percentages from their respective deposits, have been paid percentages of their claims equal to the percentage paid from special deposit.

4. The owner of a secured claim against an insurer for which a receiver has been appointed in this or any other state may surrender his security and file his claim as a general creditor, or the claim may be discharged by resort to the security, in which case the deficiency, if any, shall be treated as a claim against the general assets of the insurer on the same basis as claims of unsecured creditors. If the amount of the deficiency has been adjudicated in ancillary proceedings as provided in this act, or if it has been adjudicated by a court of competent jurisdiction in proceedings in which the domiciliary receiver has had notice and opportunity to be heard, such amount shall be conclusive; otherwise the amount shall be determined in the delinquency proceeding in the domiciliary state. (1947, c. 923.)

§ 58-155.16. Attachment and garnishment of assets.—During the pendency of delinquency proceedings in this or any reciprocal state no action or proceeding in the nature of an attachment, garnishment or execution shall be commenced or maintained in the courts of this state against the delinquent insurer or its assets. Any lien obtained by such action or proceeding within four months prior to the commencement of any such delinquency proceeding or at any time thereafter shall be void as against any rights arising in such delinquency proceeding. (1947, c. 923.)

§ 58-155.17. Uniformity of interpretation.—This uniform insurers liquidation act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it. To the extent that its provisions, when applicable, conflict with other provisions of this article, the provisions of this act shall control. (1947, c. 923.)

§ 58-155.18. Commencement of proceedings.—1. Proceedings under this article involving a domestic insurer shall be commenced in the superior court for the county in which is located the insurer's home office. Proceedings under this article involving other insurers shall be commenced in the superior court of Wake county.

2. The commissioner shall commence any such proceeding, the attorney-general representing him, by an application to the court or to any judge thereof, for an order directing the insurer to show cause why the commissioner should not have the relief prayed for. On the return of such order to show cause, and after a full hearing, the court shall either deny the application or grant the application together with such other relief as the nature of the case and the interests of policyholders, creditors, stockholders, members, subscribers or the public may require. (1947, c. 923.)

§ 58-155.19. Injunctions.—1. Upon application by the commissioner for such an order to show cause or at any time thereafter, the court may without notice issue an injunction restraining the insurer, its officers, directors, stockholders, members, subscribers, agents, employees and all other persons from the transaction of its business or the waste or disposition of its property until the further order of the court.

2. The court may at any time during a proceeding under this article issue such other injunctions or orders as may be deemed necessary to prevent interference with the commissioner or the proceeding, or waste of the assets of the insurer, or the commencement or prosecution of any actions, or the obtaining of preferences, judgments, attachments or other liens, or the making of any levy against the insurer or against its assets or any part thereof. (1947, c. 923.)

§ 58-155.20. Removal of proceedings.—At any time after the commencement of a proceeding under this article the commissioner may apply ex parte to the court for an order changing the venue of, and removing the proceeding to Wake county, or, in the discretion of the commissioner, to any other county of this state in which he deems that such proceeding may be most economically and efficiently conducted.

Upon the filing of any such application for removal, the court shall direct the clerk of the court in which the proceeding is then pending to transmit all the papers filed therein with such clerk to the clerk of the court to which the proceeding is removed, and the proceeding shall thereafter be conducted in such other court as though it had been commenced in such court. (1947, c. 923.)

§ 58-155.21. Deposit of monies collected.—The monies collected by the commissioner in a proceeding under this article, shall be, from time to time, deposited in one or more state or national banks, savings banks, or trust companies, and in the case of the insolvency or voluntary or involuntary liquidation of any such depositary which is an institution organized and supervised under the laws of this state, such deposits shall be entitled to priority of payment on an equality with any other priority given by the banking law of this state. The commissioner may in his discretion deposit such monies or any part thereof in a national bank or trust company as a trust fund. (1947, c. 923.)

§ 58-155.22. Exemption from filing fees.—The commissioner shall not be required to pay any fee to any public officer in this state for filing, recording, issuing a transcript or certificate, or authenticating any paper or instrument pertaining to the exercise by the commissioner of any of the powers or duties conferred upon him under this article, whether or not such paper or instrument be executed by the commissioner or his deputies, employees or attorneys of record and whether or not it is connected with the commencement of an action or proceeding by or against the commissioner, or with the subsequent conduct of such action or proceeding. (1947, c. 923.)

§ 58-155.23. Borrowing on pledge of assets.—For the purpose of facilitating the rehabilitation, liquidation, conservation or dissolution of an insurer pursuant to this article, the commissioner may, subject to the approval of the court, borrow money and execute, acknowledge and deliver notes or other evidences of indebtedness therefor and secure the repayment of the same by the mortgage, pledge, assignment, transfer in trust or hypothecation of any or all of the property whether real, personal or mixed of such insurer, and the commissioner, subject to the approval of the court, shall have power to take any and all other action necessary and proper to consummate any such loans and to provide for the repayment thereof. The commissioner shall be under no obligation personally or in his official capacity as commissioner to repay any loan made pursuant to this section. (1947, c. 923.)

§ 58-155.24. Report to the General Assembly.—The commissioner shall transmit to the General Assembly in his biennal report, the names of all insurers proceeded against under this article together with such facts as shall acquaint the policyholders, creditors, stockholders and the public with all proceedings. To that end the special deputy commissioner in charge of any such insurer shall file annually with the commissioner a report of the affairs of the insurer. (1947, c. 923.)

§ 58-155.25. Date rights fixed on liquidation.—The rights and liabilities of the insurer and of its creditors, policyholders, stockholders, members, subscribers and all other persons interested in its estate shall, unless otherwise directed by the court, be fixed as of the date on which the order directing the liquidation of the insurer is filed in the office of the clerk of the court which made the order, subject to the provisions of section 58-155.29 with respect to the rights of claimants holding contingent claims. (1947, c. 923.)

§ 58-155.26. Voidable transfers or liens.—1. Any transfer of, or lien upon, the property of an insurer which is made or created within four months prior to the granting of an order to show cause under this article with the intent of giving to any creditor or of enabling him to obtain a greater percentage of his debt than any other creditor of the same class and which is accepted by such creditor having reasonable cause to believe that such a preference will occur, shall be voidable.

2. Every director, officer, employee, stockholder, member, subscriber and any other person acting on behalf of such insurer who shall be concerned in any such prohibited act or deed and every person receiving thereby any property of such insurer or the benefit thereof shall be personally liable therefor and shall be bound to account to the commissioner.

3. The commissioner as liquidator, rehabilitator or conservator in any proceeding under this article, may avoid any transfer of, or lien upon the property of an insurer which any creditor, stockholder, subscriber or member of such insurer might have avoided and may recover the property so transferred or its value, from the person to whom it was transferred unless he was a bona fide holder for value prior to the date of the granting of an order to show cause under this article. Such property or its value may be recovered from anyone who has received it except a bona fide holder for value as above specified. (1947, c. 923.)

§ 58-155.27. Priority of claims for compensation.—1. Compensation actually owing to employees other than officers of an insurer, for services rendered within three months prior to the commencement of a proceeding against the insurer under this article, but not exceeding three hundred dollars for each such employee, shall be paid prior to the payment of every other debt or claim, and in the discretion of the commissioner may be paid as soon as practicable after the proceeding has been commenced; except that at all times the commissioner shall reserve such funds as will in his opinion be sufficient for the expenses of administration.

2. Such priority shall be in lieu of any other similar priority which may be authorized by law as to the wages or compensation of such employees. (1947, c. 923.)

§ 58-155.28. Offsets.—1. In all cases of mutual debts or mutual credits between the insurer and another person in connection with any action or proceeding under this article, such credits and debts shall be set off and the balance only shall be allowed or paid, except as provided in paragraph two of this section.

2. No offset shall be allowed in favor of any such person where (a) the obligation of the insurer to such person would not at the date of the entry of any liquidation order, or otherwise, as provided in section 58-155.25, entitle him to share as a claimant in the assets of the insurer, or (b) the obligation of the insurer to such person was purchased by or transferred to such person with a view of its being used as an offset, or (c) the obligation of such person is to pay an assessment levied against the members of a mutual insurer, or against the subscribers of a reciprocal insurer, or is to pay a balance upon a subscription to the capital stock of a stock insurer. (1947, c. 923.)

§ 58-155.29. Allowance of certain claims.—1. No contingent claim shall share in a distribution of the assets of an insurer which has been adjudicated to be insolvent by an order made pursuant to section 58-155.30 except that such claims shall be considered, if properly presented, and may be allowed to share where:

(a) Such claim becomes absolute against the insurer on or before the last day fixed for filing of proofs of claim against the assets of such insurer, or

(b) There is a surplus and the liquidation is thereafter conducted upon the basis that such insurer is solvent.

2. Where an insurer has been so adjudicated to be insolvent any person who has a cause of action against an insured of such insurer under a liability insurance policy issued by such insurer, shall have the right to file a claim in the liquidation proceeding, regardless of the fact that such claim may be contingent, and such claim may be allowed:

(a) If it may be reasonably inferred from the proof presented upon such claim that such person would be able to obtain a judgment upon such cause of action against such insured; and

(b) If such person shall furnish suitable proof, unless the court for good cause shown shall otherwise direct, that no further valid claims against such insurer arising out of his cause of action other than those already presented can be made; and

(c) If the total liability of such insurer to all claimants arising out of the same act of its insured shall be no greater than its total liability would be were it not in liquidation.

No judgment against such an insured taken after the date of the entry of the liquidation order shall be considered in the liquidation proceedings as evidence of liability, or of the amount of damages, and no judgment against an insured taken by default, inquest or by collusion prior to the entry of the liquidation order shall be considered as conclusive evidence in the liquidation proceeding either of the liability of such insured to such person upon such cause of action or of the amount of damages to which such person is therein entitled.

3. No claim of any secured claimant shall be allowed at a sum greater than the difference between the value of the claim without security and the value of the security itself as of the date of entry of the order of liquidation or such other date set by the court for fixation of rights and liabilities as provided in section 58-155.25 unless the claimant shall surrender his security to the commissioner in which event the claim shall be

allowed in the full amount for which it is valued. (1947, c. 923.)

§ 58-155.30. Time to file claims.—1. If upon the granting of an order of liquidation under this article or at any time thereafter during the liquidation proceeding the insurer shall not be clearly solvent, the court shall after such notice and hearing as it deems proper, make an order declaring the insurer to be insolvent. Thereupon, regardless of any prior notice which may have been given to creditors, the commissioner shall notify all persons who may have claims against such insurer and who have not filed proper proofs thereof, to present the same to him, at a place specified in such notice, within four months from the date of the entry of such order, or, if the commissioner shall certify that it is necessary, within such longer time as the court shall prescribe. The last day for the filing of proofs of claim shall be specified in the notice. Such notice shall be given in a manner determined by the court.

2. Proofs of claim may be filed subsequent to the date specified, but no such claim shall share in the distribution of the assets until all allowed claims, proofs of which have been filed before said date, have been paid in full with interest. (1947, c. 923.)

§ 58-155.31. Report for assessment.—Within three years from the date an order of rehabilitation or liquidation of a domestic mutual insurer or a domestic reciprocal insurer was filed in the office of the clerk of the court by which such order was made, the commissioner may make a report to the court setting forth:

(a) The reasonable value of the assets of the insurer;

(b) The insurer's probable liabilities; and

(c) The probable necessary assessment, if any, to pay all possible claims and expenses in full, including expenses of administration. (1947, c. 923.)

§ 58-155.32. Levy of assessment.—1. Upon the basis of the report provided for in section 58-155.31 including any amendment thereof, the court, ex parte, may levy one or more assessments against all members of such insurer who, as shown by the records of the insurer, were members of a mutual insurer or subscribers in a reciprocal insurer, at any time within one year prior to the date of issuance of the order to show cause under section 58-155.18.

2. Such assessment or assessments shall cover the excess of the probable liabilities over the reasonable value of the assets, together with the estimated cost of collection and percentage of uncollectibility thereof. The total of all assessments against any member or subscriber with respect to any policy, by whomsoever levied or for whatsoever purposes levied, shall be for no greater amount than that specified in the policy or policies of the member or subscriber and as limited under this chapter; except that if the court finds that the policy was issued at a rate of premium below the minimum rate lawfully permitted for the risk insured, the court may determine the upper limit of such assessment upon the basis of an adequate rate for the insurance.

3. No assessment shall be levied against any member or subscriber with respect to any nonassessable policy issued in accordance with this chapter. (1947, c. 923.)

§ 58-155.33. Order to pay assessment.—After levy of assessment as provided in section 58-155.32, upon the filing of a further detailed report by the commissioner, the court shall issue an order directing each member of a mutual insurer or each subscriber in a reciprocal insurer, if he shall not pay the amount assessed against him to the commissioner on or before a day to be specified in the order, to show cause why he should not be held liable to pay such assessment together with costs as set forth in section 58-155.35 and why the commissioner should not have judgment therefor. (1947, c. 923.)

§ 58-155.34. Publication and transmittal of assessment order.—The commissioner shall cause a notice of such assessment order setting forth a brief summary of the contents of such order to be:

(a) Published in such manner as shall be directed by the court; and

(b) Enclosed in a sealed envelope, addressed and mailed postage prepaid to each member or subscriber liable thereunder at his last known address as it appears on the records of the insurer, at least twenty days before the return day of the order to show cause provided for in section 58-155.33. (1947, c. 923.)

§ 58-155.35. Judgment upon the assessment.—1. On the return day of the order to show cause provided for in section 58-155.33 if the member or subscriber does not appear and serve verified objections upon the commissioner, the court shall make an order adjudging that such member or subscriber is liable for the amount of the assessment against him together with ten dollars costs, and that the commissioner may have judgment against the member or subscriber therefor.

2. If on such return day the member or subscriber shall appear and serve verified objections upon the commissioner there shall be a full hearing before the court or a referee to hear and determine, who, after such hearing, shall make an order either negativing the liability of the member or subscriber to pay the assessment or affirming his liability to pay the whole or some part thereof together with twenty-five dollars costs and the necessary disbursements incurred at such hearing, and directing that the commissioner in the latter case may have judgment therefor.

3. A judgment upon any such order, whether granted by a court or by a referee, shall have the same force and effect, and may be entered and docketed and may be appealed from as if it were a judgment in an original action brought in the court in which the proceeding is pending. (1947, c. 923.)

SUBCHAPTER III. FIRE INSURANCE.

Art. 18. General Regulations of Business.

§ 58-156: Repealed by Session Laws 1945, c. 378.

§ 58-158. Limitation as to amount and term; indemnity contracts for difference in actual value and cost of replacement.—No insurance company or agent shall knowingly issue any fire insurance policy upon property within this state for an amount which, together with any existing insurance thereon, exceeds the fair value of the prop-

erty, nor for a longer term than seven years: Provided, any fire insurance company authorized to transact business in this state may, by appropriate riders or endorsements or otherwise, provide insurance indemnifying the insured for the difference between the actual value of the insured property at the time any loss or damage occurs, and the amount actually expended to repair, rebuild or replace on the premises described in the policy, or some other location within the state of North Carolina with new materials of like size, kind and quality, such property as has been damaged or destroyed by fire or other perils insured against. Policies issued in violation of this section are binding upon the company issuing them, but the company is liable for the forfeitures by law prescribed for such violation. (Rev., s. 4755; 1899, c. 54, ss. 39, 99; 1903, c. 438, s. 10; 1949, c. 295, s. 1; C. S. 6418.)

Editor's Note.—The 1949 amendment rewrote this section and inserted the proviso.

§ 58-159. Limit of liability on total loss.—Subject to the provisions of G. S. § 58-158, when buildings insured against loss by fire and situated within the state are totally destroyed by fire, the company is not liable beyond the actual cash value of the insured property at the time of the loss or damage; and if it appears that the insured has paid a premium on a sum in excess of the actual value, he shall be reimbursed the proportionate excess of premium paid on the difference between the amount named in the policy and the ascertained values, with interest at six per centum (6%) per annum from the date of issue. (Rev., s. 4756; 1899, c. 54, s. 40; 1949, c. 295, s. 2; C. S. 6419.)

Editor's Note.—The 1949 amendment rewrote this section and added the reference to § 58-158.

§ 58-161: Repealed by Session Laws 1945, c. 378.

§ 58-162. Reinsurance assumed from unlicensed companies prohibited.—No fire, marine, or fire and marine insurance company licensed to do business in North Carolina shall assume reinsurance on property located in the state of North Carolina from a company which is not licensed to do business in North Carolina. A company violating the provisions of this section shall be subject to cancellation of its license to do business in this state and upon conviction thereof shall be punished by a fine of five hundred dollars ($500.00) for each offense. (Rev., s. 4770; 1899, c. 54, s. 63; 1901, c. 391, s. 5; 1945, c. 378; C. S. 6422.)

Editor's Note.—The 1945 amendment repealed the former section and inserted in lieu thereof the present section.

§ 58-162.1. Limitation of fire insurance risks.—No insurer authorized to do in this state the business of fire insurance shall expose itself to any loss on any one fire risk, whether located in this state or elsewhere, in an amount exceeding ten per cent of its surplus to policyholders, except that in the case of risks adequately protected by automatic sprinklers or risks principally of non-combustible construction and occupancy such insurer may expose itself to any loss on any one risk in an amount not exceeding twenty-five per cent of the sum of (a) its unearned premium reserve and (b) its surplus to policyholders. Any risk or portion of any risk which shall have been reinsured shall be deducted in determining the limitation of risk prescribed in this section. (1945, c. 378.)

§ 58-163: Repealed by Session Laws 1945, c. 378.

§ 58-164. Uniform unauthorized insurers act.—(a) No person, corporation, association or partnership shall in this state act as agent for any insurer not authorized to transact business in this state, or negotiate for or place or aid in placing insurance coverage in this state for another with any such insurer.

(b) No person, corporation, association or partnership shall in this state aid any unauthorized insurer in effecting insurance or in transacting insurance business in this state, either by fixing rates, by adjusting or investigating losses, by inspecting or examining risks, by acting as attorney-in-fact or as attorney for service for process, or otherwise, except as provided in paragraph (e) hereof.

(c) No person, corporation, association or partnership shall make, negotiate for or place, or aid in negotiating or placing any insurance contract in this state for another who is an applicant for insurance covering any property or risk in another state, territory or district of the United States with any insurer not authorized to transact insurance business in the state, territory or district wherein such property or risk or any part thereof is located.

(d) The provisions of the three foregoing paragraphs do not apply to contracts of reinsurance, or to contracts of insurance made through authorized surplus line agents or authorized surplus line brokers as provided in sections 58-53.1, 58-53.2 and 58-53.3, nor do they apply to any insurer not authorized in this state, or its representatives, in investigating, adjusting losses or otherwise complying in this state with the terms of its insurance contracts made in a state wherein the insurer was authorized; provided, the property or risk insured under such contracts at the time such contract was issued was located in such other state. A motor vehicle used and kept garaged principally in another state shall be deemed to be located in such state.

(e) (1) The transacting of business in this state by a foreign or alien insurer without a license and the issuance or delivery by such foreign or alien insurer of a policy or contract of insurance to a citizen of this state or to a resident thereof, or to a corporation authorized to do business therein, is equivalent to an appointment by such insurer of the commissioner and his successor or successors in office, to be its true and lawful attorney, upon whom may be served all lawful process in any action, suit or proceeding arising out of such policy or contract of insurance, and the said issuance or delivery is a signification of its agreement that any such service of process is of the same legal force and validity as personal service of process in this state upon it.

(2) Such service of process shall be made by delivering and leaving with the commissioner or to some person in apparent charge of his office two copies thereof and the payment to him of such fees as may be prescribed by law. The commissioner shall forthwith mail by registered mail one of the copies of such process to the defendant at its last known principal place of business, and

shall keep a record of all such process so served upon him. Such service of process is sufficient provided notice of such service and a copy of the process are sent within ten days thereafter by registered mail by plaintiff's attorney to the defendant at its last known principal place of business, and the defendant's receipt, or receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of plaintiff's attorney showing a compliance herewith are filed with the clerk of the court in which such action is pending on or before the date the defendant is required to appear, or within such further time as the court may allow. However, no plaintiff or complainant shall be entitled to a judgment by default under this sub-paragraph (2) until the expiration of thirty days from date of the filing of the affidavit of compliance.

(3) Service of process in any such action, suit or proceeding shall in addition to the manner provided in the preceding sub-paragraph (2) be valid if served upon any person within this state who, in this state on behalf of such insurer, is

a. soliciting insurance, or

b. making any contract of insurance or issuing or delivering any policies or written contracts of insurance, or

c. collecting or receiving any premium for insurance; and a copy of such process is sent within ten days thereafter by registered mail by plaintiff's attorney to the defendant at the last known principal place of business of the defendant, and the defendant's receipt, or the receipt issued by the post office with which the letter is registered, showing the name of sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of plaintiff's attorney showing a compliance herewith are filed with the clerk of the court in which such action is pending on or before the date the defendant is required to appear, or within such further time as the court may allow.

d. Nothing in this paragraph (e) shall limit or abridge the right to serve process, notice or demand upon any insurer in any other manner now or hereafter permitted by law.

(f) No unauthorized insurer shall institute or file, or cause to be instituted or filed, any suit, action or proceeding in this state to enforce any right, claim or demand arising out of the transaction of business in this state until such insurer shall have obtained a license to transact insurance business in this state. Nothing in this subsection shall be construed to require an unauthorized insurance company to obtain a certificate of authority before instituting or filing, or causing to be instituted or filed, any suit, action or proceeding either in connection with any of its investments in this state or in connection with any contract issued by it at a time when it was authorized to do business in the state where such contract was issued.

(g) (1) Before any unauthorized insurer shall file or cause to be filed any pleading in any action, suit or proceeding instituted against it, such unauthorized insurer shall either (a) file with the clerk of the court in which such action, suit or proceeding is pending a bond with good and sufficient sureties, to be approved by the court, in an amount to be fixed by the court sufficient to secure the payment of any final judgment which may be rendered in such action or (b) procure a license to transact the business of insurance in this state.

(2) The court in any action, suit or proceeding in which service is made in the manner prescribed in sub-paragraphs (2) and (3) of paragraph (e) may order such postponement as may be necessary to afford the defendant reasonable opportunity to comply with the provisions of sub-paragraph (1) of this paragraph (g) and to defend such action.

(3) Nothing in sub-paragraph (1) of this paragraph (g) shall be construed to prevent an unauthorized insurer from filing a motion to quash a writ or to set aside service thereof made in the manner provided in sub-paragraphs (2) and (3) of paragraph (e) on the ground either (a) that no policy or contract of insurance has been issued or delivered to a citizen or resident of this state or to a corporation authorized to do business therein, or (b) that such insurer has not been transacting business in this state, or (c) that the person on whom service was made pursuant to subparagraph (3) of paragraph (e) was not doing any of the acts enumerated therein.

(h) Any person, corporation, association or partnership violating any of the provisions of this section shall be guilty of a misdemeanor and shall be fined not less than one hundred dollars nor more than five hundred dollars.

(i) This section shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

(j) This section may be cited as the Uniform Unauthorized Insurers Act. (Rev., s. 4763; 1899, c. 54, s. 105; 1945, c. 386; C. S. 6424.)

Editor's Note.—The 1945 amendment rewrote this section which formerly provided that no action would lie on the policy of an unlicensed company.

The amendatory act, which amended, inserted or repealed a large number of sections in this chapter, provides: "This act shall not apply to common carriers having relief departments, pension or annuity plans, or other organizations or associations for the benefit of their employees or former employees; or to associations of such common carriers administering such departments, plans or organizations."

§ 58-165: Repealed by Session Laws 1945, c. 378.

Editor's Note.—The repealed section was rewritten as § 58-53.1.

§ 58-166: Transferred to § 58-53.2 by Session Laws 1945, c. 378.

§ 58-167: Transferred to § 58-53.3 by Session Laws 1945, c. 378.

§§ 58-170, 58-171: Repealed by Session Laws 1945, c. 458.

Editor's Note.—Repealed § 58-170 was rewritten as §§ 58-44.1, 58-44.2, and 58-44.3. Repealed § 58-171 was rewritten as § 58-44.4.

§ 58-172. Agreements restricting agent's commission; penalty.—It is unlawful for any insurance company doing the business of insurance as defined in subsections 3 to 22 inclusive of section 58-72 and employing an agent representing another such company, either directly or through any organization or association, to enter into, make or maintain any stipulation or agreement in anywise limiting the compensation such agent may receive from any such other company, or forbidding or

prohibiting reinsurance of the risks of any such domestic company in whole or in part by any other company holding membership in or cooperating with such organization or association. The penalty for any violation of this section shall be a fine of not less than two hundred and fifty ($250.00) dollars nor more than five hundred ($500.00) dollars, and the forfeiture of license to do business in this state for a period of twelve months following conviction. (Rev., ss. 3491, 4768; 1905, c. 424; 1915, c. 166, ss. 2, 3; 1945, c. 458; C. S. 6432.)

Editor's Note.—Prior to the 1945 amendment thi section was restricted to fire insurance. The amendment rewrote the first sentence and substituted the words "following conviction" for the word "thereafter" at the end of the second sentence.

Art. 19. Fire Insurance Policies.

§ 58-175. Items to be expressed in policies.—Upon request there shall be printed, stamped, or written on each fire policy issued in this state the basis rate, deficiency charge, the credit for improvements, and the rate at which written, and whenever a rate is made or changed on any property situated in this state upon request a full statement thereof showing in detail the basis rate, deficiency charges and credits, as well as rate proposed to be made, shall be delivered to the owner or his representative having the insurance on the property in charge, by the company, association, their agent or representative. (1915, c. 109, s. 3; 1925, c. 70, s. 3; 1945, c. 378; C. S. 6435.)

Editor's Note.—The 1945 amendment omitted a former provision as to notice of filing of rate with insurance department. It also omitted a provision requiring agent to inspect risks and inserted such provision as section 58-175.1.

§ 58-175.1. Agent to inspect risks.—Every agent of a fire insurance company shall, before issuing a policy of insurance on property situated in a city or town, inspect the same, informing himself as to its value and insurable condition. (1915, c. 109, s. 3; 1925, c. 70, s. 3; 1945, c. 378; C. S. 6435.)

Editor's Note.—This section was formerly a part of § 58-175.

§ 58-176. Fire insurance contract; standard policy provisions.—(1) The printed form of a policy of fire insurance, as set forth in subsection three shall be known and designated as the "Standard fire insurance policy of the State of North Carolina."

(2) No policy or contract of fire insurance shall be made, issued or delivered by any insurer or by any agent or representative thereof, on any property in this state, unless it shall conform as to all provisions, stipulations, agreements and conditions, with such form of policy.

There shall be printed at the head of said policy the name of the insurer or insurers issuing the policy; the location of the home office thereof; a statement whether said insurer or insurers are stock or mutual corporations or are reciprocal insurers. No provisions of this section limit a company to the use of any particular size or manner of folding the paper upon which the policy is printed; provided, however, that any company organized under special charter provisions may so indicate upon its policy, and may add a statement of the plan under which it operates in this state.

The standard fire insurance policy provided for herein need not be used for effecting reinsurance between insurers.

(3) The form of the standard fire insurance policy of the state of North Carolina (with permission to substitute for the word "company" a more accurate descriptive term for the type of insurer) shall be as follows: (See the four pages following for this form photographically reproduced from the original legal size pages.)

(Rev., s. 4760; 1899, c. 54, s. 43; 1901, c. 391, s. 4; 1915, c. 109, s. 9; 1945, c. 378; C. S. 6437.)

Editor's Note.—The 1945 amendment rewrote this section.

Waivers inserted in or attached to a policy of fire insurance which have the effect of making the provisions of the standard policy form more restrictive are void under this section and § 58-177. Glover v. Rowan Mut. Fire Ins. Co., 228 N. C. 195, 45 S. E. (2d) 45.

§ 58-177. Standard policy; permissible variations.—No fire insurance company shall issue fire insurance policies on property in this state other than those of the standard form as set forth in section 58-176, except as follows:

(a) A company may print on or in its policies the date of incorporation, the amount of its paid-up capital stock, the names of its officers, and to the words at the top of the back of said policy, "Standard Fire Insurance Policy of the States of" may be added after or before the words "North Carolina" the names of any states in which the said policy form may be standard when the policy is used.

(b) A company may use in its policies written or printed forms of description and specification of the property insured.

(c) A company may write or print upon the margin or across the face of a policy, or upon separate slips or riders to be attached thereto, provisions adding to or modifying those contained in the standard form, and all such slips, riders, and provisions must be signed by an officer or agent of the company so using them. Provided, however, such provisions shall not have the effect of making the provisions of the standard policy form more restrictive except for such restrictions as are provided for in the charter or bylaws of a domestic mutual fire insurance company doing business in no more than three adjacent counties of the state and chiefly engaged in writing policies of insurance on rural properties upon an assessment or non-premium basis, provided all such restrictions contained in the charter and bylaws of such domestic mutual fire insurance company shall be actually included within the printed terms of the policy contract so affected as a condition precedent to their being effective and binding on any policyholder. The iron safe or any similar clause requiring the taking of inventories, the keeping of books and producing the same in the adjustment of any loss, shall not be used or operative in the settlement of losses on buildings, furniture and fixtures, or any property not subject to any change in bulk and value.

(d) Binders or other contracts for temporary insurance may be made, orally or in writing, for a period which shall not exceed thirty days, and shall be deemed to include all the terms of such standard fire insurance policy and all such applicable endorsements, approved by the commissioner, as may be designated in such contract of temporary insurance; except that the cancellation clause of such standard fire insurance policy, and the clause thereof specifying the hour of the day at which the insurance shall commence, may be

FIRST PAGE OF STANDARD FIRE POLICY

No......

[Space for insertion of name of company or companies issuing the policy and other matter permitted to be stated at the head of the policy.]

[Space for listing amounts of insurance, rates and premiums for the basic coverages insured under the standard form of policy and for additional coverages or perils insured under endorsements attached.]

In Consideration of the Provisions and Stipulations herein or added hereto and of ..... **Dollars Premium**

this Company, for the term { from the.....day of....., 19.... { at noon, Standard Time, at
of..... { to the.....day of....., 19.... { location of property involved,

to an amount not exceeding.....Dollars,

does insure .....

and legal representatives, to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair, and without compensation for loss resulting from interruption of business or manufacture, nor in any event for more than the interest of the insured, against all DIRECT LOSS BY FIRE, LIGHTNING AND BY REMOVAL FROM PREMISES ENDANGERED BY THE PERILS INSURED AGAINST IN THIS POLICY, EXCEPT AS HEREINAFTER PROVIDED, to the property described hereinafter while located or contained as described in this policy, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from the perils insured against in this policy, but not elsewhere.

Assignment of this policy shall not be valid except with the written consent of this Company.

This policy is made and accepted subject to the foregoing provisions and stipulations and those hereinafter stated, which are hereby made a part of this policy, together with such other provisions, stipulations and agreements as may be added hereto, as provided in this policy.

In Witness Whereof, this Company has executed and attested these presents; but this policy shall not be valid unless countersigned by the duly authorized Agent of this Company at.....

.....

Secretary. *President.*

Countersigned this .....day of ....., 19.... .....
AGENT.

Concealment, fraud. This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

Uninsurable and excepted property. This policy shall not cover accounts, bills, currency, deeds, evidences of debt, money or securities; nor, unless specifically named hereon in writing, bullion or manuscripts.

Perils not included. This Company shall not be liable for loss by fire or other perils insured against in this policy caused, directly or indirectly, by: (a) enemy attack by armed forces, including action taken by military, naval or air forces in resisting an actual or an immediately impending enemy attack; (b) invasion; (c) insurrection; (d) rebellion; (e) revolution; (f) civil war; (g) usurped power; (h) order of any civil authority except acts of destruction at the time of and for the purpose of preventing the spread of fire, provided that such fire did not originate from any of the perils excluded by this policy; (i) neglect of the insured to use all reasonable means to save and preserve the property at and after a loss, or when the property is endangered by fire in neighboring premises; (j) nor shall this Company be liable for loss by theft.

Other Insurance. Other insurance may be prohibited or the amount of insurance may be limited by endorsement attached hereto.

Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring

(a) while the hazard is increased by any means within the control or knowledge of the insured; or

(b) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days; or

(c) as a result of explosion or riot, unless fire ensue, and in that event for loss by fire only.

Other perils or subjects. Any other peril to be insured against or subject of insurance to be covered in this policy shall be by endorsement in writing hereon or added hereto.

Added provisions. The extent of the application of insurance under this policy and of the contribution to be made by this Company in case of loss, and any other provision or agreement not inconsistent with the provisions of this policy, may be provided for in writing added hereto, but no provision may be waived except such as by the terms of this policy is subject to change.

Waiver provisions. No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provision, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on the part of this Company relating to appraisal or to any examination provided for herein.

Cancellation of policy. This policy shall be cancelled at any time at the request of the insured, in which case this Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled at any time by this Company by giving to the insured a five days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand.

Mortgagee interests and obligations. If loss hereunder is made payable, in whole or in part, to a designated mortgagee not named herein as the insured, such interest in this policy may be cancelled by giving to such mortgagee a ten days' written notice of cancellation.

If the insured fails to render proof of loss such mortgagee, upon notice, shall render proof of loss in the form herein specified within sixty (60) days thereafter and shall be subject to the provisions hereof relating to appraisal and time of payment and of bringing suit. If this Company shall claim that no liability existed as to the mortgagor or owner, it shall, to the extent of payment of loss to the mortgagee, be subrogated to all the mortgagee's rights of recovery, but without impairing mortgagee's right to sue; or it may pay off the mortgage debt and require an assignment thereof and of the mortgage. Other provisions relating to the interests and obligations of such mortgagee may be added hereto by agreement in writing.

Pro rata liability. This Company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not.

Requirements in case loss occurs. The insured shall give immediate written notice to this Company of any loss, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed; and within sixty days after the loss, unless such time is extended in writing by this Company, the insured shall render to this Company a proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following; the time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of loss and whether or not it then stood on leased ground, and shall furnish a copy of all the descriptions and schedules in all policies and, if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this Company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.

Appraisal. In case the insured and this Company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

Company's options. It shall be optional with this Company to take all, or any part, of the property at the agreed or appraised value, and also to repair, rebuild or replace the property destroyed or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within thirty days after the receipt of the proof of loss herein required.

Abandonment. There can be no abandonment to this Company of any property.

When loss payable. The amount of loss for which this Company may be liable shall be payable sixty days after proof of loss, as herein provided, is received by this Company and ascertainment of the loss is made either by agreement between the insured and this Company expressed in writing or by the filing with this Company of an award as herein provided.

Suit. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss.

Subrogation. This Company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefor is made by this Company.

THIRD PAGE OF STANDARD FIRE POLICY

ATTACH FORM BELOW THIS LINE

BACK OF STANDARD FIRE POLICY
(OPTIONAL)

Standard Fire Insurance Policy of the States of

Expires _____

Property _____

Assured _____

No. _____

(COMPANY)

It is important that the written portions of all policies covering the same property read exactly alike. If they do not, they should be made uniform at once.

superseded by the express terms of such contract of temporary insurance.

(e) Two or more companies authorized to do in this state the business of fire insurance, may, with the approval of the commissioner, issue a combination standard form of fire insurance policy which shall contain the following provisions:

(1) A provision substantially to the effect that the insurers executing such policy shall be severally liable for the full amount of any loss or damage, according to the terms of the policy, or for specified percentages or amounts thereof, aggregating the full amount of such insurance under such policy.

(2) A provision substantially to the effect that service of process, or of any notice or proof of loss required by such policy, upon any of the companies executing such policy, shall be deemed to be service upon all such insurers.

(f) Appropriate forms of supplemental contract or contracts or extended coverage endorsements and other endorsements whereby the interest in the property described in such policy shall be insured against one or more of the perils which the company is empowered to assume, in addition to the perils covered by said standard fire insurance policy may be approved by the commissioner, and their use in connection with a standard fire insurance policy may be authorized by him. In his discretion the commissioner may authorize the printing of such supplemental contract or contracts or extended coverage endorsements and other endorsements in the form of the standard fire insurance policy. The first page of the policy may in form approved by the commissioner be arranged to provide space for the listing of amounts of insurance, rates and premiums for the basic coverages insured under the standard form of policy and for additional coverages or perils insured under endorsements attached or printed therein, and such other data as may be conveniently included for duplication on daily reports for office records.

(g) A company may print on or in its policy, with the approval of the commissioner, any provision which it is required by law to insert in its policies not in conflict with the provisions of such standard form. Such provisions shall be printed apart from the other provisions, agreements, or conditions of the policy, under a separate title, as follows: "Provisions Required by Law to Be Inserted in This Policy." (Rev., s. 4759; 1899, c. 54, s. 43; 1901, c. 391, s. 4; 1907, c. 800, s. 1; 1915, c. 109, s. 10; 1925, c. 70, s. 5; 1945, c. 378; 1949, c. 418; C. S. 6436.)

Editor's Note.—The 1945 amendment rewrote this section. The 1949 amendment added the exception clause to the proviso in subsection (c).

I. THE APPLICATION AND CONTRACT IN GENERAL.

"Waiver" Making Policy More Restrictive Held Void.—A "waiver" inserted in or attached to a fire insurance policy, reading in essential part, "If any building insured under this policy is constructed of wood . . . and situate within one hundred and fifty feet of the combustible property of a neighbor . . . and is damaged or destroyed by fire or lightning from cause arising from adjacent buildings . . . other than outbuildings belonging to the assured, this policy is null and void and of no effect", has the effect of making the provisions of the standard policy form more restrictive, and is void under this section and § 58-176. Glover v. Rowan Mut. Fire Ins. Co., 228 N. C. 195, 45 S. E. (2d) 45.

The provisions of the standard form of fire insurance policy are valid, and the rights and liabilities of both insurer and insured must be determined in accordance with its terms. Zibelin v. Pawtucket Mut. Fire Ins. Co., 229 N. C. 567, 50 S. E. (2d) 290.

At the time of issuing the policy the local agent pro hac vice represents the company and his knowledge is ordinarily held to be notice to his principal. But this rule does not apply to authorize extension of time for the performance of conditions precedent to establishing liability after the loss has occurred, and in direct contradiction of the terms of the written contract of insurance. Zibelin v. Pawtucket Mut. Fire Ins. Co., 229 N. C. 567, 50 S. E. (2d) 290.

But Limitations on His Authority Are Binding.—Limitations on the agent's authority expressed in unambiguous language in the policy must be held binding on the insured. Zibelin v. Pawtucket Mut. Fire Ins. Co., 229 N. C. 567, 50 S. E. (2d) 290.

As to Conditions Arising after Issue of Policy and Loss.—While provisions in the policy restricting the local agent's power to waive conditions as a general rule do not include conditions existing at the inception of the contract, the rule is otherwise as to those arising after the policy has been issued and loss has occurred. Zibelin v. Pawtucket Mut. Fire Ins. Co., 229 N. C. 567, 50 S. E. (2d) 290.

Agent May Not Alter Terms of Policy after Loss.—Suggestions made by the local agent to the insured after loss are not within the scope of his authority, nor may he alter the terms of the policy after its issue and loss thereunder has been reported. Zibelin v. Pawtucket Mut. Fire Ins. Co., 229 N. C. 567, 50 S. E. (2d) 290.

III. CERTAIN OTHER CONDITIONS.

Time for Filing Proof of Loss and Bringing Action.—After the occurrence of loss insurer's local agent advised insured to defer filing formal claim until such time as materials could be obtained for repairs, and insured failed to file proof of loss within the time specified in the policy and did not institute action on the policy until after the expiraton of the time limited therein. There was no denial of liability by insurer on other grounds within the time limited for filing proof of loss. It was held that insurer's demurrer should have been sustained. Zibelin v. Pawtucket Mut. Fire Ins. Co., 229 N. C. 567, 50 S. E. (2d) 290.

§ 58-178. Notice by insured or agent as to increase of hazard, unoccupancy and other insurance.—If notice in writing signed by the insured, or his agent, is given before loss or damage by any peril insured against under the standard fire insurance policy to the agent of the company of any fact or condition stated in paragraphs (a), (b) or with respect to "other insurance" of the standard form of policy set out in section 58-176 it is equivalent to an agreement in writing added thereto, and has the force of the agreement in writing referred to in the foregoing form of policy with respect to the liability of the company and the waiver; but this notice does not affect the right of the company to cancel the policy as therein stipulated. (Rev., s. 4761; 1899, c. 54, s. 43; 1907, c. 578, s. 1; 1915, c. 109, s. 11; 1929, c. 60, s. 1; 1945, c. 378; C. S. 6438.)

The 1945 amendment rewrote this section.

§ 58-178.1. Judge to select umpire.—The resident judge of the superior court of the district in which the property insured is located is designated as the judge of the court of record to select the umpire referred to in the standard form of policy. (1945, c. 378.)

§ 58-179: Repealed by Session Laws 1945, c. 378.

§ 58-180.1. Policy issued to husband or wife on joint property.—Any policy of fire insurance issued to husband or wife, on buildings and household furniture owned by the husband and wife, either by entirety, in common, or jointly, either name of one of the parties in interest named as the insured or beneficiary therein, shall be sufficient and the policy shall not be void for fail-

ure to disclose the interest of the other, unless it appears that in the procuring of the issuance of such policy, fraudulent means or methods were used by the insured or owner thereof. (1945, c. 378.)

§ 58-181: Repealed by Session Laws 1945, c. 378.

Editor's Note.—The repealed section was rewritten as § 58-30.1 by Session Laws 1945, c. 377.

Art. 20. Deposits by Insurance Companies.

§ 58-182. Amount of deposits required of foreign or alien fire and/or marine insurance companies.—Unless otherwise provided in this article, every fire, marine, or fire and marine insurance company chartered by any other state or foreign government shall make and maintain deposits of securities with the commissioner in the following amounts: (a) companies whose premium income derived from this state is less than fifty thousand dollars ($50,000.00) per annum, ten thousand dollars ($10,000.00); (b) companies whose premium income is more than fifty thousand dollars ($50,000.00) but less than one hundred thousand dollars ($100,000.00) per annum, twenty thousand dollars ($20,000.00); (c) companies whose premium income is more than one hundred thousand dollars ($100,000.00) per annum, twenty-five thousand dollars ($25,000.00), for which deposit the commissioner shall give a receipt. (1909, c. 923, s. 1; 1911, c. 164, s. 1; Ex. Sess. 1913, c. 62, ss. 1, 2, 3; 1915, c. 166, s. 6; 1933, c. 60; 1945, c. 384; C. S. 6442.)

Editor's Note.—
The 1945 amendment rewrote this section, and struck out the words "Foreign Fire" formerly appearing in the caption of the article.

§ 58-182.1. Amount of deposits required of foreign or alien fidelity, surety and casualty insurance companies.—Unless otherwise provided in this article every fidelity, surety or casualty insurance company chartered by any other state or foreign government shall make and maintain deposits of securities with the commissioner in the following amounts: (a) companies whose premium income derived from this state is less than one hundred thousand dollars ($100,000.00), twenty-five thousand dollars ($25,000.00); (b) companies whose premium income is in excess of one hundred thousand dollars ($100,000.00), fifty thousand dollars ($50,000.00), for which deposit the commissioner shall give a receipt. (1945, c. 384.)

§ 58-182.2. Minimum deposit required upon admission.—Upon admission to do business in the State of North Carolina every foreign or alien fire, marine, or fire and marine, fidelity, surety or casualty company shall deposit with the commissioner securities in the minimum amounts required under the provisions of sections 58-182 and 58-182.1. (1945, c. 384.)

§ 58-182.3. Type of deposits.—The deposits required to be made under the provisions of sections 58-182 and 58-182.1 shall be composed of bonds of the United States, or of the State of North Carolina, or of the cities or counties of this state. (1945, c. 384.)

§ 58-182.4. Replacements upon depreciation of securities.—Whenever any of the securities deposited by companies under the provisions of sections 58-182 and 58-182.1 shall be depreciated or reduced in value, such company shall forthwith increase the deposit in order to maintain the required deposit in accordance with the amounts required by the said sections. (1945, c. 384.)

§ 58-182.5. Power of attorney.—With the securities deposited in accordance with sections 58-182 and 58-182.1 the company shall at the same time deliver to the commissioner of insurance a power of attorney executed by its president and secretary or other proper officers authorizing the sale or transfer of said securities or any part thereof for the purpose of paying any of the liabilities provided for in this article. (1945, c. 384.)

§ 58-182.6. Securities held by treasurer; faith of state pledged therefor; non-taxable.—The securities required to be deposited by each insurance company in this article shall be delivered for safekeeping by the commissioner to the treasurer of the state who shall receipt him therefor. For the securities so deposited the faith of the state is pledged that they shall be returned to the companies entitled to receive them or disposed of as herein provided for. The securities deposited by any company under this article shall not, on account of such securities being in this state, be subjected to taxation but shall be held exclusively and solely for the protection of contract holders. (1945, c. 384.)

§ 58-182.7. Authority to increase deposit. — When, in the opinion of the commissioner, it is necessary for the protection of the public interest to increase the amount of deposits specified in sections 58-182 and 58-182.1, the companies described in said sections shall, upon demand, make additional deposits in such sums as the commissioner may require, and such additional deposits shall be held in accordance with and for the purposes set out in this article. (1945, c. 384.)

§ 58-182.8. Deposits of domestic companies.— The commissioner may in the public interest require domestic fire, marine or fire and marine, fidelity, surety or casualty companies to make and maintain deposits under the provisions of sections 58-182 to 58-182.7 inclusive. (1945, c. 384.)

§ 58-188.1. Deposits held in trust by commissioner or treasurer. — 1. Deposits by Domestic Company.—The commissioner of insurance or the treasurer, in his official capacity, shall take and hold in trust deposits made by any domestic insurance company for the purpose of complying with the laws of any other state to enable the company to do business in that state. The company making the deposits is entitled to the income thereof, and may, from time to time, with the consent of the commissioner of insurance or treasurer, and when not forbidden by the law under which the deposit was made, change in whole or in part the securities which compose the deposit for other solvent securities of equal par value. Upon request of any domestic insurance company such officer may return to the company the whole or any portion of the securities of the company held by him on deposit, when he is satisfied that they are subject to no liability and are not required to be longer held by any provision of law or purpose of the original deposit.

2. Deposits by Foreign or Alien Company.—

The commissioner or treasurer may return to the trustees or other representatives authorized for that purpose any deposit made by a foreign or alien insurance company, when it appears that the company has ceased to do business in the state and is under no obligation to policyholders or other persons in the state for whose benefit the deposit was made.

3. Action to Enforce or Terminate the Trust.—An insurance company which has made a deposit in this state pursuant to this chapter, or its trustees or resident managers in the United States, or the commissioner of insurance, or any creditor of the company, may at any time bring an action in the superior court of Wake county against the state and other parties properly joined therein, to enforce, administer, or terminate the trust created by the deposit. The process in this action shall be served on the officer of the state having the deposit, who shall appear and answer in behalf of the state and perform such orders and judgments as the court may make in such action. (Rev., s. 4709; 1899, c. 54, s. 17; 1901, c. 391, s. 2; 1903, c. 438, s. 1; 1903, c. 536, s. 4; 1945, c. 384; C. S. 6313.)

Editor's Note.—The 1945 amendment transferred this section from section 58-55 and inserted the words "or alien" in subsection 2.

§ 58-188.2. Deposits subject to approval and control of commissioner.—The deposits of securities required to be made by any insurance company of this state shall be approved by the commissioner of insurance of the state, and he may examine them at all times, and may order all or any part thereof changed for better security, and no change or transfer of the same may be made without his assent. (Rev., s. 4710; 1903, c. 536, s. 5; 1945, c. 384; C. S. 6314.)

Editor's Note.—The 1945 amendment transferred this section from section 58-56.

§ 58-188.3. Deposits by alien companies required and regulated.—An alien company, other than life, shall not be admitted to do business in this state until, in addition to complying with the conditions by law prescribed for the licensing and admission of such companies to do business in this state, it has made a deposit with the treasurer or commissioner of insurance of this state, or with the financial officer of some other state of the United States, of a sum not less than the capital required of like companies under this chapter. This deposit must be in exclusive trust for the benefit and security of all the company's policyholders and creditors in the United States, and may be made in the securities, but subject to the limitations, specified in this chapter with regard to the investment of the capital of domestic companies formed and organized under the provisions of this chapter. The deposit shall be deemed for all purposes of the insurance law the capital of the company making it. (Rev., s. 4711; 1899, c. 54, s. 64; 1903, c. 438, s. 6; 1945, c. 384; C. S. 6315.)

Editor's Note.—The 1945 amendment transferred this section from § 58-57, substituted "alien" for "foreign" in the caption, and substituted at the beginning of the section the words "An alien company, other than life" for the words "A foreign company, if incorporated or associated under the laws of any government or state other than the United States or one of the United States."

§ 58-188.4. Deposits by life companies not chartered in United States.—Every alien life insurance company organized under the laws of any other country than the United States must have and keep on deposit with some state insurance department or in the hands of trustees, in exclusive trust for the security of its contracts with policyholders in the United States, funds of an amount equal to the net value of all its policies in the United States and not less than three hundred thousand dollars. (Rev., s. 4712; 1899, c. 54, s. 56; 1945, c. 384; C. S. 6316.)

Editor's Note.—The 1945 amendment transferred this section from section 58-58, inserted the word "alien" in line one, and increased the amount at the end of the section from two hundred thousand to three hundred thousand dollars.

§ 58-188.5. Registration of bonds deposited in name of treasurer.—The commissioner of insurance is hereby empowered, upon the written consent of any insurance company depositing with the commissioner or the state treasurer under any law of this State, any state, county, city, or town bonds or notes which are payable to bearer, to cause such bonds or notes to be registered as to the principal thereof in lawful books of registry kept by or in behalf of the issuing state, county, city or town, such registration to be in the name of the treasurer of North Carolina in trust for the company depositing the notes or bonds and the State of North Carolina, as their respective interest may appear, and is further empowered to require of any and all such companies the filing of written consent to such registration as a condition precedent to the right of making any such deposit or right to continue any such deposit heretofore made. (1925, c. 145, s. 2; 1945, c. 384.)

Editor's Note.—The 1945 amendment transferred this section from section 58-59.

§ 58-188.6. Notation of registration; release.—Bonds or notes so registered shall bear notation of such registration on the reverse thereof, signed by the registering officer or agent, and may be released from such registration and may be transferred on such books of registry by the signature of the State Treasurer. (1925, c. 145, s. 3; 1945, c. 384.)

Editor's Note.—The 1945 amendment transferred this section from section 58-60.

§ 58-188.7. Expenses of registration.—The necessary expenses of procuring such registration and any transfer thereof shall be paid by the company making the deposits. (1925, c. 145, s. 4; 1945, c. 384.)

Editor's Note.—The 1945 amendment transferred this section from section 58-61.

§ 58-188.8. Bond in lieu of deposit.—In lieu of any deposit required in this chapter a company may give a surety bond issued by a company licensed in this state, the form of which bond shall be approved by the commissioner. (1945, c. 384.)

Art. 21. Insuring State Property.

§ 58-189. State property fire insurance fund created.—Upon the expiration of all existing policies of fire insurance upon state owned buildings, fixtures, furniture, and equipment therein, including all such property the title to which may

be in any state department, institution, or agency, the state of North Carolina shall not reinsure any of such properties.

There is hereby created a "state property fire insurance fund," which shall be as a special fund in the state treasury, for the purpose of providing a reserve against loss from fire at state departments and institutions. The sinking fund commission shall invest all funds deposited in the "state property fire insurance fund" in the same type of securities in which state sinking funds may be invested and all earnings of the fund shall become a part of the fund and be held and invested as contributions are invested. The unexpended appropriations of state departments and institutions for fire insurance premiums for the fiscal year 1944-45 and the appropriations for fire insurance premiums made for the biennium 1945-47 or that may thereafter be made for this purpose shall be transferred to the "state property fire insurance fund." (1945, c. 1027, s. 1.)

Editor's Note.—The 1945 amendment rewrote this section.

§ 58-190. Appropriations.—Upon the expiration of the existing fire insurance policies on said properties and in making appropriations for any biennium after the next biennium, the commissioner of insurance shall file with the budget bureau his estimate of the appropriations which will be necessary in order to set up and maintain an adequate reserve to provide a fund sufficient to protect the state, its departments, institutions, and agencies from loss or damage to any of said properties up to fifty per centum of the value thereof. Appropriations made for the creating of such fire insurance reserves against property of the department of agriculture, or the state highway and public works commission or any special operating fund shall be charged against the funds of such departments. (1945, c. 1027, s. 2.)

Editor's Note.—The 1945 amendment rewrote this section.

§ 58-191. Payment of losses.—In case of total loss of any property of any state institution or partial loss thereof or the loss or damage of any other aforesaid state owned property, the commissioner of insurance is authorized, empowered and directed to determine the amount of the loss and to certify the amount of loss to the department or institution concerned, to the budget bureau and to the governor and council of state. The governor and council of state may authorize transfers from the "state property fire insurance fund" to the state agency having suffered a fire damage in such amount as they may consider necessary to restore the loss sustained, and in the event there is not a sufficient sum in said state property fire insurance fund, the governor and council of state may supplement said fund from the contingency and emergency fund, and if there is not a sufficient amount therein, then from the state postwar reserve fund. Such funds as shall be allocated from such reserve fund shall be paid therefrom upon warrant of the state auditor. (1945, c. 1027, s. 3.)

Editor's Note.—The 1945 amendment rewrote this section.

§ 58-194. Report required of commissioner.—The commissioner of insurance must submit to the governor a full report of his official action under this article, with such recommendations as commend themselves to him, and it shall be embodied in or attached to his biennial report to the general assembly. (Rev., s. 4830; 1901, c. 710, ss. 1, 2; 1903, c. 771, s. 4; 1945, c. 386; C. S. 6454.)

Editor's Note.—The 1945 amendment struck out the word "annually" formerly appearing after the word "submit" in line one.

SUBCHAPTER IV. LIFE INSURANCE.

Article 22. General Regulations of Business.

§ 58-195. Definitions; requisites of contract.—All corporations or associations doing business in this state, under any charter or statute of this or any other state, involving the payment of money or other thing of value to families or representatives of policy and certificate holders or members, conditioned upon the continuance or cessation of human life, or involving an insurance, guaranty, contract, or pledge for the payment of endowments or annuities, or who employ agents to solicit such business, are life insurance companies, in all respects subject to the laws herein made and provided for the government of life insurance companies, and shall not make any such insurance, guaranty, contract, or pledge in this state with any citizen, or resident thereof, which does not distinctly state the amount of benefits payable, the manner of payment, the consideration therefor and such other provisions as the commissioner may require. (Rev., s. 4773; 1899, c. 54, s. 55; 1945, c. 379; C. S. 6455.)

Editor's Note.—

The 1945 amendment repealed the former section and inserted the present one in place thereof. Formerly the section applied to partnerships and individuals.

The amendatory act which amended, inserted or repealed a large number of sections of this chapter, provides: "This act shall not apply to common carriers having relief departments, pension or annuity plans, or other organizations or associations for the benefit of their employees or former employees; or to associations of such common carriers administering such departments, plans or organizations."

§ 58-195.1. Industrial life insurance defined.—Industrial life insurance is hereby declared to be that form of life insurance under which the premiums are payable monthly or oftener, provided the face amount of insurance stated in the policy does not exceed one thousand dollars ($1,000.00) and the words "Industrial Policy" are printed upon the policy as a part of the descriptive matter. (1945, c. 379; 1947, c. 721.)

Editor's Note.—Prior to the 1947 amendment the premiums were payable either (1) weekly or (2) monthly or oftener.

§ 58-196: Transferred to § 58-151.1 by Session Laws 1945, c. 379.

§ 58-199. Misrepresentations of policy forbidden.—No life insurance company doing business in this state, and no officer, director, solicitor, or other agent thereof, shall make, issue, or circulate, or cause to be made, issued, or circulated any estimate, illustration, circular, or statement of any sort misrepresenting the terms of the policy issued by it or the dividends or share of surplus to be received thereon, or shall use any name or title of any policy or class of policies misrepresenting the true nature thereof. Nor shall any such company, agent, or broker make any misrepresentation to any person insured in said company or in any other insurer or govern-

mental agency for the purpose of inducing or tending to induce such person to lapse, forfeit, or surrender his said insurance. (1913, c. 95; 1947, c. 721; C. S. 6459.)

Editor's Note.—The 1947 amendment struck out the word "company" in line 13 and inserted in lieu thereof the words "insurer or governmental agency".

§ 58-200: Repealed by Session Laws 1945, c. 379.

§ 58-201. Reserve fund of domestic companies to be calculated.—The valuation of the reserves on the policies and bonds of every life insurance company incorporated by the laws of this state shall be based upon any recognized standard of valuation and mortality table as the commissioner should deem best for the security of the business and the safety of the persons insured. The commissioner shall annually value or cause to be valued the reserves on all policies and annuities of each domestic company and may accept the valuation of such reserves made by the company upon such evidence of its correctness as he may require. Upon this valuation being made by the commissioner and a certificate thereof furnished by him, each company shall pay to such officer, to defray the expenses thereof, the sum of one cent for every thousand dollars of the whole amount insured by its policies so valued. The reserve fund hereinbefore provided for shall not be available for or used for any other purpose than the discharge of policy obligations, but is a trust fund to be held and expended only for the benefit of policyholders. In case of the insolvency of the company, the reserve on outstanding policies may, with the consent of the commissioner, be used for the reinsurance of its policies to the extent of their pro rata part thereof. (Rev., s. 4777; 1903, c. 536, s. 4; 1905, c. 410; 1907, c. 1000, s. 7; 1945, c. 379; C. S. 6461.)

Editor's Note.—The 1945 amendment rewrote this section.

§ 58-201.1. Standard valuation law.—1. This section shall be known as the Standard Valuation Law.

2. The commissioner shall annually value, or cause to be valued, the reserve liabilities (hereinafter called reserves) for all outstanding life insurance policies and annuity and pure endowment contracts of every life insurance company doing business in this state, and may certify the amount of such reserves, specifying the mortality table or tables, rate or rates of interest and methods (net level premium method or other) used in the calculation of such reserves. Group methods and approximate averages for fractions of a year or otherwise may be used in calculating such reserves and the valuation made by the company may be accepted by the commissioner upon such evidence of its correctness as the commissioner may require. In lieu of the valuation of the reserves herein required of any foreign or alien company, he may accept any valuation made, or caused to be made, by the insurance supervisory official of any state or other jurisdiction when such valuation complies with the minimum standard herein provided and if the official of such state or jurisdiction accepts as sufficient and valid for all legal purposes the certificate of valuation of the commissioner when such certificate states the valuation to have been made in a specified manner according to which the aggregate reserves would be at least as large as if they had been computed in the manner prescribed by the law of that state or jurisdiction.

3. The minimum standard for the valuation of all such policies and contracts issued prior to the operative date of section 58-201.2 shall be that provided by the laws in effect immediately prior to such date. The minimum standard for the valuation of all such policies and contracts issued on or after the operative date of section 58-201.2 shall be the commissioner's reserve valuation method defined in subsection four, three and one-half per cent (3½%) interest, and the following tables:

(a) For all ordinary policies of life insurance issued on the standard basis, excluding any disability and accidental death benefits in such policies, the commissioner's 1941 Standard Ordinary Mortality Table.

(b) For all industrial life insurance policies issued on the standard basis, excluding any disability and accidental death benefits in such policies, the 1941 Standard Industrial Mortality Table.

(c) For annuity and pure endowment contracts, excluding any disability and accidental death benefits in such policies, the 1937 Standard Annuity Mortality Table.

(d) For total and permanent disability benefits in or supplementary to ordinary policies or contracts, Class (3) Disability Table (1926) which, for active lives, shall be combined with a mortality table permitted for calculating the reserves for life insurance policies.

(e) For accidental death benefits in or supplementary to policies, the Inter-Company Double Indemnity Mortality Table combined with a mortality table permitted for calculating the reserves for life insurance policies.

(f) For group life insurance, life insurance issued on the sub-standard basis and other special benefits, such tables as may be approved by the commissioner.

4. Reserves according to the commissioner's reserve valuation method, for the life insurance and endowment benefits of policies providing for a uniform amount of insurance and requiring the payment of uniform premiums shall be the excess, if any, of the present value, at the date of valuation, of such future guaranteed benefits provided for by such policies, over the then present value of any future modified net premiums therefor. The modified net premiums for any such policy shall be such uniform percentage of the respective contract premiums for such benefits that the present value, at the date of issue of the policy, of all such modified net premiums shall be equal to the sum of the then present value of such benefits provided for by the policy and the excess of (a) over (b), as follows:

(a) A net level annual premium equal to the present value, at the date of issue, of such benefits provided for after the first policy year, divided by the present value, at the date of issue, of an annuity of one per annum payable on the first and each subsequent anniversary of such policy on which a premium falls due; provided, however, that such net level annual premium shall not exceed the net level annual premium on the nineteen year premium whole life plan for insurance of the same amount at an age one year higher than the age at issue of such policy.

(b) A net one year term premium for such benefits provided for in the first policy year.

Reserves according to the commissioner's reserve valuation method for (1) life insurance policies providing for a varying amount of insurance or requiring the payment of varying premiums, (2) annuity and pure endowment contracts, (3) disability and accidental death benefits in all policies and contracts, and (4) all other benefits, except life insurance and endowment benefits in life insurance policies, shall be calculated by a method consistent with the principles of this section.

5. In no event shall a company's aggregate reserves for all life insurance policies, excluding disability and accidental death benefits, issued on or after the operative date of section 58-201.2, be less than the aggregate reserves calculated in accordance with the method set forth in subsection four and the mortality table or tables and rate or rates of interest used in calculating non-forfeiture benefits for such policies.

6. Reserves for all policies and contracts issued prior to the operative date of section 58-201.2 may be calculated, at the option of the company, according to any standards which produce greater aggregate reserves for all such policies and contracts than the minimum reserves required by the laws in effect immediately pror to such date.

Reserves for any category of policies, contracts or benefits as established by the commissioner, issued on or after the operative date of section 58-201.2, may be calculated, at the option of the company, according to any standards which produce greater aggregate reserves for such category than those calculated according to the minimum standard herein provided, but the rate or rates of interest used shall not be higher than the corresponding rate or rates of interest used in calculating any non-forfeiture benefits provided for therein. Provided, however, that reserves for participating life insurance policies issued on or after the operative date of section 58-201.2 may, with the consent of the commissioner, be calculated according to a rate of interest lower than the rate of interest used in calculating the nonforfeiture benefits in such policies, with the further proviso that if such lower rate differs from the rate used in the calculation of the non-forfeiture benefits by more than one-half per cent (½%) the company issuing such policies shall file with the commissioner a plan providing for such equitable increases, if any, in the cash surrender values and non-forfeiture benefits in such policies as the commissioner shall approve.

Any such company which at any time shall have adopted any standard of valuation producing greater aggregate reserves than those calculated according to the minimum standard herein provided may, with the approval of the commissioner, adopt any lower standard of valuation, but not lower than the minimum herein provided.

7. If the gross premium charged by any life insurance company on any policy or contract is less than the net premium for the policy or contract according to the mortality table, rate of interest and method used in calculating the reserve thereon, there shall be maintained on such policy or contract a deficiency reserve in addition to all other reserves required by law. For each such policy or contract the deficiency reserve shall be the present value, according to such standard, of an annuity of the difference between such net premium and the premium charged for such policy or contract, running for the remainder of the premium-paying period. (1945, c. 379.)

§ 58-201.2. Standard nonforfeiture provisions.— 1. This section shall be known as the Standard Nonforfeiture Law.

2. In the case of policies issued on or after the operative date of this section, as defined in subsection 8, no policy of life insurance, except as stated in subsection 7, shall be issued or delivered in this state unless it shall contain in substance the following provisions, or corresponding provisions which in the opinion of the commissioner are at least as favorable to the defaulting or surrendering policyholder:

(a) That, in the event of default in any premium payment after premiums have been paid for at least one full year in the case of ordinary insurance or three full years in the case of industrial insurance, the company will grant, upon proper request not later than sixty days after the due date of the premium in default, a paid-up nonforfeiture benefit on a plan stipulated in the policy, effective as of such due date, of such value as may be hereinafter specified.

(b) That, upon surrender of the policy within sixty days after the due date of any premium payment in default after premiums have been paid for at least three full years in the case of ordinary insurance or five full years in the case of industrial insurance, the company will pay, in lieu of any paid-up nonforfeiture benefit, a cash surrender value of such amount as may be hereinafter specified.

(c) That a specified paid-up nonforfeiture benefit shall become effective as specified in the policy unless the person entitled to make such election elects another available option not later than sixty days after the due date of the premium in default. Nothing herein shall prevent the use of an automatic premium loan provision.

(d) That, if the policy shall have become paid-up by completion of all premium payments or if it is continued under any paid-up nonforfeiture benefit which became effective on or after the third policy anniversary in the case of ordinary insurance or the fifth policy anniversary in the case of industrial insurance, the company will pay, upon surrender of the policy within thirty days after any policy anniversary, a cash surrender value of such amount as may be hereinafter specified.

(e) A statement of the mortality table and interest rate used in calculating the cash surrender values and the paid-up nonforfeiture benefits available under the policy, together with a table showing the cash surrender value, if any, and paid-up nonforfeiture benefit, if any, available under the policy on each policy anniversary either during the first twenty policy years or during the term of the policy, whichever is shorter, such values and benefits to be calculated upon the assumption that there are no dividends or paid-up additions credited to the policy and that there is no indebtedness to the company on the policy.

(f) A brief and general statement of the method to be used in calculating the cash surrender value

and the paid-up nonforfeiture benefit available under the policy on any policy anniversary with an explanation of the manner in which the cash surrender values and the paid-up nonforfeiture benefits are altered by the existence of any paid-up additions credited to the policy or any indebtedness to the company on the policy.

Any of the foregoing provisions or portions thereof not applicable by reason of the plan of insurance may, to the extent inapplicable, be omitted from the policy.

The company shall reserve the right to defer the payment of any cash surrender value for a period of six months after demand therefor with surrender of the policy.

3. Any cash surrender value available under the policy in the event of default in a premium payment due on any policy anniversary, whether or not required by subsection two, shall be an amount not less than the excess, if any, of the present value, on such anniversary, of the future guaranteed benefits which would have been provided for by the policy, including any existing paid-up additions, if there had been no default, over the sum of (a) the then present value of the adjusted premiums as defined in subsection five, corresponding to premiums which would have fallen due on and after such anniversary, and (b) the amount of any indebtedness to the company on the policy. Any cash surrender value available within thirty days after any policy anniversary under any policy paid up by completion of all premium payments or any policy continued under any paid-up nonforfeiture benefit, whether or not required by subsection two, shall be an amount not less than the present value, on such anniversary, of the future guaranteed benefits provided for by the policy, including any existing paid-up additions, decreased by any indebtedness to the company on the policy.

4. Any paid-up nonforfeiture benefit available under the policy in the event of default in a premium payment due on any policy anniversary shall be such that its present value as of such anniversary shall be at least equal to the cash surrender value then provided for by the policy or, if none is provided for, at least equal to that cash surrender value which would have been required by this section in the absence of the condition that premiums shall have been paid for at least a specified period.

5. The adjusted premiums for any policy shall be calculated on an annual basis and shall be such uniform percentage of the respective premiums specified in the policy for each policy year that the present value, at the date of issue of the policy, of all such adjusted premiums shall be equal to the sum of (i) the then present value of the future guaranteed benefits provided for by the policy; (ii) two per cent of the amount of insurance, if the insurance be uniform in amount, or of the equivalent uniform amount, as hereinafter defined, if the amount of insurance varies with duration of the policy; (iii) forty per cent of the adjusted premium for the first policy year; (iv) twenty-five per cent of either the adjusted premium for the first policy year or the adjusted premium for a whole life policy of the same uniform or equivalent uniform amount with uniform premiums for the whole of life issued at the same age for the same amount of insurance, whichever is less. Provided, however, that in applying the percentages specified in (iii) and (iv) above, no adjusted premium shall be deemed to exceed four per cent (4%) of the amount of insurance or level amount equivalent thereto. The date of issue of a policy for the purpose of this subsection shall be the date as of which the rated age of the insured is determined.

In the case of a policy providing an amount of insurance varying with duration of the policy, the equivalent level amount thereof for the purpose of this section shall be deemed to be the level amount of insurance provided by an otherwise similar policy, containing the same endowment benefit or benefits, if any, issued at the same age and for the same term, the amount of which does not vary with duration and the benefits under which have the same present value at the inception of the insurance as the benefits under the policy.

All adjusted premiums and present values referred to in this section shall be calculated on the basis of the commissioner's 1941 Standard Ordinary Mortality Table for ordinary insurance and the 1941 Standard Industrial Mortality Table for industrial insurance and the rate of interest, not exceeding three and one-half per cent (3½%) per annum, specified in the policy for calculating cash surrender value and paid-up nonforfeiture benefits. Provided, however, that in calculating the present value of any paid-up term insurance with accompanying pure endowment, if any, offered as a nonforfeiture benefit, the rates of mortality assumed may be not more than one hundred and thirty per cent (130%) of the rates of mortality according to such applicable table. Provided, further, that for insurance issued on a substandard basis, the calculation of any such adjusted premiums and present values may be based on such other table of mortality as may be specified by the company and approved by the commissioner.

6. Any cash surrender value and any paid-up nonforfeiture benefit, available under the policy in the event of default in a premium payment due at any time other than on the policy anniversary, shall be calculated with allowance for the lapse of time and the payment of fractional premiums beyond the last preceding policy anniversary. All values referred to in subsections three, four and five may be calculated upon the assumption that any death benefit is payable at the end of the policy year of death. The net value of any paid-up additions, other than paid-up term additions, shall be not less than the dividends used to provide such additions. Notwithstanding the provisions of subsection three, additional benefits payable (a) in the event of death or dismemberment by accident or accidental means, (b) in the event of total and permanent disability, (c) as reversionary annuity or deferred reversionary annuity benefits, (d) as decreasing term insurance benefits provided by a rider or supplemental policy provision to which, if issued as a separate policy, this section would not apply, and (e) as other policy benefits additional to life insurance and endowment benefits, and premiums for all such additional benefits, shall be disregarded in ascertaining cash surrender values and nonforfeiture benefits required by this section, and no such additional benefits shall be re-

quired to be included in any paid-up nonforfeiture benefits.

7. The provisions of this section shall not apply to any industrial sick benefit insurance as defined in this chapter, nor to any reinsurance, group insurance, pure endowment, annuity or reversionary annuity contract, nor to any term policy of uniform amount, or renewal thereof, of twenty years or less, for which uniform premiums are payable during the entire term of the policy, nor to any term policy of decreasing amount on which each adjusted premium, calculated as specified in subsection five, is less than the adjusted premium so calculated, on such twenty year term policy issued at the same age and for the same initial amount of insurance, nor to any policy which shall be delivered outside this state through an agent or other representative of the company issuing the policy.

8. After the effective date of this section, any company may file with the commissioner a written notice of its election to comply with the provisions of this section after a specified date before January 1, 1950. After the filing of such notice then upon such specified date (which shall be the operative date for such company) this section shall become operative with respect to the policies thereafter issued by such company. If a company makes no such election, the operative date of this section for such company shall be January 1, 1950. (1945, c. 379.)

§ 58-202. Reinsurance of companies regulated.—The receiver of any life insurance company organized under the laws of this state, when the assets of the company are sufficient for that purpose, and the consent of two-thirds of its policyholders has been secured in writing, may reinsure all the policy obligations of such company in some other solvent life insurance company, or, when the assets are insufficient to secure the reinsurance of all the policies in full, he may reinsure such a percentage of each and every policy outstanding as the assets will secure; but there must be no preference or discrimination as against any policyholder, and the contract for such reinsurance by the receiver must be approved by the commissioner of insurance of this state before it has effect. (Rev., s. 4778; 1899, c. 54, s. 58; 1903, c. 536, s. 9; 1945, c. 379; C. S. 6462.)

Editor's Note.—The 1945 amendment substituted "companies" for "risks" in the caption, and struck out the former first sentence reading "No domestic life insurance company may reinsure its risks without the permission of the commissioner of insurance, except to the extent of one-half of any individual risk."

§ 58-203: Repealed by Session Laws 1945, c. 379.

§ 58-205.1. Minors may enter into insurance or annuity contracts and have full rights, powers and privileges thereunder.—All minors in North Carolina of the age of fifteen years and upwards shall have full power and authority to make contracts of insurance or annuity with any life insurance company authorized to do business in the State of North Carolina, either domestic or foreign, and to exercise all the powers, rights, and privileges of ownership conferred upon them under the terms of any and all such contracts applied for by and issued to them, and with full power to surrender, assign, modify, pledge, or change such contracts, and to receive any dividends thereon and generally to have the full power and authority in the premises that persons twenty-one years and upwards could and would have relative to any and all such contracts. (1945, c. 379; 1947, c. 721.)

Editor's Note.—The 1947 amendment substituted in line nine the words "by and" for the word "or".

§ 58-206. Creditors deprived of benefits of life insurance policies except in cases of fraud.—If a policy of insurance is effected by any person on his own life or on another life in favor of a person other than himself, or, except in cases of transfer with intent to defraud creditors, if a policy of life insurance is assigned or in any way made payable to any such person, the lawful beneficiary or assignee thereof, other than the insured or the person so effecting such insurance or the executor or administrator of such insured or of the person effecting such insurance, shall be entitled to its proceeds and avails against creditors and representatives of the insured and of the person effecting same, whether or not the right to change the beneficiary is reserved or permitted, and whether or not the policy is made payable to the person whose life is insured if the beneficiary or assignee shall predecease such person: Provided, that subject to the statute of limitations, the amount of any premiums for said insurance paid with the intent to defraud creditors, with interest thereon, shall inure to their benefit from the proceeds of the policy; but the company issuing the policy shall be discharged of all liability thereon by payment of its proceeds in accordance with its terms unless, before such payment, the company shall have written notice by or in behalf of the creditor, of a claim to recover for transfer made or premiums paid with intent to defraud creditors, with specifications of the amount claimed. (1931, c. 179, s. 1; 1947, c. 721.)

The 1947 amendment struck out in lines 9 and 10 the words and commas, "or his executors or administrators," and inserted in lieu thereof the words "or the executor or administrator of such insured or of the person effecting such insurance".

§ 58-207. Notice of nonpayment of premium required before forfeiture.—No life insurance corporation doing business in this state shall, within one year after the default in payment of any premium, installment, or interest, declare forfeited or lapsed any policy hereafter issued or renewed, except policies on which premiums are payable monthly or at shorter intervals and except group insurance contracts and term insurance contracts for one year or less, nor shall any such policy be forfeited or lapsed by reason of nonpayment, when due, of any premium, interest, or installment or any portion thereof required by the terms of the policy to be paid, within one year from the failure to pay such premium, interest, or installment, unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof due on such policy, the place where it shall be paid, and the person to whom the same is payable has been duly addressed and mailed, postage paid, to the person whose life is insured, or to the assignee or owner of the policy, or to the person designated in writing by such insured, assignee or owner, if notice of the assignment has been given to the corporation, at

his or her last known postoffice address in this state, by the corporation or by any officer thereof or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable, as regards policies which do not contain a provision for grace or are not entitled to grace in the payment of premiums and at least five and not more than forty-five days prior to the day when the same is payable as regards policies which do contain a provision for grace or are entitled to grace in the payment of premiums. The notice shall also state that unless such premium, interest, installment, or portion thereof then due shall be paid to the corporation or to the duly appointed agent or person authorized to collect such premium, by or before the day it falls due, the policy and all payments thereon will become forfeited and void, except as to the right to a surrender value or paid-up policy, as in the contract provided. If the payment demanded by such notice shall be made within its time limit therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk, or agent of the corporation, or of any one authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given. No action shall be maintained to recover under a forfeited policy unless the same is instituted within three years from the day upon which default was made in paying the premium, installment, interest, or portion thereof for which it is claimed that forfeiture ensued. (1909, c. 884; 1929, c. 308, s. 1; 1931, c. 317; 1945, c. 379; C. S. 6465.)

Editor's Note.—
The 1945 amendment transferred a part of the former section to § 58-260.1 and made other changes in this section.

Cited in Abrams v. Metropolitan Life Ins. Co., 223 N. C. 500, 27 S. E. (2d) 148; Abrams v. Metropolitan Life Ins. Co., 224 N. C. 1, 29 S. E. (2d) 130.

§ 58-209. Distribution of surplus in mutual companies.—Every life insurance company doing business in this state upon the principle of mutual insurance, or the members of which are entitled to share in the surplus funds thereof, may distribute the surplus annually, or once in two, three, four, or five years, as its directors determine. No payments shall be made to policyholders by way of dividends unless the company possesses admitted assets in the amount of such payments in excess of its capital and/or minimum required surplus and all other liabilities. (Rev., s. 4776; 1903, c. 536, s. 10; 1945, c. 379; C. S. 6466.)

Editor's Note.—The 1945 amendment rewrote the second sentence.

§ 58-210. Group life insurance defined.—No policy of group life insurance shall be delivered in this state unless it conforms to one of the following descriptions:

(1) A policy issued to an employer, or to the trustee of a fund established by an employer, which employer or trustee shall be deemed the policyholder, to insure employees of the employer for the benefit of persons other than the employer, subject to the following requirements:

(a) The employees eligible for insurance under the policy shall be all of the employees of the employer, or all of any class or classes thereof determined by conditions pertaining to their employment. The policy may provide that the term "employees" shall include the employees of one or more subsidiary corporations, and the employees, individual proprietors, and partners of one or more affiliated corporations, proprietors or partnerships if the business of the employer and of such affiliated corporations, proprietors or partnerships is under common control through stock ownership, contract, or otherwise. The policy may provide that the term "employees" shall include the individual proprietor or partners if the employer is an individual proprietor or a partnership. The policy may provide that the term "employees" shall include retired employees.

(b) The premium for the policy shall be paid by the policyholder, either wholly from the employer's funds or funds contributed by him, or partly from such funds and partly from funds contributed by the insured employees. No policy may be issued on which the entire premium is to be derived from funds contributed by the insured employees. A policy on which part of the premium is to be derived from funds contributed by the insured employees may be placed in force only if at least 75% of the then eligible employees, excluding any as to whom evidence of individual insurability is not satisfactory to the insurer, elect to make the required contributions. A policy on which no part of the premium is to be derived from funds contributed by the insured employees must insure all eligible employees, or all except any as to whom evidence of individual insurability is not satisfactory to the insurer.

(c) The policy must cover at least 25 employees at date of issue.

(d) The amounts of insurance under the policy must be based upon some plan precluding individual selection either by the employees or by the employer or trustee. No policy may be issued which provides insurance on any employee which together with any other insurance under any group life insurance policy or policies issued to the employer or to the trustee of a fund established in whole or in part by the employer exceeds $20,000, except that this limitation shall not apply to amounts of group permanent life insurance issued in connection with a pension or profit-sharing plan.

(2) A policy issued to a creditor, who shall be deemed the policyholder, to insure debtors of the creditor, subject to the following requirements:

(a) The debtors eligible for insurance under the policy shall be all of the debtors of the creditor whose indebtedness is repayable in installments, or all of any class or classes thereof determined by conditions pertaining to the indebtedness or to the purchase giving rise to the indebtedness. The policy may provide that the term "debtors" shall include the debtors of one or more subsidiary corporations, and the debtors of one or more affiliated corporations, proprietors or partnerships if the business of the policyholder and of such affiliated corporations, proprietors or

partnerships is under common control through stock ownership, contract or otherwise.

(b) The premium for the policy shall be paid by the policyholder, either from the creditor's funds, or from charges collected from the insured debtors, or from both. A policy on which part or all of the premium is to be derived from the collection from the insured debtors of identifiable charges not required of uninsured debtors shall not include, in the class or classes of debtors eligible for insurance, debtors under obligations outstanding at its date of issue without evidence of individual insurability unless at least 75% of the then eligible debtors elect to pay the required charges. A policy on which no part of the premium is to be derived from the collection of such identifiable charges must insure all eligible debtors, or all except any as to whom evidence of individual insurability is not satisfactory to the insurer.

(c) The policy may be issued only if the group of eligible debtors is then receiving new entrants at the rate of at least 100 persons yearly, or may reasonably be expected to receive at least 100 new entrants during the first policy year, and only if the policy reserves to the insurer the right to require evidence of individual insurability if less than 75% of the new entrants become insured.

(d) The amount of insurance on the life of any debtor shall at no time exceed the amount owed by him which is repayable in instalments to the creditor, or $5,000, whichever is less.

(e) The insurance shall be payable to the policyholder. Such payment shall reduce or extinguish the unpaid indebtedness of the debtor to the extent of such payment.

(3) A policy issued to a labor union, which shall be deemed the policyholder, to insure members of such union for the benefit of persons other than the union or any of its officials, representatives or agents, subject to the following requirements:

(a) The members eligible for insurance under the policy shall be all of the members of the union, or all of any class or classes thereof determined by conditions pertaining to their employment, or to membership in the union, or both.

(b) The premium for the policy shall be paid by the policyholder, either wholly from the union's funds, or partly from such funds and partly from funds contributed by the insured members specifically for their insurance. No policy may be issued on which the entire premium is to be derived from funds contributed by the insured members specifically for their insurance. A policy on which part of the premium is to be derived from funds contributed by the insured members specifically for their insurance may be placed in force only if at least 75% of the then eligible members, excluding any as to whom evidence of individual insurability is not satisfactory to the insurer, elect to make the required contributions. A policy on which no part of the premium is to be derived from funds contributed by the insured members specifically for their insurance must insure all eligible members, or all except any as to whom evidence of individual insurability is not satisfactory to the insurer.

(c) The policy must cover at least 25 members at date of issue.

(d) The amounts of insurance under the policy must be based upon some plan precluding individual selection either by the members or by the union. No policy may be issued which provides insurance on any union member which together with any other insurance under any group life insurance policies issued to the union exceeds $20,000.

(4) A policy issued to the trustee of a fund established by two or more employers in the same industry or kind of business or by two or more labor unions, which trustee shall be deemed the policyholder, to insure employees of the employers or members of the unions for the benefit of persons other than the employers or the unions, subject to the following requirements:

(a) The persons eligible for insurance shall be all of the employees of the employers or all of the members of the unions, or all of any class or classes thereof determined by conditions pertaining to their employment, or to memberships in the unions, or to both. The policy may provide that the term "employees" shall include the individual proprietor or partners if an employer is an individual proprietor or a partnership. The policy may provide that the term "employees" shall include the trustee or the employees of the trustee, or both, if their duties are principally connected with such trusteeship. The policy may provide that the term "employees" shall include retired employees.

(b) The premium for the policy shall be paid by the trustee wholly from funds contributed by the employers of the insured persons. The policy must insure all eligible persons, or all except any as to whom evidence of individual insurability is not satisfactory to the insurer.

(c) The policy must cover at least 100 persons at date of issue.

(d) The amounts of insurance under the policy must be based upon some plan precluding individual selection either by the insured persons or by the policyholder, employers, or unions. No policy may be issued which provides insurance on any person which together with any other insurance under any group life insurance policy or policies issued to the employers, or any of them, or to the trustee of a fund established in whole or in part by the employers, or any of them, exceeds $20,000, except that this limitation shall not apply to amounts of group permanent life insurance issued in connection with a pension or profit-sharing plan.

(5) A policy issued to an association of persons having a common professional or business interest, which association shall be deemed the policyholder, to insure members of such association for the benefit of persons other than the association or any of its officials, representatives or agents, subject to the following requirements:

(a) Such association shall have had an active existence for at least two years immediately preceding the purchase of such insurance, was formed for purposes other than procuring insurance and does not derive its funds principally from contributions of insured members toward the payment of premiums for the insurance.

(b) The members eligible for insurance under the policy shall be all of the members of the association or all of any class or classes thereof de-

termined by conditions pertaining to their employment, or the membership in the association, or both. The policy may provide that the term "members" shall include the employees of members, if their duties are principally connected with the member's business or profession.

(c) The premium for the policy shall be paid by the policyholder, either wholly from the association's funds, or partly from such funds and partly from funds contributed by the insured members specifically for their insurance. No policy may be issued on which the entire premium is to be derived from funds contributed by the insured members specifically for their insurance nor if the commissioner finds that the rate of such contributions will exceed the maximum rate customarily charged employees insured under like group life insurance policies issued in accordance with the provisions of paragraph (1). A policy on which part of the premium is to be derived from funds contributed by the insured members specifically for their insurance may be placed in force only if at least 75% of the then eligible members, excluding any as to whom evidence of individual insurability is not satisfactory to the insurer, elect to make the required contributions. A policy on which no part of the premium is to be derived from funds contributed by the insured members specifically for their insurance must insure all eligible members, or all except any as to whom evidence of individual insurability is not satisfactory to the insurer.

(d) The policy must cover at least 25 members at date of issue.

(e) The amounts of insurance under the policy must be based upon some plan precluding individual selection either by the members or by the association. No policy may be issued which provides insurance on any member which together with any other insurance under any group life insurance policies issued to the association exceeds $20,000. (1925, c. 58, s. 1; 1931, c. 328; 1943, c. 597, s. 1; 1947, c. 834.)

Editor's Note.—
The 1947 amendment rewrote this section.
For comment on the 1943 amendment, see 21 N. C. Law Rev. 355; on the 1947 amendment, see 25 N. C. Law Rev. 432.

§ 58-211. Group life insurance standard provisions.—No policy of group life insurance shall be delivered in this state unless it contains in substance the following provisions, or provisions which in the opinion of the commissioner are more favorable to the persons insured, or at least as favorable to the persons insured and more favorable to the policyholder, provided, however, (a) that provisions (6) to (10) inclusive shall not apply to policies issued to a creditor to insure debtors of such creditor; (b) that the standard provisions required for individual life insurance policies shall not apply to group life insurance policies; and (c) that if the group life insurance policy is on a plan of insurance other than the term plan, it shall contain a non-forfeiture provision or provisions which in the opinion of the commissioner is or are equitable to the insured persons and to the policyholder, but nothing herein shall be construed to require that group life insurance policies contain the same nonforfeiture provisions as are required for individual life insurance policies:

(1) A provision that the policyholder is entitled to a grace period of thirty-one days for the payment of any premium due except the first, during which grace period the death benefit coverage shall continue in force, unless the policyholder shall have given the insurer written notice of discontinuance in advance of the date of discontinuance and in accordance with the terms of the policy. The policy may provide that the policyholder shall be liable to the insurer for the payment of a pro rata premium for the time the policy was in force during such grace period.

(2) A provision that the validity of the policy shall not be contested, except for nonpayment of premiums, after it has been in force for two years from its date of issue; and that no statement made by any person insured under the policy relating to his insurability shall be used in contesting the validity of the insurance with respect to which such statement was made after such insurance has been in force prior to the contest for a period of two years during such person's life time nor unless it is contained in a written instrument signed by him.

(3) A provision that a copy of the application, if any, of the policyholder shall be attached to the policy when issued, that all statements made by the policyholder or by the persons insured shall be deemed representations and not warranties, and that no statement made by any person insured shall be used in any contest unless a copy of the instrument containing the statement is or has been furnished to such person or to his beneficiary.

(4) A provision setting forth the conditions, if any, under which the insurer reserves the right to require a person eligible for insurance to furnish evidence of individual insurability satisfactory to the insurer as a condition to part or all of his coverage.

(5) A provision specifying an equitable adjustment of premiums or of benefits or of both to be made in the event the age of a person insured has been misstated, such provision to contain a clear statement of the method of adjustment to be used.

(6) A provision that any sum becoming due by reason of the death of the person insured shall be payable to the beneficiary designated by the person insured, subject to the provisions of the policy in the event there is no designated beneficiary as to all or any part of such sum living at the death of the person insured, and subject to any right reserved by the insurer in the policy and set forth in the certificate to pay at its option a part of such sum not exceeding $250 to any person appearing to the insurer to be equitably entitled thereto by reason of having incurred funeral or other expenses incident to the last illness or death of the person insured.

(7) A provision that the insurer will issue to the policyholder for delivery to each person insured an individual certificate setting forth a statement as to the insurance protection to which he is entitled, to whom the insurance benefits are payable, and the rights and conditions set forth in (8), (9) and (10) following.

(8) A provision that if the insurance, or any portion of it, on a person covered under the policy ceases because of termination of employment or

of membership in the class or classes eligible for coverage under the policy, such person shall be entitled to have issued to him by the insurer, without evidence of insurability, an individual policy of life insurance without disability or other supplementary benefits, provided application for the individual policy shall be made, and the first premium paid to the insurer, within thirty-one days after such termination, and provided further that,

(a) The individual policy shall, at the option of such person, be on any one of the forms, except term insurance, then customarily issued by the insurer at the age and for the amount applied for;

(b) The individual policy shall be in an amount not in excess of the amount of life insurance which ceases because of such termination, provided that any amount of insurance which shall have matured on or before the date of such termination as an endowment payable to the person insured, whether in one sum or in instalments or in the form of an annuity, shall not, for the purposes of this provision, be included in the amount which is considered to cease because of such termination; and

(c) The premium on the individual policy shall be at the insurer's then customary rate applicable to the form and amount of the individual policy, to the class of risk to which such person then belongs, and to his age attained on the effective date of the individual policy.

(9) A provision that if the group policy terminates or is amended so as to terminate the insurance of any class of insured persons, every person insured thereunder at the date of such termination whose insurance terminates and who has been so insured for at least five years prior to such termination date shall be entitled to have issued to him by the insurer an individual policy of life insurance, subject to the same conditions and limitations as are provided by (8) above, except that the group policy may provide that the amount of such individual policy shall not exceed the smaller of (a) the amount of the person's life insurance protection ceasing because of the termination or amendment of the group policy, less the amount of any life insurance for which he is or becomes eligible under any group policy issued or reinstated by the same or another insurer within thirty-one days after such termination, and (b) $2,000.

(10) A provision that if a person insured under the group policy dies during the period within which he would have been entitled to have an individual policy issued to him in accordance with (8) or (9) above and before such an individual policy shall have become effective, the amount of life insurance which he would have been entitled to have issued to him under such individual policy shall be payable as a claim under the group policy, whether or not application for the individual policy or the payment of the first premium therefor has been made. (1925, c. 58, s. 2; 1943, c. 597, s. 2; 1947, c. 834.)

Editor's Note.—
The 1947 amendment rewrote this section.
For comment on the 1943 amendment, see 21 N. C. Law Rev. 355; on the 1947 amendment, see 25 N. C. Law Rev. 435.

§ 58-211.1. Group annuity contracts defined; requirements.—Any policy or contract, except a joint, reversionary or survivorship annuity contract, whereby annuities are payable dependent upon the continuation of the lives of more than one person, shall be deemed a group annuity contract. The person, firm or corporation to whom or to which such contract is issued, as herein provided, shall be deemed the holder of such contract. The term "annuitant" as used herein, refers to any person upon whose continued life such annuity is dependent. No authorized insurer shall deliver or issue for delivery in this state any group annuity contract except upon a group of annuitants which conforms to the following: Under a contract issued to an employer, or to the trustee of a fund established by an employer or two or more employers in the same industry or kind of business, the stipulated payments on which shall be paid by the holder of such contract either wholly from the employer's funds or funds contributed by him, or partly from such funds and partly from funds contributed by the employees covered by such contract, and providing a plan of retirement annuities under a plan which permits all of the employees of such employer or of any specified class or classes thereof to become annuitants. Any such group of employees may include retired employees, and may include officers and managers as employees, and may include the employees of subsidiary or affiliated corporations of a corporation employer, and may include the individual proprietors, partners and employees of affiliated individuals and firms controlled by the holders through stock ownership, contract or otherwise. (1947, c. 721.)

Editor's Note.—For comment on this section, see 25 N. C. Law Rev. 437.

§ 58-211.2. Employee life insurance defined.—Employee life insurance is hereby declared to be that plan of life insurance other than salary savings life insurance under which individual policies are issued to the employees of any employer where such policies are issued on the lives of not less than ten nor more than 49 employees at date of issue. Premiums for such policies shall be paid by the employer or the trustee of a fund established by the employer either wholly from the employer's funds, or funds contributed by him, or partly from such funds and partly from funds contributed by the insured employees. (1947, c. 721.)

Editor's Note.—For comment on this section, see 25 N. C. Law Rev. 436.

Art. 23. Registered Policies.

§ 58-214. Deposits to secure registered policies.—Any life insurance company, incorporated under the laws of this state, may deposit with the commissioner securities of the kind authorized for the investment of the funds of life insurance companies, which shall be legally transferred by it to him as commissioner and his successors for the common benefit of all the holders of its "registered" policies and annuity bonds issued under the provisions of this article; and these securities shall be held by him and his successors in office in trust for the purposes and objects specified herein.

All securities offered to the commissioner for deposit under this section shall be received and

held pursuant to regulations promulgated by the commissioner. (Rev., s. 4780; 1905, c. 504, s. 12; 1909, c. 920, ss. 1, 2; 1911, c. 140, s. 1; 1917, c. 191, s. 2; 1945, c. 379; C. S. 6467.)

Editor's Note.—The 1945 amendment rewrote this section.

§ 58-215. Additional deposits may be required.—Each company which has made deposits herein provided for shall make additional deposits from time to time, as the commissioner of insurance prescribes, in amounts of not less than five thousand dollars and of such securities as are described in the preceding section, so that the admitted value of the securities deposited shall equal the net value of the registered policies and annuity bonds issued by the company, less such liens not exceeding such value as the company has against it. The commissioner shall annually value or cause to be valued such policies and shall prepare an estimate based upon probable changes in the minimum amounts to be kept on deposit for each month of the ensuing year. (Rev., s. 4781; 1905, c. 504, s. 15; 1909, c. 920, s. 3; 1911, c. 140, s. 2; 1917, c. 191, s. 3; 1945, c. 379; C. S. 6468.)

Editor's Note.—The 1945 amendment rewrote a part of this section.

§ 58-217: Repealed by Session Laws 1945, c. 379.

§ 58-218. Record of securities kept by commissioner; deficit made good.—The commissioner of insurance shall keep a careful record of the securities deposited by each company, and when furnishing the annual certificates of value required in this article, he may enter thereon the face and market value of the securities deposited by such company. If at any time it appears from such certificate or otherwise that the value of securities held on deposit is less than the net value of the registered policies and annuity bonds issued by such companies, it is not lawful for the commissioner of insurance to execute the certificate on any additional policies or annuity bonds of such company until it has made good the deficit. If any company fails or neglects to make such deposits for sixty days the commissioner may suspend its license to do business until such deposit be made. (Rev., s. 4784; 1905, c. 504, s. 16; 1945, c. 379; C. S. 6471.)

Editor's Note.—The 1945 amendment struck out the word "hereafter" formerly appearing after "value" in line four, and substituted in the last sentence the words "the commissioner may suspend its license to do business until such deposit be made" for the words "it shall be deemed to be insolvent and shall be proceeded against in the manner provided by law in such cases."

§§ 58-220, 58-221: Repealed by Session Laws 1945, c. 379.

§ 58-223. Fees for registering policies.—Every company making deposits under the provisions of this article must pay to the commissioner of insurance for each certificate on registered policies or annuity bonds, including seal, a fee of fifty cents for those exceeding ten thousand dollars in amount and twenty-five cents for all under ten thousand dollars in amount, except policies for one hundred dollars and not exceeding five hundred dollars the fee shall be fifteen cents; for policies of one hundred dollars or less the fee shall be ten cents. (Rev., s. 4789; 1905, c. 504, s. 21; 1945, c. 379; C. S. 6476.)

Editor's Note.—The 1945 amendment struck out from the end of the section the words "for each certificate, including seal, for nonregistered policies issued in accordance with the provisions of this article, the fee shall be twenty-five cents."

§ 58-223.1. Registration of policies.—After January first, one thousand nine hundred and forty-seven, the commissioner shall not register any new policies that are issued by any company, nor accept any deposits covering reserves on business thereafter written. (1945, c. 379.)

Article 24. Mutual Burial Associations.

§ 58-226. Requirements as to rules and by-laws.—All burial associations now operating within the state of North Carolina, and all burial associations hereafter organized and operating within the state of North Carolina shall have and maintain rules and by-laws embodying the following:

Article 4. The annual meeting of the association shall be held at ..... (here insert the place, date and hour); each member shall have one vote at said annual meeting and fifteen members of the association shall constitute a quorum. There shall be elected at the annual meeting of said association a board of directors of seven members, each of whom shall serve for a period of from one to five years as the membership may determine and until his or her successor shall have been elected and qualified. Any member of the board of directors who shall fail to maintain his or her membership as provided in the rules and by-laws of said association, shall cease to be a member of the board of directors and a director shall be appointed by the president of said association for the unexpired term of such disqualified member. There shall be at least an annual meeting of the board of directors, and such meeting shall be held immediately following the annual meeting of the membership of the association. The directors of the association may, by a majority vote, hold other meetings of which notice shall be given to each member by mailing such notice five days before the meeting to be held. At the annual meetings of the directors of the association, the board of directors shall elect a president, a vice-president, and a secretary-treasurer. The president and vice-president shall be elected from among the directors, but the secretary-treasurer may be selected from the director membership or from the membership of the association, it being provided that it is not necessary that the secretary-treasurer shall be a member of the board of directors. Among other duties that the secretary-treasurer may perform, he shall be chargeable with keeping an accurate and faithful roll of the membership of this association at all times and he shall be chargeable with the duty of faithfully preserving and faithfully applying all moneys coming into his hands by virtue of his said office. The president, vice-president and secretary-treasurer shall constitute a board of control who shall direct the affairs of the association in accordance with these articles and the by-laws of the association, and subject to such modification as may be made or authorized by an act of the general assembly. The secretary-treasurer shall keep a record of all assessments made, dues collected and benefits paid. The books of the association, together with all records and bank accounts shall be at all times open to the inspection of the burial association commissioner or his duly constituted auditors or representatives.

It shall be the duty of the secretary or secretary-treasurer of each association to keep the books of the association posted up to date so that the financial standing of the association may be readily ascertained by the burial association commissioner or any auditor or representative employed by him. Upon the failure of any secretary or secretary-treasurer to comply with this provision, it shall be the duty of the burial association commissioner to employ an auditor or bookkeeper to take charge of the books of the association and do whatever work is necessary to bring the books up to date. The burial association commissioner shall have the power and authority to set a fee sufficient to pay the said auditor or bookkeeper for the work done upon the books of said association and the secretary or secretary-treasurer of the association shall pay the fees as specified by the burial association commissioner out of the funds of the burial association. This fee must be included in the twenty-five per cent allowed by law for the operation of the burial associations.

Article 13. All legitimate operating expenses of the association shall be paid out of the assessments, but in no case shall the entire expenses exceed twenty-five per cent of the assessments collected, in any one calendar year. In the event the association fails to expend the twenty-five per cent (25%) allowed herein by the thirty-first day of December of any year, then that amount not used shall be placed in the surplus.

Article 18. Each year, before the annual meeting of the membership of this association, the association shall cause to be published in a newspaper of general circulation in the county in which such association has its principal place of business, or shall cause to be mailed to each member in good standing a statement showing total income collected, expenses paid and burial benefits provided for by such association during the next preceding year.

(1945, c. 125, s. 1; 1947, c. 100, s. 1; 1949, c. 201, ss. 1, 2.)

Editor's Note.—

The 1945 amendment struck out the words "in substance" formerly appearing after the word "embodying" in line five. It also struck out from article 4 the following words: "The secretary-treasurer shall be the only paid officer of the association and his compensation shall be fixed by the board of directors." The amendment changed article 13 by adding the words "in any one calendar year" to the first sentence, inserting the second sentence and increasing the amount in the former third sentence. The 1947 amendment also increased such amount. The 1949 amendment struck out the former third sentence of article 13 and rewrote article 18. As only the preliminary paragraph and articles 4, 13 and 18 were changed, the rest of the section is not set out.

Members are bound by subsequent legislation making changes in the rules and by-laws of burial associations, and changes so made are not offensive to the constitutional provision against the passage of a law which impairs the obligation of a contract. Spearman v. United Mut. Burial Ass'n, 225 N. C. 185, 33 S. E. (2d) 895.

§ 58-227. Limitation of soliciting agents; licensing and qualifications; officers exempt from license; issuance of membership certificates.—Each burial association shall have for each funeral home serving the said burial association not more than five agents or representatives soliciting members other than the secretary-treasurer and president, and before any agent or representative shall or may represent any burial association in North Carolina, he or she shall first apply to the burial association commissioner of North Carolina for a license, and the burial association commissioner shall have full power and authority to issue such license upon proof satisfactory to such commissioner that such person is capable of soliciting burial association memberships, is of good moral character and recommended by the association in behalf of which such membership solicitations are to be made. The burial association commissioner may reject the application of any person who does not meet the requirements set out by him, as to capacity and moral fitness on recommendations by the association. The burial association commissioner may, upon proof satisfactory to himself that said licensed agent has violated any section of this law, revoke said license. Upon the issuing of a license to solicit membership in any burial association, such person shall be required to pay in cash, at the time of issuing license to such applicant, to the burial association commissioner, the sum of five dollars ($5.00); moneys derived from this fee or charge to be and remain in the department or office of such burial association commissioner, for supervision of burial associations in this state, subject to withdrawal for expenses of supervision by authority of the burial association commissioner. It shall not be necessary that the president or secretary-treasurer of any burial association shall obtain a license for soliciting membership in any association, of which such person is president or secretary-treasurer. Membership certificates shall not be issued by a solicitor in the field, but shall be reported to the office of the association and there issued and a record made of such issuance at the time such certificate is so issued. (1941, c. 130, s. 5; 1945, c. 125, s. 2; 1947, c. 100, s. 2; 1949, c. 201, s. 3.)

Editor's Note.—The 1945 amendment inserted the third sentence.

The 1947 amendment inserted in lines two and three the words "for each funeral home serving the said burial association."

The 1949 amendment reduced the amount in line twenty-nine from $10.00 to $5.00.

§ 58-228. Assessments against associations for supervision expense.—In order to meet the expense of supervision, the burial association commissioner shall prorate the amount of the supervisory cost (over and above any other funds in his hands for this purpose), and assess each association on a pro rata basis in accordance with the number of members of each association, which total assessment shall in no case exceed thirty-six thousand five hundred dollars ($36,500.00), and each such association shall remit to the burial association commissioner its pro rata part of the assessment, as fixed by the burial association commissioner, which expense shall be included in the twenty-five per cent expense allowance as provided in article 13. This assessment shall be made on the first day of July of each and every year and said assessment shall be paid within thirty days thereafter. In case any association shall fail or refuse to pay such assessment within thirty days, it shall be the duty of the burial association commissioner to transfer all memberships and assets of every kind and description to the nearest next association that is found by the burial association commissioner to be in good sound financial condition. (1941, c. 130, s. 6; 1943, c. 272, s. 3; 1945, c. 125, s. 3; 1947, c. 100, s. 3; 1949, c. 201, s. 4.)

Editor's Note.—
The 1945 amendment increased the amount specified in this section from $25,000 to $26,500, the 1947 amendment increased the amount to $31,500.00, and the 1949 amendment increased it to $36,500.00.

§ 58-229.1. Revocation of license.—In the event it is proven to the satisfaction of the burial association commissioner that any burial association is being operated not in conformity with one or more sections of chapter fifty-eight, article twenty-four of the General Statutes of North Carolina, or it is proven to the satisfaction of the burial association commissioner that the official funeral director, or directors, are not adequately equipped to render the services provided for by said article, then it shall become the duty of the burial association commissioner upon hearing to revoke the license of said burial association and transfer said burial association, its membership and all its assets of every kind and description to another burial association that is found by the burial association commissioner to be in good sound financial condition: Provided, that if said burial association gives notice of appeal as provided for in § 58-236, then said burial association shall continue to operate as before the revocation and until final adjudication. (1945, c. 125, s. 4.)

§ 58-232. Penalty for making false and fraudulent entries.—Any person or burial association official who makes or allows to be made any false entry on the books of the association with intent to deceive or defraud any member thereof, or with intent to conceal from the burial association commissioner or his deputy or agent, or any auditor authorized to examine the books of such association, under the supervision of the burial association commissioner, shall be guilty of a misdemeanor and upon conviction shall be fined not less than two hundred and fifty dollars ($250.00), or imprisoned in the common jail for not less than twelve months, or both, in the discretion of the court. (1941, c. 130, s. 10; 1945, c. 125, s. 5.)

Editor's Note.—The 1945 amendment inserted in the first line the words "person or."

§ 58-237.3: Repealed by Session Laws 1947, c. 100, s. 4.

§ 58-241.1. Election for benefits or return of assessments on death of member in armed forces.
The spouse or next of kin of a member of a mutual burial association serving in the armed forces, who dies overseas, may elect to have return of the paid-in assessments in settlement, or to have the prescribed funeral benefits at any time the body of deceased is returned for burial to the territory served by the burial association; and the personal representative of the deceased may not recover $100 in lieu thereof. Spearman v. United Mut. Burial Ass'n, 225 N. C. 185, 33 S. E. (2d) 895.

§ 58-241.4. Hearing by commissioner of dispute over liability for funeral benefits; appeal.—In case of a disagreement between the representative of a deceased member of any burial association and the association a hearing may be held by the burial association commissioner on request of either party to determine whether the association is liable for the benefits set forth in the policy issued to the said deceased member of said burial association. The burial commissioner shall render a decision which shall have the same force and effect as judgments rendered by courts of competent jurisdiction in North Carolina. Either party may appeal from the decision of the burial commissioner to the superior court of the county in which the burial association is located as provided in § 58-236 hereof. (1947, c. 100, s. 5.)

SUBCHAPTER V. AUTOMOBILE LIABILITY INSURANCE.

Art. 25. Regulation of Automobile Liability Insurance Rates.

§§ 58-242 to 58-245: Repealed by Session Laws 1945, c. 381, s. 2.

§ 58-246. North Carolina automobile rate administrative office created; objects and functions; hearings on rates. — There is hereby created a bureau to be known as the North Carolina automobile rate administrative office which office shall be established in the compensation rating and inspection bureau of North Carolina, created under § 97-102 and shall be a branch and under the management of the general manager of the compensation rating and inspection bureau of North Carolina, with the following objects, functions and sources of income:

(a) To maintain rules and regulations and fix rates for automobile bodily injury and property damage insurance and equitably adjust the same as far as practicable in accordance with the hazard of the different classes of risks as established by said bureau.

(b) To furnish upon request of any person carrying this form of insurance in the state or to any member of the North Carolina automobile rate administrative office, upon whose risk a rate has been promulgated, information as to the rating, including the method of its capitulation, and to encourage safety on the highways and streets of the state, by offering reduced premium rates under a uniform system of experience rating as may be approved by the commissioner of insurance.

(c) The bureau shall provide reasonable means to be approved by the commissioner whereby any person affected by a rate made by it may be heard in person or by his authorized representative before the governing or rating committee or other proper executive of the bureau.

(d) The bureau shall not have authority to maintain rules and regulations nor fix rates for bodily injury and property damage insurance for operators of motor vehicles who are required by law to carry any such insurance. The provisions of this subsection shall not apply to private passenger cars or taxicabs required by law to carry bodily injury and property damage insurance. (1939, c. 394, s. 1; 1945, c. 381, s. 2; 1947, cc. 1068, 1073.)

Editor's Note.—The 1945 amendment made changes in subsection (a) and added subsection (c).
The 1947 amendments added subsection (d).

§ 58-247. Membership as a prerequisite for writing insurance; governing committee; rules and regulations; expenses; commissioner of insurance ex officio chairman.—Before the commissioner of insurance shall grant permission to any stock, nonstock, or reciprocal insurance company or any other insurance organization to write automobile bodily injury and property damage insurance in this state, it shall be a requisite that they shall subscribe to and become members of the North Carolina automobile rate administrative office.

(a) Each member of the North Carolina automobile rate administrative office writing the above classes of insurance in North Carolina shall, as a requisite thereto, be represented in the aforesaid bureau and shall be entitled to one representative and one vote in the administration of the affairs of the bureau. They shall, upon organization, elect a governing committee which governing committee shall be composed of equal representation by stock and nonstock members.

(b) The bureau, when created, shall adopt such rules and regulations for its orderly procedure, as shall be necessary for its maintenance and operation. No such rules and regulations shall discriminate against any type of insurer because of its plan of operation, nor shall any insurer be prevented from returning any unused or unabsorbed premium, deposit, savings, or earnings to its policyholders or subscribers. The expense of such bureau shall be borne by its members by quarterly contributions to be made in advance, such contributions to be made in advance by prorating such expense among the members in accordance with the amount of gross premiums derived from automobile bodily injury and property damage insurance in North Carolina during the preceding year ending December 31, 1938, and members entering such bureau since that date to advance an amount to be fixed by the governing committee. After the first fiscal year of operation of the bureau the necessary expense of the bureau shall be advanced by the members in accordance with rules and regulations to be established and adopted by the governing committee.

(c) The commissioner of insurance of the state of North Carolina, or such deputy as he may appoint, shall be ex-officio chairman of the North Carolina automobile rate administrative office and shall preside over all meetings of the governing committee or other meetings of the bureau and it shall be his duty to determine any controversy that may arise by reason of a tie vote between the members of the governing committee. (1939, c. 394, s. 2; 1945, c. 381, s. 2.)

Editor's Note.—The 1945 amendment inserted the word "and" in line five of the first paragraph and struck out the words "and collision" formerly appearing after the word "damage." It made the same changes in the third sentence of subsection (b) and inserted the second sentence thereof.

§ 58-248. Personnel and assistants; general manager; authority of commissioner of insurance.—In order to carry into effect the objects of §§ 58-246 to 58-248, the bureau members shall immediately elect its governing committee who shall employ and fix the salaries of such personnel and assistants as are necessary, but the general manager of the compensation rating and inspection bureau of North Carolina shall be the general manager also of the North Carolina automobile rate administrative office and the commissioner of insurance is hereby authorized to compel the production of all books, data, papers and records and any other data necessary to compile statistics for the purpose of determining the pure cost and expense loading of automobile bodily injury and property damage insurance in North Carolina and this information shall be available and for the use of the North Carolina automobile rate administrative office for the capitulation and promulgation of rates on automobile bodily injury and property damage insurance. All such rates compiled and promulgated by such bureau shall be submitted to the commissioner of insurance for approval and no such rates shall be put into effect in this state until approved by the commissioner of insurance and not subsequently disapproved: Provided §§ 58-246 to 58-248 shall not apply to publicly owned vehicles. (1939, c. 394, s. 3; 1945, c. 381, s. 2.)

Editor's Note.—The 1945 amendment inserted the word "and" between "injury" and "property" in lines fourteen and nineteen and struck out the words "and collision" formerly appearing after the word "damage" in lines fifteen and twenty.

§ 58-248.1. Order of commissioner revising improper rates, classifications and classification assignments.—Whenever the commissioner, upon his own motion or upon petition of any aggrieved party, shall determine, after notice and a hearing, that the rates charged or filed on any class of risks are excessive, inadequate, unreasonable, unfairly discriminatory, or otherwise not in the public interest, or that a classification or classification assignment is unwarranted, unreasonable, improper or unfairly discriminatory he shall issue an order to the bureau directing that such rates, classifications or classification assignments be altered or revised in the manner and to the extent stated in such order to produce rates, classifications or classification assignments which are reasonable, adequate, not unfairly discriminatory, and in the public interest. (1945, c. 381, s. 2.)

§ 58-248.2. Insurance policy must conform to rates, etc., filed by rating bureau; when deviation allowed.—No insurer, officer, agent or representative thereof shall knowingly issue or deliver or knowingly permit the issuance or delivery of any policy of insurance in this state which does not conform to the rates, rating plans, classifications, schedules, rules and standards made and filed by the rating bureau. However, an insurer may deviate from the rates promulgated by the rating bureau provided the insurer has filed the deviation to be applied both with the rating bureau and the commissioner, and provided the said deviation is uniform in its application to all risks in the state of the class to which such deviation is to apply; and provided such deviation is approved by the commissioner. If approved the deviation shall remain in force for a period of one year from the date of approval by the commissioner. Such deviation may be renewed annually subject to all of the foregoing provisions. A rate in excess of that promulgated by the rating bureau may be charged on any specific risk provided such higher rate is charged with the knowledge and written consent of both the insured and the commissioner. (1945, c. 381, s. 2.)

§ 58-248.3. Revocation or suspension of license for violation of article.—If the commissioner shall find, after due notice and hearing that any insurer, officer, agent or representative thereof has violated any of the provisions of this article, he may issue an order revoking or suspending the license of any such insurer, agent, broker or representative thereof. (1945, c. 381, s. 2.)

§ 58-248.4. Punishment for violation of article.—Any insurer, officer, agent or representative thereof failing to comply with, or otherwise violating any of the provisions of this article, shall be guilty of a misdemeanor and upon conviction

be punished by a fine of not less than one hundred ($100.00) dollars nor more than five hundred ($500.00) dollars. (1945, c. 381, s. 2.)

§ 58-248.5. Review of order of commissioner.—A review of any order made by the commissioner in accordance with the provisions of this article, shall be by appeal to the Superior Court of Wake County in accordance with the provisions of section 58-9.3. (1945, c. 381, s. 2.)

§ 58-248.6. Appeal to commissioner from decision of bureau.—Any member of the bureau may appeal to the commissioner from any decision of such bureau and the commissioner shall, after a hearing held on not less than ten days' written notice to the appellant and to the bureau, issue an order approving the decision of the bureau or directing it to give further consideration to such proposal. In the event the bureau fails to take satisfactory action, the commissioner shall make such order as he may see fit. (1945, c. 381, s. 2.)

SUBCHAPTER VI. ACCIDENT AND HEALTH INSURANCE.

Art. 26. Nature of Policies.

§ 58-249. Form, classification, and rates to be approved by commissioner of insurance.—No policy of insurance against loss or damage from the sickness or the bodily injury or death of the insured by accident shall be issued or delivered to any person in this state until a copy of the form thereof and of the classification of risks and the premium rates pertaining thereto have been filed with, and the forms approved by, the commissioner of insurance. If the commissioner shall notify, in writing, the company or other insurer which has filed such form that it does not comply with the requirements of law, specifying the reasons for his opinion, it shall be unlawful thereafter for any such insurer to issue any policy in such form. The action of the commissioner in this regard shall be subject to review by any court of competent jurisdiction; but nothing in this article shall be construed to give jurisdiction to any court not already having jurisdiction. (1911, c. 209, s. 1; 1913, c. 91, s. 1; 1945, c. 385; C. S. 6477.)

Editor's Note.—The 1945 amendment inserted in line eight the words "and the forms approved by," struck out the word "society" formerly appearing after the word "company" in line ten, and struck out from the end of the first sentence the words "nor shall it be so issued or delivered until the expiration of thirty days after it has been so filed unless the commissioner shall sooner give his written approval thereto."

§ 58-250. Specifications as to form of policy.—No such policy which purports to insure only one person shall be delivered or issued for delivery in this state (1) unless the entire money and other considerations therefor are expressed in the policy; nor (2) unless the time at which the insurance thereunder takes effect and terminates is stated in a portion of the policy preceding its execution by the insurer; nor (3) unless every printed portion thereof and of any endorsements or attached papers shall be plainly printed in type of which the face shall be not smaller than ten point; nor (4) unless a brief description thereof be printed on its first page, and on its filing back in type of which the face shall not be smaller than fourteen point; nor (5) unless the exceptions of the policy be printed with the same prominence as the benefits to which they apply: Provided, however, that any portion of such policy which purports, by reason of the circumstances under which a loss is incurred, to reduce any indemnity promised therein to an amount less than that provided for the same loss occurring under ordinary circumstances, shall be printed in bold-face type and with greater prominence than any other portion of the text of the policy. (1913, c. 91, s. 2; 1945, c. 385; C. S. 6478.)

Editor's Note.—The 1945 amendment inserted in lines one and two the words "which purports to insure only one person," struck out following subsection (2) the words "nor (3) if the policy purports to insure more than one person," and renumbered former subsections (4) through (6) as (3) through (5).

§ 58-252. Certain provisions forbidden in policy.—No such policy shall be issued or delivered which contains any provision (1) relative to cancellation at the instance of the insurer; or (2) limiting the amount of indemnity to a sum less than the amount stated in the policy and for which the premium has been paid; or, (3) providing for the deduction of any premium from the amount paid in settlement of claim; or, (4) relative to other insurance by the same insurer; or, (5) relative to the age limits of the policy; or (6) relative to violation of law; or (7) relative to intoxicating liquor or narcotics; unless such provisions, which are hereby designated as optional standard provisions, shall be in the words and in the order in which they are set forth in the next section, but the insurer may at its option omit from the policy any such optional standard provisions. Such optional standard provisions if inserted in the policy shall immediately succeed the standard provisions named in this article. (1911, c. 209, s. 2; 1913, c. 91, s. 4; 1945, c. 385; C. S. 6480.)

Editor's Note.—The 1945 amendment inserted "or (6) relative to violation of law; or (7) relative to intoxicating liquor or narcotics."

§ 58-253. Optional standard provisions.

6. Violation of Law.—Any provision which affects the liability of the insurer because of any violation of law by the insured during the term of the policy shall be in the following form:

"The insurer shall not be liable for death, injury incurred or disease contracted, to which a contributing cause was the insured's commission of, or attempt to commit, a felony, or which occurs while the insured is engaged in an illegal occupation."

7. Intoxicating Liquor or Narcotics.—Any provision which affects the liability of the insurer because of the insured's use of intoxicating liquor or narcotics during the term of the policy shall be in the following form:

"The insurer shall not be liable for death, injury incurred or disease contracted while the insured is intoxicated or under the influence of narcotics unless administered on the advice of a physician."

Any such policy which contains either or both of the provisions specified under the foregoing paragraphs 6 and 7 need not include such provisions under the heading of "Standard Provisions." (1911, c. 209, s. 2; 1913, c. 91, s. 4; 1945, c. 385; C. S. 6481.)

Editor's Note.—The 1945 amendment added subsections 6

and 7. As the rest of the section was not changed it is not set out.

§ 58-254.1. Industrial sick benefit insurance defined.—Industrial sick benefit insurance is hereby defined as that form of insurance for which premiums are payable weekly and which provides for the payment of a weekly indemnity on account of sickness or accident in addition to a benefit in case of death. Such death benefit shall not exceed one hundred and fifty dollars ($150.00). There shall be a provision for the payment of weekly premium, 80% of which shall be allocated for the purchase of sick and accident coverages and 20% thereof for the purchase of death benefits. (1945, c. 385.)

§ 58-254.2. Industrial sick benefit insurance; standard provisions.—Policies issued under the industrial sick benefit plan shall contain the standard provisions contained in section 58-251 and in addition shall contain the following: (1) a provision for grace for the payment of the additional premium or assessment or proportion thereof for such death benefits of not less than four weeks during which period the death benefit shall continue in force; (2) a provision for incontestability of the death benefit coverage after not more than two years except for (a) non-payment of premiums, and (b) misstatement of age; (3) optional standard provision No. 1 in section 58-253 relating to the sickness and accident coverage only; (4) a provision that the death benefit is non-cancellable by the company except for non-payment of premium.

The commissioner may approve any form of certificate to be issued under the industrial sick benefit plan which omits or modifies any of the standard provisions hereinbefore required, if he deems such omission or modification suitable for the character of such insurance and not unjust to the persons insured thereunder. (1945, c. 385.)

§ 58-254.3. Blanket accident and health insurance defined.—1. Any policy or contract of insurance against death or injury resulting from accident or from accidental means which insures a group of persons conforming to the requirements of one of the following paragraphs (a) to (f) inclusive shall be deemed a blanket accident policy. Any policy or contract which insures a group of persons conforming to the requirements of one of the following paragraphs (c), (e) or (f) against total or partial disability, excluding such disability from accident or from accidental means, shall be deemed a blanket health insurance policy. Any policy or contract of insurance which combines the coverage of blanket accident insurance and of blanket health insurance on such a group of persons shall be deemed a blanket accident and health insurance policy:

(a) Under a policy or contract issued to any railroad, steamship, motorbus or airplane carrier of passengers, which shall be deemed the policyholder, a group defined as all persons who may become such passengers may be insured against death or bodily injury either while, or as a result of, being such passengers.

(b) Under a policy or contract issued to an employer, or the trustee of a fund established by the employer, who shall be deemed the policyholder, covering any group of employees defined by reference to exceptional hazards incident to such employment, insuring such employee against death or bodily injury resulting while, or from, being exposed to such exceptional hazard.

(c) Under a policy or contract issued to a college, school or other institution of learning or to the head or principal thereof, who or which shall be deemed the policyholder.

(d) Under a policy or contract issued in the name of any volunteer fire department, which shall be deemed the policyholder, covering all of the members of such department.

(e) Under a policy or contract issued to and in the name of an incorporated or unincorporated association of persons having a common interest or calling, which association shall be deemed the policyholder, having not less than twenty-five members, and formed for purposes other than obtaining insurance, covering all of the members of such association.

(f) Under a policy or contract issued to the head of a family, who shall be deemed the policyholder, whereunder the benefits thereof shall provide for the payment by the insurer of amounts for expenses incurred by the policyholders on account of hospitalization or medical or surgical aid for himself, his spouse, his child or children not over eighteen years of age, provided, that any disability within the terms of such policy incurred by a child before his 18th birthday and continuing thereafter shall be deemed to be covered by the policy.

2. All benefits under any blanket accident, blanket health or blanket accident and health insurance policy shall be payable to the person insured, or to his designated beneficiary or beneficiaries, or to his estate, except that if the person insured be a minor, such benefits may be made payable to his parent, guardian, or other person actually supporting him, or to a person or persons chiefly dependent upon him for support and maintenance.

3. Nothing contained in this section shall be deemed to affect the legal liability of policyholders for the death of or injury to, any such member of such group. (1945, c. 385; 1947, c. 721.)

Editor's Note.—The 1947 amendment made several changes in subsection 1. It inserted in lines two and three of paragraph (b) the words "or the trustee of a fund established by the employer"; substituted "twenty-five" for "fifty" in line five of paragraph (e), inserted "provide for" in lieu of "be limited to" in lines three and four of paragraph (f) and added the proviso thereto.

For account of changes made by 1947 legislation in the laws relating to group and blanket accident and health insurance, see 25 N. C. Law Rev. 437.

§ 58-254.4. Group accident and health insurance defined.—1. Any policy or contract of insurance against death or injury resulting from accident or from accidental means which covers more than one person, except blanket accident policies as defined in section 58-254.3, shall be deemed a group accident insurance policy. Any policy or contract which insures against disablement, disease or sickness of the insured (excluding disablement which results from accident or from accidental means) and which covers more than one person, except blanket health insurance policies as defined in section 58-254.3, shall be deemed a group health insurance policy or contract. Any policy or contract of insurance which combines the coverage of group accident insurance and of group health insurance shall be

deemed a group accident and health insurance policy. No policy or contract of group accident, group health or group accident and health insurance, and no certificates thereunder, shall be delivered or issued for delivery in this state unless it conforms to the requirements of subsection 2.

2. No policy or contract of group accident, group health or group accident and health insurance shall be delivered or issued for delivery in this state unless the group of persons thereby insured conforms to the requirements of the following paragraph:

Under a policy issued to an employer or to the trustee of a fund established by an employer or two or more employers in the same industry or kind of business, which employer or trustee shall be deemed the policyholder, covering not less than 25 employees of such employer, and covering, except as hereinafter provided, only employees of any class or classes thereof determined by conditions pertaining to employment, for amounts of insurance based upon some plan which will preclude individual selection. The premium may be paid by the employer, by the employer and employees jointly, or by the employees. If the premium is paid by the employer and employees jointly, or by the employees, the group shall comprise not less than seventy-five per cent of all employees or not less than seventy-five per cent of any class or classes of employees determined by conditions pertaining to the employment.

3. The term "employees" as used in this section shall be deemed to include, for the purposes of insurance hereunder, as employees of a single employer, the officers, managers, and employees of the employer and of subsidiary or affiliated corporations of a corporation employer, and the individual proprietors, partners, and employees of individuals and firms of which the business is controlled by the insured employer through stock ownership, contract or otherwise. The term "employer" as used herein may be deemed to include any municipal corporation or the proper officers, as such, of any unincorporated municipality, or any department of such corporation or municipality determined by conditions pertaining to the employment.

4. The benefits payable under any policy or contract of group accident, group health and group accident and health insurance shall be payable to the employees or to some beneficiary or beneficiaries designated by him, other than the employer, but if there is no designated beneficiary as to all or any part of the insurance at the death of the employee or member, then the amount of insurance payable for which there is no designated beneficiary shall be payable to the estate of the employee or member, except that the insurer may in such case, at its option, pay such insurance to any one or more of the following surviving relatives of the employee or member: wife, husband, mother, father, child, or children, brothers or sisters; and except that payment of benefits for expenses incurred on account of hospitalization or medical or surgical aid, as provided in subsection 5, may be made by the insurer to the hospital or other person or persons furnishing such aid. Payment so made shall discharge the insurer's obligation with respect to the amount of insurance so paid.

5. Any policy or contract of group accident, group health or group accident and health insurance may include provisions for the payment by the insurer of benefits to the employee or other member of the insured group, on account of hospitalization or medical or surgical aid for himself, his spouse, his child or children, or other persons chiefly dependent upon him for support and maintenance.

6. Any policy or contract of group accident, group health or group accident and health insurance may provide for readjustment of the rate of premium based on the experience thereunder at the end of the first year or of any subsequent year of insurance thereunder, and such readjustment may be made retroactive only for such policy year. Any refund under any plan for readjustment of the rate of premium based on the experience under group policies and any dividend paid under such policies may be used to reduce the employer's contribution to group insurance for the employees of the employer, and the excess over such contribution by the employer shall be applied by the employer for the sole benefit of the employees.

7. Nothing contained in this section shall be deemed applicable to any contract issued by any corporation defined in chapter 57 of the General Statutes of North Carolina. (1945, c. 385; 1947, c. 721.)

Editor's Note.—Prior to the 1947 amendment the first part of the second paragraph of subsection 2 read as follows: "Under a policy issued to an employer which employer shall be deemed the policyholder covering not less than 50 employees."

For account of changes made by 1947 legislation in the laws relating to group and blanket accident and health insurance, see 25 N. C. Law Rev. 437.

§ 58-254.5. Group or blanket accident and health insurance; approval of forms and filing of rates.— No policy of group or blanket accident, health or accident and health insurance shall be delivered or issued for delivery in this state unless the form of the policy contracts including the master policy contract, the individual certificates thereunder, the applications for the contract, and a schedule of the premium rates pertaining to such form or forms, have been filed with and the forms approved by the commissioner. (1945, c. 385.)

§ 58-254.6. Definition of franchise accident and health insurance.—Accident and health insurance on a franchise plan is hereby declared to be that form of accident and health insurance issued to five or more employees of any corporation, copartnership or individual employer or any governmental corporation, agency or department thereof, or ten or more members of any trade or professional association or of a labor union or of any other association having had an active existence for at least two years where such association or union has a constitution or by-laws and is formed in good faith for purposes other than that of obtaining insurance, where such persons, with or without their dependents, are issued the same form of an individual policy varying only as to amounts and kinds of coverage applied for by such persons, under an arrangement whereby the premiums on such policies may be paid to the insurer periodically by the employer, with or without payroll deductions, or by the association for its members, or by some designated person acting

on behalf of such employer or association. The provisions of this section shall not be construed so as to repeal sections 58-254.3 and 58-254.4 or any parts thereof. (1947, c. 721.)

Editor's Note.—For brief comment on this section, see 25 N. C. Law Rev. 438.

Art. 27. General Regulations.

§ 58-260.1. Notice of nonpayment of premium required before forfeiture.—No insurance company doing business in this State and issuing health and/or accident insurance policies, other than contracts of group insurance or disability and/or accidental death benefits in connection with policies of life insurance, the premium for which is to be collected in weekly, monthly, or other periodical installments by authority of a payroll deduction order executed by the assured and delivered to such insurance company or the assured's employer authorizing the deduction of such premium installments from the assured's salary or wages, shall, during the period for which such policy is issued, declare forfeited or lapsed any such policy hereafter issued or renewed until and unless a written or printed notice of the failure of the employer to remit said premium or installment thereof stating the amount or portion thereof due on such policy and to whom it must be paid, has been duly addressed and mailed to the person who is insured under such policy at least fifteen days before said policy is cancelled or lapsed. (1909, c. 884; 1929, c. 308, s. 1; 1931, c. 317; 1945, c. 379; C. S. 6465.)

Editor's Note.—Prior to the 1945 amendment this section was a part of § 58-207.

§ 58-261. Certain policies of insurance not affected.—1. Nothing in this subchapter shall apply to or affect any policy of liability or workmen's compensation insurance.

2. Nothing in this subchapter shall apply to or in any way affect contracts supplemental to contracts of life or endowment insurance where such supplemental contracts contain no provisions except such as operate to safeguard such insurance against lapse or to provide special benefits therefor in the event that the insured shall be totally, or totally and permanently disabled by reason of accidental bodily injury or by sickness, nor to contracts issued as supplements to life insurance contracts or contracts of endowment insurance, and intended to increase the amount insured by such life or endowment contracts in the event that the death or disability of the insured shall result from accidental bodily injuries: Provided, that no such supplemental contracts shall be issued or delivered to any person in this state unless and until a copy of the form thereof has been submitted to and approved by the commissioner of insurance under such reasonable rules and regulations as he shall make concerning the provisions in such contracts, and their submission to an approval by him.

3. Nothing in this subchapter shall apply to or in any way affect fraternal benefit societies.

4. The provisions of this subchapter contained in clause (5) of § 58-250, and clauses two, three, eight, and twelve of § 58-251, may be omitted from railroad ticket policies sold only at railroad stations or at railroad ticket offices by railroad employees. (1911, c. 209, s. 5; 1913, c. 91, s. 12; 1921, c. 136, s. 5; 1945, c. 385; 1947, c. 721; C. S. 6489.)

Editor's Note.—The 1945 amendment substituted in line six of subsection 2 the words "special benefits" for the words "a special surrender value," and inserted in line eight the words "or totally" and in line fourteen the words "or disability."

The 1947 amendment struck from subsection 1 the former provision relating to general or blanket policy of insurance.

SUBCHAPTER VII. FRATERNAL ORDERS AND SOCIETIES.

Art. 28. Fraternal Orders.

§ 58-289. Mergers and transfers.

As to partial repeal of section, see note under § 58-303.

§ 58-303. Merger, consolidation or reinsurance of fraternal risks with licensed life insurance companies or with other fraternal orders or benefit societies.—No fraternal order or society organized under the laws of this state to do the business of life, accident, or health insurance shall consolidate or merge with any other fraternal order or society, or with a life insurance company, or reinsure its risks, or any part thereof with any other fraternal order or society, or with a life insurance company, or assume or reinsure the whole or any portion of the risks of any other fraternal order or society, except with a fraternal order or society, or a life insurance company, licensed to transact business in North Carolina and subject to the provisions of G. S. § 58-304. (1921, c. 60, s. 1; 1949, c. 1080, s. 1; C. S. 6529(a).)

Editor's Note.—The 1949 amendment rewrote this section. The amendatory act, which also rewrote § 58-304 and inserted § 58-304.1, provides in § 4 thereof: "All laws and clauses of laws, and in particular the provisions of G. S. 58-289, in conflict with this act are repealed to the extent of such conflict."

§ 58-304. Contracts approved by boards of directors or governing bodies of parties to same; approval by commissioner of insurance.—When any fraternal order or society shall propose to consolidate or merge its business or to enter into a contract of reinsurance with any other fraternal order or society or with a life insurance company, or to assume or reinsure the whole or any portion of the risks of any other fraternal order or society, the proposed contract in writing setting forth the terms and conditions of the proposed consolidation, merger, or reinsurance shall be submitted to the boards of directors or to the governing bodies of each of said parties to said contract at a meeting called for that purpose by notice given in writing ten days prior thereto, and if approved by a majority vote of the said boards of directors, or governing bodies, said contract as so approved shall be submitted to the commissioner of insurance of this state for his approval, and the parties to said contract shall at the same time submit a sworn statement showing their financial condition as of the 31st day of December next preceding the date of such contract. Provided, that the commissioner of insurance may, within his discretion, require such financial statement to be submitted as of the last day of the month next preceding the date of such contract. The commissioner of insurance shall thereupon consider such contract of consolidation, merger, or reinsurance, and if satisfied that

the interests of the certificate and policyholders of each of the parties are properly protected and that the contract will be in the public interest, and that such contract is just and equitable to the certificate and policyholders of each of the parties, and that no reasonable objection exists thereto, he shall approve said contract as submitted. In case the parties corporate to such contract shall have been incorporated in separate states, or territories, such contract shall be submitted as herein provided to the commissioner of insurance of each of such incorporating states, or territories, to be considered and approved separately by each of said commissioners of insurance. If the commissioner of insurance approves such contract of consolidation, merger, or reinsurance, he shall issue a certificate to that effect, and thereupon the said contract of consolidation, merger, or reinsurance shall be in full force and effect. In case such contract is not approved it shall be inoperative, and the fact of the submission and its contents shall not be disclosed by the commissioner of insurance. (1921, c. 60, s. 2; 1949, c. 1080, s. 2; C. S. 6529 (b).)

Editor's Note.—The 1949 amendment rewrote this section.

§ 58-304.1. Application of sections 58-155.1 to 58-155.35, inclusive.—The provisions of G. S. §§ 58-155.1 to 58-155.35, inclusive, shall apply, where pertinent, to all fraternal orders and societies doing business in this state. (1949, c. 1080, s. 3.)

Art. 31. Non-Profit Life Benefit Association.

§§ 58-316 to 58-340: Repealed by Session Laws 1945, c. 379.

Benefit Plans of Common Carriers Exempt from Acts.—Session Laws 1945, cc. 379, 386, which amended, inserted or repealed a large number of sections in this chapter, provide: "This act shall not apply to common carriers having relief departments, pension or annuity plans, or other organizations or associations for the benefit of their employees or former employees; or to associations of such common carriers administering such departments, plans or organizations."

Chapter 59. Partnership.

§ 59-36. Partnership defined.

Cited in Dwiggins v. Parkway Bus Co., 230 N. C. 234, 52 S. E. (2d) 892.

§ 59-37. Rules for determining the existence of a partnership.

Applied in Eggleston v. Eggleston, 228 N. C. 668, 47 S. E. (2d) 243.

§ 59-39. Partner agent of partnership as to partnership business.

Service of Summons on One Partner.—Under the Uniform Partnership Act it is not necessary that all members of an alleged partnership should be served with summons. A partnership is represented by the partner who is served, and as to him a judgment in the action in which he is served would be binding on him individually, and as to the partnership property. But as to a partner not served with summons, the judgment would not be binding on him individually. Nevertheless even after judgment such partner could be brought in and made a party. The court may, before or after judgment, direct the bringing in of new parties to the end that substantial justice may be done. § 1-73. Dwiggins v. Parkway Bus Co., 230 N. C. 234, 52 S. E. (2d) 892.

Cited in Pappas v. Crist, 223 N. C. 265, 25 S. E. (2d) 850.

§ 59-43. Partnership bound by partner's wrongful act.

Where one partner is sued individually for a tort committed by him in the course of the partnership business, a judgment would be binding upon him individually, and as to the partnership property, but not as against the other partner individually, but the court even after judgment may direct that such other partner be brought in and made a party. Dwiggins v. Parkway Bus Co., 230 N. C. 234, 52 S. E. (2d) 892. See § 59-45 and notes.

§ 59-45. Nature of partner's liability.

Section States Common Law. — The common law rule of joint and several liability of partners for a tort committed by one of the members of the partnership is incorporated in the Uniform Partnership Act, embraced in this article. Dwiggins v. Parkway Bus Co., 230 N. C. 234, 52 S. E. (2d) 892.

Each partner is jointly and severally liable for a tort committed by one partner in the course of the partnership business, and the injured person may sue all members of the partnership or any one of them at his election. Dwiggins v. Parkway Bus Co., 230 N. C. 234, 52 S. E. (2d) 892. See note to § 59-43.

§ 59-70. Rules for distribution.

Applied in Benson v. Roberson, 226 N. C. 103, 36 S. E. (2d) 729.

§ 59-74. Surviving partner to give bond.

The purpose of this section is limited to the protection of those who are interested in the property or estate administered by the surviving partner, who is required to account to them and pay over in case there is a surplus (of that interest) after paying the partnership debts. It is a trust relationship in which only they have a legal interest. Therefore, the objection that the surviving partner has not filed the bond is not available to one who is merely a debtor of the estate. Coppersmith v. Upton, 228 N. C. 545, 46 S. E. (2d) 565.

Giving Bond Is Not Condition Precedent to Maintenance of Action.—It seems apparent that the giving of the bond cannot be regarded as a condition precedent to the maintenance of an action by a surviving partner, for the reason that the following section provides an alternative remedy upon failure of the surviving partner to give bond. In that event "the clerk of the superior court shall, upon application of any person interested in the estate of the deceased partner, appoint a collector of the partnership, who shall be governed by the same law governing an administrator of a deceased person." Coppersmith v. Upton, 228 N. C. 545, 46 S. E. (2d) 565.

§ 59-75. Effect of failure to give bond.

Quoted in Coppersmith v. Upton, 228 N. C. 545, 46 S. E. (2d) 565.

§ 59-82. Surviving partner to account and settle.—In case the surviving partner shall not avail himself of the privilege of purchasing the interest of the deceased partner, he shall, within twelve months from the date of the first publication of notice to creditors, file with the clerk of the superior court of the county where the partnership was located, an account, under oath, stating his action as surviving partner, and shall come to a settlement with the executor or administrator of the deceased partner: Provided, that the clerk of the superior court shall have power, upon good cause shown, to extend the time within which said final settlement shall be made. The surviving partner for his services in settling the partnership estate shall receive commissions to be allowed by the court, and in no case to exceed five per cent out of the share of the deceased partner. (Rev., s. 2546; 1901, c. 640, s. 7; 1947, c. 781; C. S. 3285.)

Editor's Note.—The 1947 amendment struck out the words "death of the deceased partner" formerly appearing in line four and inserted in lieu thereof the words "date of the first publication of notice to creditors."

Chapter 60. Railroads and Other Carriers.

Art. 1. General Provisions.

§ 60-5. Discrimination in charges misdemeanor.—If any common carrier shall directly or indirectly by special rate, rebate, drawback, or other device, charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property subject to the provisions of law than it charges, demands or collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions; or shall make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatsoever; or shall subject any particular person, company, firm, corporation or locality or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, such common carrier shall be upon conviction thereof fined not less than one thousand nor more than five thousand dollars for each and every offense. (Rev., s. 3749; 1899, c. 164, s. 13; 1947, c. 781; C. S. 3416.)

Editor's Note.—
The 1947 amendment struck out the words "person or corporation" formerly appearing in lines twenty-one and twenty-two and inserted in lieu thereof the words "common carrier."

Applied in Atlantic Coast Line R. Co. v. West Paving Co., 228 N. C. 94, 44 S. E. (2d) 523.

§ 60-6. Discrimination by rebate or reduced charges, misdemeanor.—Any railroad company doing business in the state, or officer or agent thereof, who shall give to any person or shipper any advantage over another person or shipper under like circumstances, by way of any rebate or reduced rate not authorized by law or by the North Carolina utilities commission, or which shall make charges for shipments of freight in violation of the law as to railroad freight rates, contained in article 8 of the chapter Utilities Commission, or shall willfully discriminate in the matter of service in favor of one person or corporation against another in like circumstances, shall be guilty of a misdemeanor, and such railroad company shall, upon conviction, be fined not less than one hundred dollars and such officer or agent shall be fined or imprisoned or both, in the discretion of the court; and any shipper or consignee of any freight in the state of North Carolina who shall knowingly accept any rebate or other consideration or services from any railroad company which is not allowed or given other shippers or consignees under like or similar circumstances, and which is not allowed by law, shall be guilty of a misdemeanor, and fined or imprisoned in the discretion of the court. (1907, c. 217, s. 2; 1933, c. 134, s. 8; 1941, c. 97, s. 5; 1947, c. 781; C. S. 3417.)

Editor's Note.—The 1947 amendment struck out the word "corporation" formerly appearing in line fourteen and inserted in lieu thereof the words "railroad company."

Applied in Atlantic Coast Line R. Co. v. West Paving Co., 228 N. C. 94, 44 S. E. (2d) 523.

Art. 3. County Subscriptions in Aid of Railroads.

§ 60-23. Conduct of election.—All elections ordered under General Statutes § 60-22 shall be conducted by the county board of elections under the laws and regulations provided for the election of members of the general assembly.

The results of such elections shall be canvassed and declared by the county board of elections. (Rev., s. 2560; Code, s. 1998; 1868-9, c. 171, s. 3; 1947, c. 781; C. S. 3433.)

Editor's Note.—The 1947 amendment rewrote this section.

Art. 4. Township Subscriptions in Aid of Railroads.

§ 60-28. Conduct of election; canvass of votes.—All elections ordered under § 60-27 shall be held by the county board of elections of the county in which such township is located, under such laws and regulations as are now or may hereafter be provided for the election of members of the general assembly. The votes of each township for whose use and benefit subscription under this article is proposed to be made shall be canvassed and the results of such election declared by the county board of elections of the county in which such township is located. (1917, c. 64, s. 3; 1947, c. 781; C. S. 3438.)

Editor's Note.—The 1947 amendment substituted in line two "county board of elections" for "sheriff" and rewrote the latter part of the section.

Art. 5. Powers and Liabilities.

§ 60-43. Obstructing highways; defective crossings; failure to repair after notice misdemeanor.

Applied in Bundy v. Powell, 229 N. C. 707, 51 S. E. (2d) 307.

§ 60-52. Forfeiture for preferences to shippers.

Applied in Atlantic Coast Line R. Co. v. West Paving Co., 228 N. C. 94, 44 S. E. (2d) 523.

Art. 8. Liability of Railroads for Injuries to Employees.

§ 60-64. Common carrier defined; employee defined.—The term "common carrier" as used in this article, shall include the receiver or receivers, or other persons or corporations charged with the duty of the management of the business of a common carrier. The term "employee" or "servant" as used in this article shall include any person carried on the pay roll of such railroad company and required to be on its property regardless whether such person is receiving compensation at the time or not. (1913, c. 6, s. 5; 1947, c. 916; C. S. 3464.)

Editor's Note.—
The 1947 amendment added the definition of "employee" or "servant".

Art. 9. Construction and Operation of Railroads.

§ 60-81. Negligence presumed from killing livestock.

Applied in Coburn v. Atlantic Coast Line R. Co., 227 N. C. 695, 44 S. E. (2d) 200.

Art. 10. Railroad and Other Company Police.

§ 60-83. Governor may appoint and commission police for railroad, etc., companies; civil liability of companies.—Any corporation operating a railroad on which steam or electricity is used as the motive power or any electric or water-power company or construction company or manufacturing company or motor vehicle carrier or railway express agencies may apply to the governor to commission such persons as the corporation or company may designate to act as policemen for it. The governor upon such application may appoint such persons or so many of them as he may deem proper to be such policemen, and shall issue to the persons so appointed a commission to act as such policemen. Nothing contained in the provisions of this section shall have the effect to relieve any such company from any civil liability now existing by statute or under the common law for the act or acts of such policemen, in exercising or attempting to exercise the powers conferred by this section. (Rev., ss. 2605, 2606; Code, ss. 1988, 1989; 1871-2, c. 138, ss. 51, 52; 1907, c. 128, s. 1; 1923, c. 23; 1933, c. 61; 1943, c. 676, ss. 1, 4; 1947, c. 390; C. S. 3484.)

Editor's Note.—

The 1947 amendment made this section applicable to railway express agencies.

For comment on the 1943 amendment, see 21 N. C. Law Rev. 330.

§ 60-85. Company police to wear badges.

Editor's Note.—For comment on the 1943 amendment, see 21 N. C. Law Rev. 330.

§ 60-87. Police powers cease on company's filing notice.

Editor's Note.—

For comment on the 1943 amendment, see 21 N. C. Law Rev. 330.

Art. 12. Carriage of Passengers.

§ 60-106. Checking baggage; liability for loss.—A check shall be affixed to every parcel of baggage when taken for transportation by the agent or servant of any railroad corporation, if there is a handle, loop or fixture so that the same can be attached upon the parcel or baggage so offered for transportation, and a duplicate thereof given to the passenger or person delivering the same on his behalf. If such check be refused on demand, the corporation shall pay to such passenger the sum of ten dollars, to be recovered in a civil action; and further, no fare or toll shall be collected or received from such passenger, and if such passenger shall have paid his fare the same shall be refunded by the conductor in charge of the train.

If a passenger, whose bag has been checked, shall produce the check and his baggage shall not be delivered to him, he may by an action recover the value of such baggage. (Rev., s. 2623; Code, s. 1970; 1871-2, c. 138, s. 36; 1947, c. 781; C. S. 3510.)

Editor's Note.—The section consisted of one sentence prior to the 1947 amendment which rewrote the part now constituting the third sentence.

Art. 13. Carriage of Freight.

§ 60-114. Freight charges to be at legal rates; penalty for failure to deliver to consignee on tender of same.

Applied in Atlantic Coast Line R. Co. v. West Paving Co., 228 N. C. 94, 44 S. E. (2d) 523.

§ 60-118: Repealed by Session Laws 1947, c. 781.

§§ 60-128, 60-129: Repealed by Session Laws 1947, c. 781.

Art. 14. Street and Interurban Railways.

§ 60-135. Separate accommodations for different races; failure to provide misdemeanor.

Effect of § 60-139.—See note to § 60-136.

§ 60-136. Passengers to take certain seat; violation of requirement misdemeanor.

Effect of § 60-139.—The contention that this section and § 60-135 do not apply to motor vehicles transporting passengers for hire except on busses used in transporting passengers within a city or town was held without merit as the provisions of such sections were extended by § 60-139, to include "motor busses operated in the urban, interurban or suburban transportation of passengers for hire, and to the operator or operators thereof, and the agents, servants, and employees of such operators." State v. Johnson, 229 N. C. 701, 51 S. E. (2d) 186.

Segregation of Interstate Passengers.—While it is held in Morgan v. Virginia, 328 U. S. 373, 66 S. Ct. 1050, 90 L. Ed. 1317, 165 A. L. R. 574, that a state statute which requires segregation of interstate passengers is beyond the state's power to make, the decision does not purport to invalidate reasonable rules and regulations of interstate carriers, which require segregation of the white and negro races. Pridgen v. Carolina Coach Co., 229 N. C. 46, 47 S. E. (2d) 609.

Burden of Proof.—While this section does not require the state to prove willfulness, the burden rests upon the state to show beyond a reasonable doubt that defendant intentionally violated the statute. State v. Brown, 225 N. C. 22, 25, 33 S. E. (2d) 121.

State Need Not Show That Defendant Was Intrastate Passenger.—In a prosecution under § 60-135 and this section, evidence that a white and a colored defendant occupied the same seat on a bus and refused to move to unoccupied seats in the front and rear of the bus as required by statute, makes out a prima facie case of intent to violate the statute and is sufficient to withstand defendants' motion for judgment as of nonsuit even in the absence of evidence by the state that defendants were intrastate passengers, since the burden of going forward with the evidence to show that defendants were interstate passengers rests upon defendants. State v. Johnson, 229 N. C. 701, 51 S. E. (2d) 186.

Evidence Sufficient for Jury.—Where state's evidence tended to show that defendant, when called upon by bus driver, refused to move her seat, compelling the driver to call upon officers of the law to remove her, there was sufficient evidence for the jury, and motion for nonsuit was properly denied. State v. Brown, 225 N. C. 22, 33 S. E. (2d) 121.

§ 60-139. Sections 60-135 to 60-138 extended to motor busses used as common carriers.

Applied in State v. Johnson, 229 N. C. 701, 51 S. E. (2d) 186.

Art. 15. Electric Interurban Railways.

§ 60-144. Right of eminent domain.—Any such company may exercise the right of eminent domain under the provisions of chapter forty and acts amendatory thereof, and for the purpose of constructing its roads and other works, shall have the powers given railroad corporations by this chapter, and acts amendatory thereof, provided, that no such company shall operate over the streets of any municipality by means of steam motive power, except with the consent of the municipal authorities. (1927, c. 33, s. 2; 1949, c. 496.)

Editor's Note.—The 1949 amendment rewrote the last few lines of this section relating to steam motive power.

Chapter 61. Religious Societies.

§ 61-1. Trustees may be appointed and removed.

Editor's Note.—Session Laws 1945, c. 90, provides for the appointment of trustees for certain Primitive Baptist churches to dispose of abandoned church property and distribute the proceeds thereof.

Cited in King v. Richardson, 136 F. (2d) 849.

§ 61-2. Trustees may hold property.

Rights of Trustees as against Majority of Members.—See note to § 61-3.

Trusts for Special Purposes.—There is nothing in this section which precludes trustees of a certain North Carolina church from accepting trusts for special purposes; and, even if there were, a trust for a special purpose would not fail because they were named as trustees but equity would appoint other trustees to administer it in application of the maxim that a trust will not be allowed to fail for lack of a trustee. King v. Richardson, 136 F. (2d) 849, 856.

§ 61-3. Title to lands vested in trustees, or in societies.

Trustees May Hold Property as against Majority of Members.—Where land is conveyed to the officers and trustees of a non-denominational religious organization for the purposes of the organization, its officers and trustees have title to the property in trust and are entitled to hold it for the use and occupancy of the organization as against members of the organization, even though they are in the large majority, who seek possession of the property for use and occupancy by a denominational church. Wheeless v. Barrett, 229 N. C. 282, 49 S. E. (2d) 629.

Rights of Majority of Congregation Withdrawing from Denomination.—A conveyance of land to trustees for the erection of a church to belong to a denomination, to have and to hold to them and their successors in office forever in trust for the erection of a place of worship for the use of members of the denomination, takes the title in trust for the use of the denomination, and therefore members of the congregation of the church so erected who withdraw affiliation from the denomination, even though they be a majority of the congregation, are not entitled to the control and use of the property as against the denomination, irrespective of whether the particular church is congregational or connectional. Western North Carolina Conference v. Talley, 229 N. C. 1, 47 S. E. (2d) 467.

Cited in dissenting opinion of Soper, J., in King v. Richardson, 136 F. (2d) 849.

§ 61-4. Trustees may convey property.

Cited in dissenting opinion of Soper, J., in King v. Richardson, 136 F. (2d) 849.

Chapter 62. Utilities Commission.

Art. 1. Organization of the Commission.

Art. 2. Procedure before the Commission.

Art. 3. Powers and Duties of the Commission.

Art. 4. Public Utilities Act of 1933.

Art. 6. Motor Carriers Generally.

Art. 6A. Insurance and Safety Regulations for Motor Vehicles Carrying Passengers for Hire.

Art. 6B. Motor Carriers of Property.

Art. 6C. Bus Act of 1949.

Art. 7. Rate Regulation.

Art. 1. Organization of the Commission.

§ 62-1. Number and appointment of commissioners; terms.—The North Carolina utilities commission shall consist of five commissioners, who shall be appointed by the governor, by and with the consent of the 1949 senate, before adjournment sine die. Upon the expiration of the terms of the three commissioners now serving under appointments for terms of six years, their successors shall be appointed for terms of six years beginning the first day of February of the year in which their present terms expire, respectively. The two additional commissioners shall be appointed for terms expiring the first day of February, 1953, and upon the expiration of their terms their successors shall be appointed for terms of four years, respectively. The salary of the additional commissioners shall be fixed by the director of the budget, subject to approval of the advisory budget commission, not in excess of the salaries now paid to the other commissioners. (1941, c. 97, s. 2; 1949, c. 1009, s. 1.)

Editor's Note.—The 1949 amendment rewrote this section. For brief comment on amendment, see 27 N. C. Law Rev. 489.

§ 62-2. Organization of the commission.—To facilitate the work of the commission and for administrative purposes, the chairman of the commission, with the consent and approval of the

commission, may organize the work of the commission in several divisions and may designate a member of the commission as the head of any division or divisions and assign to members of the commission various duties in connection therewith. (1949, c. 1009, s. 2.)

Editor's Note.—The 1949 amendment rewrote this section, which formerly related to salaries of commissioners. For brief comment on amendment, see 27 N. C. Law Rev. 489.

§ 62-10.1. Authority of utilities commission to employ technically qualified personnel.—The utilities commission is authorized and empowered to employ technically qualified personnel to serve as members of its staff and under its direction and supervision, including a communications engineer, an electrical engineer, a director of accounting, a transportation expert, and such other experts as the commission may determine to be necessary in the proper discharge of the commission's duties as prescribed by law. (1949, c. 1009, s. 3.)

Editor's Note.—For brief comment on this section, see 27 N. C. Law Rev. 489.

§ 62-10.2. Appointment of assistant attorney general assigned to utilities commission.—The attorney general shall appoint an additional assistant attorney general who shall be assigned to the utilities commission and shall be under the direction of the attorney general and perform such legal services as may be necessary in connection with the duties of said commission, but the attorney general may require this assistant to perform such other legal duties as may be determined by him. The director of the budget is authorized to transfer to the department of justice, attorney general's division, any appropriations made to the utilities commission for payment of legal services, to be used for the payment of the salary of such assistant attorney general, whose salary shall be fixed as provided by law. (1949, c. 1029, s. 3.)

Editor's Note.—For brief comment on this section, see 27 N. C. Law Rev. 489.

§ 62-10.3. Utilities commission and state board of assessment to coordinate facilities and personnel for mutual assistance for rate making and taxation purposes.—The utilities commission, at the request of the state board of assessment, shall make available to the state board of assessment the services of such of the personnel of the utilities commission as may be desired and required for the purpose of furnishing to the state board of assessment advice and information as to the value of properties of public utilities, the valuations of which for ad valorem taxation are required by law to be determined by the state board of assessment. It shall be the duty of the utilities commission and the state board of assessment, with regard to the assessment and valuation of properties of public utilities doing business in North Carolina, to coordinate the activities of said departments so that each of said boards shall receive the benefit of the exchange of information gathered by them with respect to the valuations of public utilities property for rate making and taxation purposes, and the facilities of each of said state agencies shall be made fully available to both of them. (1949, c. 1029, s. 3.)

Art. 2. Procedure before the Commission.

§ 62-11. Short title.—This article shall be known and may be cited as the North Carolina Utilities Commission Procedure Act of 1949. (1949, c. 989, s. 1.)

Cross Reference.—For cases decided under § 62-11 as it stood prior to the 1949 revision of this article, see note to § 62-12.

Editor's Note.—The 1949 act, effective April 15, 1949, repealed the former sixteen sections of this article and inserted in lieu thereof present §§ 62-11 to 62-26.15. Section 3 of the act provides: "This act shall not apply to any proceeding pending on appeal to the superior court or to the supreme court from an order or decision of the utilities commission made prior to the effective date of this act. Any party to any proceeding, which is pending before the commission at the time of the effective date of this act, who has theretofore filed exceptions within the time and in the manner provided theretofore by law, shall be allowed sixty days after the effective date hereof to file application for rehearing as provided in G. S. 62-26.6 and shall have the right to appeal therefrom as provided in said section."

For a summary and discussion of the 1949 revision of this article, see 27 N. C. Law Rev. 490.

§ 62-12. Commission constituted a court of record.—For the purpose of making investigations, conducting hearings, making decisions and issuing orders, the commission is hereby constituted a court of record and shall have all the powers and jurisdiction of a court of general jurisdiction as to all subjects over which the commission has or may hereafter be given jurisdiction by law. The commissioners, their clerks, and members of the commission's staff designated and assigned as examiners shall have full power to administer oaths and to hear and take evidence. The commission shall render its decisions upon questions of law and of fact as other courts of similar jurisdiction. A majority of the commissioners shall constitute a quorum, and any act or decision of a majority of the commissioners shall constitute the act or decision of the commission. (1949, c. 989, s. 1.)

Editor's Note.—For cases decided under this section as it stood prior to the 1949 revision of this article, see note to § 62-26. The cases cited below were decided under former § 62-11, to which the present § 62-12 corresponds.

Commission Is an Administrative Agency.—The utilities commission, a creature of the General Assembly, is an administrative agency of the state, with such powers and duties as are given it by this chapter. These powers and duties are of a dual nature—supervisory or regulatory, and judicial. State v. Atlantic Greyhound Corp., 224 N. C. 293, 29 S. E. (2d) 909; Utilities Comm. v. Atlantic Greyhound Corp., 224 N. C. 672, 32 S. E. (2d) 23.

With Powers of Court of General Jurisdiction as to Certain Matters.—For the purpose of making investigations and conducting hearings, the legislature has constituted the utilities commission a court of record, with all the powers of a court of general jurisdiction as to all subjects embraced within the purview of the statute, for which procedure is prescribed, with the right in any party affected thereby to appeal to the courts. State v. Atlantic Greyhound Corp., 224 N. C. 293, 29 S. E. (2d) 909; Utilities Comm. v. Atlantic Greyhound Corp., 224 N. C. 672, 32 S. E. (2d) 23.

And May Defer Use of Increased Rates Pending Investigation.—After rates for certain intrastate shipments had been duly established by the utilities commission, defendant sought to increase such rates by filing tariff schedules to that effect. The commission, in a proceeding to which defendant was a party, by order of postponement, which was not objected to, deferred use of the new increased rates pending investigation, and also directed that the rates previously fixed should not be changed by subsequent tariffs or schedules until this investigation and suspension proceeding had been disposed of, continuing the investigation from time to time at the request of defendant. It was held that such action of the commission was binding on defendant. However, defendant should be given a reasonable time to comply with the order before penalties might be invoked. State v. Atlantic Coast Line R. Co., 224 N. C. 283, 29 S. E. (2d) 912.

But without Inherent Powers of Appellate Court.—The North Carolina utilities commission is a court of general jurisdiction only as to subjects embraced within this chapter. It is a court of original jurisdiction and does not pos-

sess the inherent powers of an appellate court. State v. Norfolk Southern Ry. Co., 224 N. C. 762, 32 S. E. (2d) 346.

§ 62-13. Witnesses; production of papers; contempt.—The utilities commission shall have the same power to compel the attendance of witnesses, require the examination of persons and parties, and compel the production of books and papers, and punish for contempt, as by law is conferred upon the superior courts. (1949, c. 989, s. 1.)

§ 62-14. Refusal of witnesses to testify.—If any person duly summoned to appear and testify before the utilities commission, or an examiner of said commission, shall fail or refuse to testify without lawful excuse, or shall refuse to answer any proper question propounded him by a commissioner or examiner in the discharge of duty, or shall conduct himself in a rude, disrespectful or disorderly manner before a commissioner or examiner engaged in the conduct of any hearing or investigation, such persons shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than fifty dollars ($50.00) nor more than one thousand dollars ($1,000.00). (1949, c. 989, s. 1.)

§ 62-15. Subpoenas, issuance and service.—All subpoenas for witnesses to appear before the commission or an examiner and notice to persons or corporations, shall be issued by the commission or its clerk and be directed to any sheriff, constable or other officer authorized by law to serve process issued out of the superior courts, who shall execute the same and make due return thereof as directed therein, under the penalties prescribed by law for a failure to execute and return the process of any court. The commission shall have the authority to require the applicant for a subpoena for persons and documents to make a reasonable showing that the evidence of such persons or documents will be material and relevant to the issue in the proceeding. (1949, c. 989, s. 1.)

§ 62-16. Service of process and notices.—The clerk of the commission may serve any notice issued by it and his return thereof shall be evidence of said service; and it shall be the duty of the sheriffs and all officers authorized by law to serve process issuing out of the superior courts, to serve any process, subpoenas and notices issued by the commission, and such officers shall be entitled to the same fees as are prescribed by law for serving similar papers issuing from the superior court. Service of notice of all hearings, investigations and proceedings by the commission may be made upon any person upon whom a summons may be served in accordance with the provisions governing civil actions in the superior courts of this state, and may be made personally by an authorized agent of the commission or by mailing in a sealed envelope, registered, with postage prepaid. (1949, c. 989, s. 1.)

§ 62-17. Bonds.—All bonds or undertakings required to be given by any of the provisions of this chapter shall be payable to the state of North Carolina, and may be sued on as are other undertakings which are payable to the state. (1949, c. 989, s. 1.)

§ 62-18. Rules of evidence.—In hearings and investigations conducted under the provisions of this chapter, the commission shall apply the rules of evidence applicable in civil actions in the superior court, in so far as practicable, but no decision or order of the commission shall be made or entered in any such proceeding unless the same is supported by competent material and substantial evidence upon consideration of the whole record. Oral evidence shall be taken only on oath or affirmation. The rules of privilege shall be effective to the same extent that they are now or hereafter recognized in civil actions in the superior court. The commission may exclude incompetent, irrelevant, immaterial and unduly repetitious or cumulative evidence. All evidence, including records and documents in the possession of the commission of which it desires to avail itself, shall be made a part of the record in the case by definite reference thereto at the hearing. Every party to a proceeding shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matter relevant to the issues, to impeach any witnesses regardless of which party first called such witness to testify and to rebut the evidence against him. If a respondent does not testify in his own behalf, he may be called and examined as if under cross-examination. (1949, c. 989, s. 1.)

§ 62-19. Depositions.—The commission or any party to a proceeding may take and use depositions of witnesses in the same manner as provided by law for the taking and use of depositions in civil actions in the superior court. (1949, c. 989, s. 1.)

Cross Reference.—For cases decided under this section as it stood prior to the 1949 revision of this article, see notes to §§ 62-26.6, 62-26.8.

§ 62-20. Use of affidavits.—At any time, ten or more days prior to a hearing or a continued hearing, any party or the commission may send by registered mail or deliver to the opposing parties a copy of any affidavit proposed to be used in evidence, together with the notice as herein provided. Unless an opposing party or the commission at least five days prior to the hearing if the affidavit and notice are received at least twenty days prior to such hearing, otherwise at any time prior to or during such hearing sends by registered mail or delivers to the proponent a request to cross-examine the affiant at the hearing, the right to cross-examine such affiant is waived and the affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally. If an opportunity to cross-examine an affiant at the hearing is not afforded after request therefor is made as herein provided, the affidavit shall not be received in evidence. The notice accompanying the affidavit shall set forth the name and address of the affiant and shall contain a statement that the affiant will not be called to testify orally and will not be subject to cross-examination unless the opposing parties or the commission demand the right of cross-examination by notice mailed or delivered to the proponent at least five days prior to the hearing if the notice and affidavit are received at least twenty days prior to such hearing otherwise at any time prior to or during such hearing. (1949, c. 989, s. 1.)

Cross Reference.—For cases decided under this section as

it stood prior to the 1949 revision of this article, see note to § 62-26.6.

§ 62-21. Attorney general may intervene in certain cases.—The attorney general shall, in cases in which in his opinion the public interest so requires, or upon the request of the governor or of the commission, attend or assign an assistant to attend any hearing before the commission or an examiner and conduct the examination of witnesses and otherwise participate in said hearing on behalf of the state. (1949, c. 989, s. 1.)

Cross Reference.—For cases decided under this section as it stood prior to the 1949 revision of this article, see notes to § 62-26.10.

§ 62-22. Stipulations and agreements.—In all contested proceedings the commission, by prehearing conferences and in such other manner as it may deem expedient and in the public interest, shall encourage the parties and their counsel to make and enter stipulations of record for the purpose of eliminating the necessity of proof of all facts which may be admitted, the authenticity of documentary evidence, the use of exhibits, and the clarification of the issues of fact and law. The commission may make informal disposition of any contested proceeding by stipulation, agreed settlement, consent order or default. (1949, c. 989, s. 1.)

§ 62-23. Hearings to be public; record of proceedings.—All hearings before the commission or its examiners shall be public, and shall be conducted in accordance with such general rules and regulations as the commission may prescribe. A full and complete record shall be kept of all proceedings had before the commission or its examiners, on any formal hearing, and all testimony shall be taken by a reporter appointed by the commission. Any party to a proceeding shall be entitled to a copy of the record upon the payment of the reasonable cost thereof as determined by the commission. (1949, c. 989, s. 1.)

§ 62-24. Complaints against public utilities.—Complaints may be made by the commission on its own motion or by any corporation or person, chamber of commerce, board of trade, labor organization, or any civic, commercial, mercantile, traffic, agricultural, or manufacturing association or organization, or any body politic or municipal corporation or any agency of the state of North Carolina or any electric membership corporation organized under chapter 291 of the Public Laws of 1935, as amended, having an interest in the subject matter of such complaint by petition or complaint in writing setting forth any act or thing done or omitted to be done by any public utility, including any rule, regulation or charge heretofore established or fixed by or for any public utility in violation of any provision of law or of any order or rule of the commission, or that any rate, charge, schedule, classification, rule, regulation or practice is unjust and unreasonable. Upon good cause shown and in compliance with the rules of the commission, the commission shall also allow any interested person or organization, having an interest in the subject matter of such complaint and authorized to file a complaint, to intervene in any pending proceeding. The commission, by regulation, may prescribe the form of complaints filed under this section, and may in its discretion order two or more complaints dealing with the same subject matter to be joined in one hearing and thereafter no motion shall be allowed for the misjoinder of causes of action or misjoinder or nonjoinder of parties. Unless the commission shall determine, upon consideration of the complaint or otherwise, and after notice to the complainant and after opportunity to be heard that no reasonable ground exists for an investigation of such complaint, the commission shall fix a time and place for hearing, after reasonable notice to the complainant and the utility complained of, which notice shall be not less than ten days before the time set for such hearing. (1949, c. 989, s. 1.)

Editor's Note.—Chapter 291 of Public Laws 1935, referred to in this section, was codified as §§ 117-6 to 117-27.

§ 62-25. Complaints by public utilities.—Any public utility shall have the right to complain on any of the grounds upon which complaints are allowed to be filed by other parties, and the same procedure shall be adopted and followed as in other cases, except that the complaint and notice of hearing shall be served by the commission upon such interested parties as it may designate. (1949, c. 989, s. 1.)

§ 62-26. Burden of proof; commission may make rules of practice.—In all proceedings instituted by the commission for the purpose of investigating any rate, charge, schedule, classification, rule, regulation or practice, the burden of proof shall be upon the carrier or public utility whose rate, charge, schedule, classification, rule, regulation or practice is under investigation to show that the same is just and reasonable. In all other proceedings the burden of proof shall be upon the complainant. Except as otherwise provided in this chapter, the utilities commission is authorized to formulate and promulgate rules of practice. (1949, c. 989, s. 1.)

Rules Must Not Be Contrary to Statutes. — It was held under former § 62-12, to which this section corresponds, that while the power of the legislature to delegate authority to an administrative agency of the state to prescribe rules and regulations for the due and orderly performance of its public functions is unquestioned, this did not authorize the formulation of rules contrary to the statute. State v. Atlantic Coast Line R. Co., 224 N. C. 283, 29 S. E. (2d) 912.

Challenging Validity of Rules by Appeal.—No procedure for appeals to the courts, from rules and regulations of the utilities commission, was prescribed by this article as it stood prior to the revision of 1949, hence it was held that the validity of such rules could not be challenged by appeal. State v. Atlantic Greyhound Corp., 224 N. C. 293, 29 S. E. (2d) 909; Utilities Comm. v. Atlantic Greyhound Corp., 224 N. C. 672, 32 S. E. (2d) 23. See § 62-26.10.

§ 62-26.1. Hearings by the commission, a commissioner or examiner.—Except as otherwise provided in this chapter, any matter requiring a hearing shall be heard and decided by the commission or shall, by written order of the commission, be referred to one of the commissioners or a qualified member of the commission staff as examiner for hearing, report and recommendation of an appropriate order or decision thereon. Subject to the limitations prescribed in this article, a commissioner or examiner, to whom a hearing has been referred by order of the commission, shall have all the rights, duties, powers and jurisdiction conferred by this chapter upon the commission. The commission, in its discretion, may direct any hearing by the commission or any commissioner or examiner to be held in such place or places within the state of North Carolina

as it may determine to be in the public interest and as will best serve the convenience of interested parties. Before any member of the commission staff enters upon the performance of duties as an examiner, he shall first take, subscribe to and file with the commission an oath similar to the oath required of members of the commission. (1949, c. 989, s. 1.)

§ 62-26.2. Recommended decision of a commissioner or examiner.—Any report made or order or decision recommended by a commissioner or examiner with respect to any matter referred to him for hearing shall be in writing and shall set forth separately his findings of fact and conclusions of law and shall be filed with the commission. Copy of such recommended order, report and findings shall be served upon the parties in interest who have appeared in the proceeding. (1949, c. 989, s. 1.)

§ 62-26.3. Rules of practice.—Prior to each decision or order by the commission in a proceeding initially heard by it and prior to any recommended decision or order of a commissioner or examiner, the parties shall be afforded an opportunity to submit, within the time prescribed by order entered in the cause, unless further extended by order of the commission for the consideration of the commission, commissioner, or examiner, as the case may be, proposed findings of fact and conclusions of law and brief. Within the time prescribed by the commissioner or examiner the parties shall be afforded an opportunity to file exceptions to his recommended decision or order and brief in support thereof, provided the time so fixed shall be not less than ten days from the receipt by such party of such recommended decision or order. The record shall show the ruling upon each requested finding and conclusion or exception. All final orders and decisions of the commission shall be sufficient in detail to enable the court on appeal to determine the controverted questions presented in the proceedings and shall include (1) findings and conclusions and the reasons or basis therefor upon all the material issues of fact, law, or discretion presented in the record, and (2) the appropriate rule, order, sanction, relief, or statement of denial thereof. In all contested proceedings in which a commissioner or examiner has filed a report, recommended decision or order to which exceptions have been filed by one or more parties to the proceeding, the commission, before making its final decision or order, shall afford the parties an opportunity for oral arguments. When no exceptions are filed within the time specified to a recommended decision or order, such recommended decision or order shall become the order of the commission and shall immediately become effective unless the order is stayed or postponed by the commission, provided, the commission may, on its own motion, review any such matter and take action thereon as if exceptions thereto had been filed. When exceptions are filed, as herein provided, it shall be the duty of the commission to consider the same and if sufficient reason appears therefor, to grant such review or make such order or hold or authorize such further hearing or proceeding in the premises as may be necessary or proper to carry out the purposes of this chapter. The commission, after review, upon the whole record, or as supplemented by a further hearing, shall decide the matter in controversy and make appropriate order or decision thereon. (1949, c. 989, s. 1.)

§ 62-26.4. Final orders and decisions; service; compliance.—A copy of every final order or decision under the seal of the commission, shall be served by registered mail upon the person, corporation, or municipal corporation against whom it runs or his attorney and notice thereof shall be given to the other parties to the proceeding or their attorney. Such order shall take effect and become operative as designated therein and shall continue in force either for a period which may be designated therein, or until changed or revoked by the commission. If an order cannot, in the judgment of the commission, be complied with within the time designated therein, the commission may grant and prescribe such additional time as in its judgment is reasonably necessary to comply with the order, and may, on application and for good cause shown, extend the time for compliance fixed in its order. (1949, c. 989, s. 1.)

§ 62-26.5. Powers of commission to rescind, alter or amend a prior order or decision.—The commission may at any time upon notice to the public utility affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any order or decision made by it. Any order rescinding, altering or amending a prior order or decision shall, when served upon the public utility affected, have the same effect as is herein provided for original orders or decisions. (1949, c. 989, s. 1.)

§ 62-26.6. Rehearing; right of appeal.—No party to a proceeding before the commission may appeal from any final order or decision of the commission unless he first petition for a rehearing as provided in this section. Within twenty days after the entry of any final order or decision, or within such time thereafter as may be fixed by the commission, by order made within such twenty days, any party aggrieved by such decision or order may file a petition for rehearing with the commission, which petition shall set forth specifically the ground or grounds on which the applicant considers said decision or order to be unlawful, unjust, unreasonable or unwarranted. Any application for a rehearing made ten days or more before the effective date of the order as to which a rehearing is sought shall be either granted or denied before such effective date, or the order shall then be suspended until such application is granted or denied. Any application for rehearing made within less than ten days before the effective date of the order as to which a rehearing is sought, and not granted within twenty days shall be deemed to be denied, unless the effective date of the order is extended for the period of the pendency of the application. If the application for rehearing is granted, the commission shall proceed to hear and decide the matter with all dispatch. The commission may decide the questions of law and fact raised by the petition to rehear upon the record previously made or order its record reopened and take additional evidence and make its decision upon the original record as amended. Within thirty days after the rendition of a decision on rehearing, if the decision fails to grant the full relief prayed

for in the petition, or within thirty days after a decision becomes final by reason of the failure of the commission to act, the petitioner may appeal to the superior court by filing written notice of such appeal with the commission and serving a copy thereof upon the original complainant, if any, and mailing a copy to each party to the proceeding to the addresses as they appear in the files of the commission in the proceeding. The failure of any party, other than the complainant and the commission, to be served with or to receive a copy of the notice of appeal shall not affect the validity or regularity of the appeal. Within ten days after the filing of the notice of appeal, unless the time be extended by order of the court or by consent of the parties, the commission shall transmit the entire record in the proceeding, or a copy thereof, certified under the seal of the commission, to the superior court of a county agreed upon by the parties, or in the absence of such agreement to the superior court of a county in which the business involved in the proceeding is conducted, or is proposed to be conducted, or in which the remedy or relief sought is to be applied or enforced. The judge holding the courts of the county to which the record is sent or the resident judge of the judicial district embracing said county shall hear and determine all matters arising on such appeal, as in this article provided, and may, in the exercise of discretion, remove the case to any other county. After final determination of the case on appeal, the clerk of the superior court shall return to the commission such records as were transmitted by it to such court, together with a certified copy of the decision of the court. (1949, c. 989, s. 1.)

Powers and Jurisdiction of Commission.—Under this article as it stood prior to the revision of 1949, it was held that, for the purpose of making investigations and conducting hearings, the legislature had constituted the North Carolina utilities commission a court of record, with all the powers and jurisdiction of a court of general jurisdiction as to all subjects embraced within the purview of the statute, for which procedure was prescribed and authorized, with the right in "any party affected thereby" to appeal "from all decisions and determinations made by the utilities commission." State v. Atlantic Greyhound Corp., 224 N. C. 293, 29 S. E. (2d) 909; Utilities Comm. v. Atlantic Greyhound Corp., 224 N. C. 672, 32 S. E. (2d) 23. See § 62-12.

Rehearing upon Exceptions.—Under this article as it stood prior to the 1949 revision, it was held that the utilities commission was not authorized to grant rehearings except in the manner prescribed by former § 62-20, to which this section corresponds. State v. Norfolk Southern Ry. Co., 224 N. C. 762, 32 S. E. (2d) 346.

Notice Mandatory.—Under former § 62-20, it was held that the statutory notice of an appeal by a railroad company from an order of the commission was mandatory, and could not be extended by the consent of the parties of record. State v. Norfolk Southern Ry. Co., 224 N. C. 762, 32 S. E. (2d) 346.

Right of Appeal as Affecting Motor Bus Act.—Since neither the Corporation Commission Act nor the Utilities Commission Act vests the commission with power to grant franchises to motor bus companies, it was said that the right of appeal contained in the Corporation Commission Act and redefined in former §§ 62-19 and 62-20 of the Utilities Commission Act had no relation to orders or decisions under the Motor Bus Act, except, perhaps, orders concerning rates and services. State v. Great Southern Trucking Co., 223 N. C. 687, 28 S. E. (2d) 201 (con. op.). See §§ 62-121.43 to 62-121.79.

Independent Action to Restrain Exercise of Rights Granted by Commission.—Plaintiffs instituted action against a competing carrier to restrain it from exercising rights given it by orders of the utilities commission amending its franchise. The orders were entered in proceedings to which plaintiffs were parties. It was held that plaintiffs had adequate remedy for the protection of their rights by appeal under former §§ 62-19 and 62-20, and judgment sustaining defendant's demurrer in the independent action was proper. Atlantic Greyhound Corp. v. North Carolina Utilities Comm., 229 N. C. 31, 47 S. E. (2d) 473.

§ 62-26.7. Appeal docketed; priority of trial.—The cause shall be entitled "State of North Carolina on relation of the Utilities Commission against (here insert name of appellant)". It shall be placed on the civil issue docket of such court and shall have precedence over other civil actions. (1949, c. 989, s. 1.)

§ 62-26.8. Parties on appeal.—In any appeal to the superior court, the complainant in the original complaint before the commission shall be a party to the record and each of the parties to the proceeding before the commission shall have a right to appear and participate in said appeal. (1949, c. 989, s. 1.)

The utilities commission is a party of record in a proceeding before it, and upon appeal the commission becomes the party plaintiff. State v. Norfolk Southern Ry. Co., 224 N. C. 762, 32 S. E. (2d) 346.

§ 62-26.9. No evidence admitted on appeal; remission for further evidence.—No evidence shall be received at the hearing on appeal but if any party shall satisfy the court that evidence has been discovered since the hearing before the commission that could not have been obtained for use at that hearing by the exercise of reasonable diligence, and will materially affect the merits of the case, the court may, in its discretion, remand the record and proceedings to the commission with directions to take such subsequently discovered evidence, and after consideration thereof, to make such order as the commission may deem proper, from which order an appeal shall lie as in the case of any other final order, from which order an appeal may be taken as provided in G. S. § 62-26.6, except that no additional petition for rehearing shall be required. (1949, c. 989, s. 1.)

§ 62-26.10. Record on appeal; extent of review.—On appeal the court shall review the proceeding without a jury in chambers or at term time and such review shall be confined to the record as certified by the commission to the court, except that in cases of alleged irregularities in procedure before the commission, not shown in the record, testimony thereon may be taken in the court. So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any commission action. The court may affirm or reverse the decision of the commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the commission's findings, inferences, conclusions or decisions are:

(a) in violation of constitutional provisions, or

(b) in excess of statutory authority or jurisdiction of the commission, or

(c) made upon unlawful proceedings, or

(d) affected by other errors of law, or

(e) unsupported by competent, material and substantial evidence in view of the entire record as submitted, or

(f) arbitrary or capricious.

The court shall also compel action of the commission unlawfully withheld or unlawfully or unreasonably delayed. In making the foregoing deter-

minations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error. The appellant shall not be permitted to rely upon any grounds for relief on appeal which were not set forth specifically in his petition for rehearing by the commission. Upon any appeal to the superior court, the rates fixed, or any rule, regulation, finding, determination, or order made by the commission under the provisions of this chapter, shall be prima facie just and reasonable. If on any appeal the court may determine that an issue is presented which, for constitutional reasons, must be submitted to a jury, the court may order a jury trial as to such issue. (1949, c. 989, s. 1.)

Prior to the 1949 revision of this article, on appeal to the superior court the trial was under the same rules and regulations applicable in other civil causes, save and except the prima facie effect to be given the decision or determination of the commission. State v. Great Southern Trucking Co., 223 N. C. 687, 28 S. E. (2d) 201.

Trial Was De Novo.—A provision of former § 62-21, to which this section corresponds, that on appeal the trial should be "under the same rules and regulations as are prescribed for the trial of other civil causes," was interpreted to mean that the trial should be de novo. State v. Great Southern Trucking Co., 223 N. C. 687, 28 S. E. (2d) 201, citing North Carolina Corp. Comm. v. Winston-Salem Southbound R. Co., 170 N. C. 560, 87 S. E. 785.

Decision of Commission Was "Prima Facie Just and Reasonable."—While on appeal from the utility commission to the superior court the provision of former § 62-21 was interpreted to mean that the trial should be ne dovo, the section also provided that the decision or determination of the commission "shall be prima facie just and reasonable." State v. Great Southern Trucking Co., 223 N. C. 687, 28 S. E. (2d) 201.

Affirmance of Decision of Commission. — Under former § 62-21, in the absence of a showing that the decision of the utilities commission was clearly unreasonable and unjust, appellee, on appeal to superior court, was entitled to an affirmance of the decision of the commission. State v. Carolina Coach Co., 224 N. C. 390, 30 S. E. (2d) 328.

§ 62-26.11. Relief pending review on appeal.—Pending judicial review, the commission is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, except as provided in G. S. § 62-136, the judge of the superior court is authorized to issue all necessary and appropriate process to postpone the effective date of any action by the commission or take such action as may be necessary to preserve status or rights of any of the parties pending conclusion of the proceedings on appeal. The court may require the applicant for such stay to post adequate bond as required by the court. (1949, c. 989, s. 1.)

§ 62-26.12. Appeal to supreme court.—Any party may appeal to the supreme court from the judgment of the superior court under the same rules and regulations as are prescribed by law for appeals, except that the utilities commission, if it shall appeal, shall not be required to give any undertaking or make any deposit to assure the cost of such appeal, and such court may advance the cause on its docket so as to give the same a speedy hearing. (1949, c. 989, s. 1.)

§ 62-26.13. Judgment on appeal enforced by mandamus.—In all cases in which, upon appeal, a judgment of the utilities commission is affirmed, in whole or in part, the appellate court shall embrace in its decree a mandamus to the appellant to put said order in force, or so much thereof as shall be affirmed, or the appellate court may make such other order as it deems appropriate. (1949, c. 989, s. 1.)

§ 62-26.14. Peremptory mandamus to enforce order, when no appeal.—If no appeal is taken from an order, decision or judgment of the utilities commission within the time prescribed by law and the utility, corporation, firm or person to which the order, decision or judgment is directed, fails to put the same in operation, as therein required, the utilities commission may apply to the judge riding the superior court district which embraces Wake county or to the resident judge of said district at chambers, or to the judge holding the superior court in any judicial district in which the business is conducted upon ten days' notice, for a peremptory mandamus upon said utility, corporation, firm or person for the putting in force of said order, decision or judgment; and if said judge shall find that the order of said commission was valid and within the scope of its powers, he shall issue such peremptory mandamus. An appeal shall lie to the supreme court in behalf of the utilities commission, or the defendant utility, corporation, firm or person, from the refusal or the granting of such peremptory mandamus. The remedy herein prescribed for enforcement of orders of the commission is in addition to other remedies prescribed by law. (1949, c. 989, s. 1.)

§ 62-26.15. Procedural provisions not repealed.—Nothing in this article shall be construed to repeal any of the procedural provisions of article 6B and article 7 of chapter 62 of G. S. (1949, c. 989, s. 4.)

Art. 3. Powers and Duties of the Commission.

§ 62-27. General powers of commission.

Applied in City Coach Co. v. Gastonia Transit Co., 227 N. C. 391, 42 S. E. (2d) 398.

Cited in Atlantic Constr. Co. v. Raleigh, 230 N. C. 365, 53 S. E. (2d) 165.

§ 62-30. Supervisory powers.

Fees and Charges Made by Municipality.—The North Carolina utilities commission has no jurisdiction to fix or supervise the fees and charges to be made by a municipality for connections with a city sewerage system, either within or without its corporate limits. Atlantic Constr. Co. v. Raleigh, 230 N. C. 365, 53 S. E. (2d) 165.

Applied in City Coach Co. v. Gastonia Transit Co., 227 N. C. 391, 42 S. E. (2d) 398.

Cited in Sinclair v. Moore Cent. R. Co., 228 N. C. 389, 45 S. E. (2d) 555, treated under §§ 62-46 and 62-63.

§ 62-37. Manner of enforcing above regulations.

Cited in Sinclair v. Moore Cent. R. Co., 228 N. C. 389, 45 S. E. (2d) 555, treated under § 62-46.

§ 62-39. To require transportation and transmission companies to maintain facilities.

Cited in Sinclair v. Moore Cent. R. Co., 228 N. C. 389, 45 S. E. (2d) 555, treated under § 62-46.

§ 62-46. To require trains to be run over railroads and connections at intersections.

Private Persons May Not Maintain Action to Force Continuing Operation. — Persons asserting unliquidated damages past and prospective resulting to them as consignees and consignors from the abandonment of the operation of a railroad may not in their individual capacities maintain an action to force continuing operation of the railroad by the appointment of a permanent operating receiver, since such damages, though possibly different in degree, are not different in kind from those sustained by the public generally, and since the power to require continuous operation

in the public interest of the state is vested exclusively by statute in the utilities commission. Sinclair v. Moore Cent. R. Co., 228 N. C. 389, 45 S. E. (2d) 555.

§ 62-48. To inspect railroads as to equipment and facilities, and to require repair.

Cited in Sinclair v. Moore Cent. R. Co., 228 N. C. 389, 45 S. E. (2d) 555, treated under § 62-46.

§ 62-54. To regulate crossings of telephone, telegraph, electric power lines and crossings of rights of way of railroads and other utilities by another utility.—The utilities commission upon its own motion or upon petition of any utility operating in this state and subject to regulation by the utilities commission under the provisions of this chapter or upon petition of the North Carolina Rural Electrification Authority on behalf of any electric membership corporation organized under chapter 291 of the Public Laws of 1935, as amended, or church or other place of public worship shall have the power and authority, after notice and hearing, to order the lines and right of way of any utility, railroad or electric membership corporation or church or other place of public worship to be crossed by any other utility or electric membership corporation, or church or other place of public worship. The commission, in all such cases, may require any telephone, telegraph or electric power lines making such crossings to be constructed and maintained in a safe manner and in accord with accepted and approved standards of safety so that the wires of one line will not fall upon the other or that the wires of any telephone, telegraph or electric power lines shall not fall upon the track and right of way of any railroad, and to prescribe the manner in which such construction shall be done. The commission shall also have the power and authority to discontinue and prohibit such crossings where they are unnecessary and can reasonably be avoided and to order changes in existing crossings when deemed necessary. In all cases in which the commission orders such crossings to be made or changed and when the parties affected cannot agree upon the cost of the construction of such crossings or the damages to be paid to one of the parties for the privilege of crossing the lines of such party, it shall be the duty of the commission to apportion the cost of such construction and to fix the damage if any to be paid to apportion the damages, if any, among the parties in such manner as may be just and equitable. Nothing in this section shall be construed to limit the right and power of the utilities commission in all cases in which it shall determine that any crossing of the lines of one utility over the lines of another has been rendered dangerous by the presence of high tension wire or wires of any electric power or light company to require the utility owning such high tension wire or wires to pay the entire cost of constructing and maintaining such crossing in a safe manner. This section shall not be construed to limit the right of eminent domain conferred upon railroads, utilities, electric membership corporations, churches and other places of public worship by the laws of this state or to limit the right and duty conferred by law with respect to crossing of railroads and highways or railroads crossing railroads, but the duty imposed and the remedy given by this section shall be in addition to other duties and remedies now prescribed by law. Any party shall have the right of appeal from any final order or decision or determination of the commission as provided by law for appeals from orders or decisions or final determinations of the utilities commission. (1913, c. 130, s. 1; 1933, c. 134, s. 8; 1941, c. 97; 1949, c. 1029, s. 1; C. S. 1052.)

Editor's Note.—The 1949 amendment rewrote this section. Chapter 291 of Public Laws 1935, referred to in the first sentence, was codified as §§ 117-6 to 117-27.

For a brief comment on the 1949 amendment, see 27 N. C. Law Rev. 493.

§ 62-56.1. To require extension or contraction of railroad switching limits.—1. Powers of Utilities Commission.—In addition to the powers and duties conferred upon the North Carolina utilities commission by chapter 62 of the General Statutes of North Carolina, the said North Carolina utilities commission is hereby authorized and empowered to require the extension or contraction of the boundaries of the switching limits of any railroad company at any point where the commission has information that a shipper or a prospective shipper is being discriminated against or subjected to unreasonable practices, or where it would be to the best interest of the shipper or prospective shipper to be included in the switching limits or excluded from the switching limits.

2. Application to Be Included within Switching Limits; Notice; Hearing and Order.—Upon the application of any shipper or prospective shipper to be included within the switching limits of a terminal or junction which is served by more than one railroad, the North Carolina utilities commission may cause notice to be given to the carrier or carriers serving such terminal. If upon investigation and hearing based upon such application the commission finds that such shipper or prospective shipper should be within or without the switching limits of the terminal or junction, then the commission is authorized and empowered to order the switching limits extended or contracted as the facts may warrant in each case.

3. Switching Limits to Be Observed Regardless of Character of Traffic.—The boundaries of switching limits which have been or may be established hereunder shall be the boundaries to be observed by the railroad company, carrier or carriers whether or not the traffic moving into said boundaries or out of said boundaries is either interstate or intrastate in character.

4. Penalties for Failure to Comply with Commission Orders, etc.—The failure or refusal of any railroad company, carrier or carriers to conform to or obey any decision, rule, regulation or order made by the commission under the provisions of this section shall subject said railroad company, carrier or carriers refusing or failing to comply herewith to a penalty of five hundred dollars ($500.00); and each day that such failure or refusal to conform to or obey any decision, rule, regulation or order of the commission shall subject said railroad company, carrier or carriers to a separate and distinct penalty of five hundred dollars ($500.00), the same to be certified to and prosecuted by the attorney general as provided in chapter 62 of the General Statutes of North Carolina. (1947, c. 1075, ss. 1-4.)

§ 62-63. To notify of violation of rules and institute suit.

Private Persons May Not Maintain Action to Force Continuing Operation of Railroad.—See note to § 62-46.

Art. 4. Public Utilities Act of 1933.

§ 62-65. Definitions.

Applied in City Coach Co. v. Gastonia Transit Co., 227 N. C. 391, 42 S. E. (2d) 398.

Cited in State v. Great Southern Trucking Co., 223 N. C. 687, 28 S. E. (2d) 201 (con. op.).

§ 62-74. Compelling efficient service, extension of services and facilities, additions and improvements.—Whenever the commission, after reasonable notice and a hearing had upon its own motion or upon complaint, finds that the service of any public utility is inadequate, insufficient or unreasonably discriminatory, or that persons are not served who may reasonably be served, or that additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility, or of any two or more public utilities ought reasonably to be made or that it is reasonable and proper that new structures should be erected to promote the security or convenience or safety of its patrons, employees and the public or to do any other act necessary to secure reasonably adequate service or facilities and to reasonably and adequately serve the public convenience and necessity, the commission shall enter and serve an order directing that such additions, extensions, repairs, improvements, or additional services or changes shall be made or effected within a reasonable time prescribed in the order; and if such order is directed to two or more public utilities, the utilities so designated shall be given such reasonable time as the commission may grant within which to agree upon the portion or division of the cost of such additions, extensions, repairs, improvements or changes which each shall bear. If at the expiration of the time limited in the order of the commission, the utility or utilities named in the order shall fail to file with the commission a statement that an agreement has been made for a division or apportionment of the cost or expense, the commission shall have the authority, after further hearing in the same proceedings to make an order fixing the portion of such cost or expense to be borne by each public utility affected and the manner in which the same shall be paid or secured. (1933, c. 307, s. 10; 1949, c. 1029, s. 2.)

Editor's Note.—The 1949 amendment rewrote this section. For brief comment on amendment, see 27 N. C. Law Rev. 493.

Cited in Sinclair v. Moore Cent. R. Co., 228 N. C. 389, 45 S. E. (2d) 555, treated under § 62-46.

§ 62-82. Assumption of certain liabilities and obligations to be approved by commission; refinancing of utility securities.

Furthermore, in the event of an application by a utility for the refinancing of its outstanding shares of stock by exchanging or redeeming such outstanding shares, the exchange or redemption of such shares of any dividend rate or rates, class or classes, may be made, in whole or in part, in the manner and to the extent approved by the commission, notwithstanding any provisions of law applicable to corporations in general: Provided, that the proposed transactions are found by the commission to be in the public interest and in the interest of consumers and investors, and provided that any redemption shall be at a price or prices, not less than par, and at a time or times, stated or provided for in the utility's charter or stock certificates. (1933, c. 307, s. 18; 1945, c. 656.)

Editor's Note.—The 1945 amendment added the above provision at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

§ 62-89. Not applicable to debentures of court receivers; notice to commission.

Receiver's Certificates Maturing More than Two Years After Date—Under this section it would seem that the legislature has withdrawn from the courts the right to authorize the issuance of receiver's certificates maturing more than two years after date of issue. Sinclair v. Moore Cent. R. Co., 228 N. C. 389, 45 S. E. (2d) 555.

§ 62-96. Abandonment and reduction of service.

Cited in Sinclair v. Moore Cent. R. Co., 228 N. C. 389, 45 S. E. (2d) 555, treated under § 62-46.

Art. 6. Motor Carriers Generally.

§§ 62-103 to 62-121: Repealed by Session Laws 1949, c. 1132, § 38.

Editor's Note.—The repealing section is codified as § 62-121.79.

Art. 6A. Insurance and Safety Regulations for Motor Vehicles Carrying Passengers for Hire.

§ 62-121.1. Insurance and approval of equipment prerequisite to transporting passengers for compensation.—No person, firm, partnership, or corporation, or the agent of either, shall transport persons for compensation in the state of North Carolina without having first filed with the North Carolina utilities commission such insurance as said commission may require, nor use any equipment in such transportation as has not been approved by the said commission for use in the transportation of persons. (1947, c. 1025, s. 1.)

Editor's Note.—For a brief discussion of this article, see 25 N. C. Law Rev. 384.

§ 62-121.2. Certificate required for issuance of license; cancellation of license.—The motor vehicle department shall not issue any license for use upon any motor vehicle for the transportation of persons for compensation until it shall have received from the North Carolina utilities commission a certificate that there has been filed with said commission such insurance as it may require, and that the equipment to be used is safe for the transportation of persons for compensation. When any license shall have been issued by the motor vehicle department, and the required insurance shall not then be effective, or the commission shall have found that the equipment being used is unsafe for the transportation of persons for compensation, upon certificate from the North Carolina utilities commission, the license shall be cancelled by the motor vehicle department. (1947, c. 1025, s. 2.)

§ 62-121.3. Exemptions from application of article.—This article shall not apply to motor vehicle carriers regulated under Article 6, Chapter 62, General Statutes of North Carolina, nor to taxi cabs, nor to motor vehicles used exclusively in the transportation of bona fide employees of an

industrial plant to and from the places of their regular employment. (1947, c. 1025, s. 3.)

§ 62-121.4. Fee for certificate.—The North Carolina Utilities Commission shall charge a fee of one dollar ($1.00) for each vehicle certified to the Motor Vehicle Department under the provisions of this article. (1947, c. 1025, s. 4.)

Art. 6B. Motor Carriers of Property.

§ 62-121.5. Declaration of policy.—Upon investigation, it has been determined that the transportation of property by motor carriers for compensation over the public highways of the state is a business affected with the public interest; that there has been shown a definite public need for the continuation and preservation of all existing motor carrier service, and to that end, it is hereby declared to be the policy of the state of North Carolina to preserve and continue all motor carrier transportation services now afforded this state, and to provide fair and impartial regulations of motor carriers of property in the use of the public highways in such a manner as to promote, in the interest of the public, the inherent advantages of highway transportation; to promote adequate, economical and efficient service to all of the communities of the state by motor carriers engaged in the transportation of property over the public highways for compensation; to encourage the establishment and maintenance of reasonable charges for transportation services without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to encourage and promote harmony among motor carriers of property, between such carriers and carriers of property by rail or water, and between all carriers of property and the shipping public; to foster a coordinated statewide motor carrier service; to conform with the national transportation policy and the federal motor carrier acts insofar as the same may be found practical and adequate for application to intrastate commerce; and to cooperate with other states and with the federal government in promoting and coordinating intrastate and interstate commerce by motor carriers. (1947, c. 1008, s. 1.)

Editor's Note.—The act from which this article was codified became effective on October 1, 1947. Its title purported to amend and restate the provisions of article 6 of this chapter insofar as the same applied to motor carriers of property. See § 62-121.79.

§ 62-121.6. Delegation of jurisdiction.—Full power and authority to administer and enforce the provisions of this article, and to make and enforce reasonable and necessary rules and regulations to that end, are hereby vested in the North Carolina utilities commission. (1947, c. 1008, s. 2.)

§ 62-121.7. Definitions.—When used in this article, unless the language or context clearly indicate that different meanings are intended:

(1) "State" means the state of North Carolina.

(2) "Commission" means the North Carolina utilities commission.

(3) "Person" means a corporation, individual, co-partnership, company, association, or any combination of individuals or organizations doing business as a unit, and includes any trustee, receiver, assignee, or personal representative thereof.

(4) "Highway" means any road or street in this state used by the public or dedicated or appropriated to public use.

(5) "Motor vehicle", "vehicle", or "truck" mean any vehicle, machine, tractor, semi-trailer, or any combination thereof determined by the commission, which is propelled or drawn by mechanical power and used upon the highways within the state in the transportation of property for compensation in intrastate commerce, but does not include vehicles designed for and used in the transportation of passengers by certificated passenger carriers in which baggage, mail, newspapers, and light express are transported at the same time with passengers.

(6) "Intrastate commerce" means the transportation of property by motor vehicle for compensation between points and over a route or within a territory wholly within the state, which transportation is not a part of a prior or subsequent movement to or from points outside of the state in interstate or foreign commerce, and includes all transportation of property by motor vehicles within the state for compensation in interstate or foreign commerce which has been exempted from regulation under the Interstate Commerce Act.

(7) The term "interstate commerce" means commerce between any place in a state and any place in another state or between places in the same state through another state, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water.

(8) The term "foreign commerce" means commerce between any place in the United States and any place in a foreign country, or between places in the United States through any foreign country, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water.

(9) "Intrastate operations" means the transportation of property by motor vehicle for compensation in intrastate commerce.

(10) "Service," "transportation," and "operations" means the transportation of property by a motor carrier over the highways of the state in intrastate commerce for compensation, and includes all services, vehicles, equipment, and facilities used in connection therewith.

(11) "Certificate" means a certificate of public convenience and necessity issued by the commission pursuant to the provisions of this article to a common carrier by motor vehicle.

(12) "Permit" means a permit issued by the commission pursuant to the provisions of this article to a contract carrier by motor vehicle.

(13) "Common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in intrastate commerce of property or any class or classes thereof for compensation, whether over regular or irregular routes.

(14) "Contract carrier by motor vehicle" means any person which, under individual contracts or agreements, engages in the transportation, other than transportation referred to in paragraph (13), by motor vehicle of property in intrastate commerce for compensation.

(15) "Motor carrier" includes both a common

carrier by motor vehicle and a contract carrier by motor vehicle.

(16) "Private carrier" means any person not included in definitions of common carrier or contract carrier, which transports in intrastate commerce in its own vehicle or vehicles property of which such person is the owner, leasee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or when such transportation is purely an incidental adjunct to some other established private business owned and operated by such person other than the transportation of property for compensation. (1947, c. 1008, s. 3.)

§ 62-121.8. Exemption from regulations.—(1) Nothing in this article shall be construed to include persons and vehicles engaged in one or more of the following services if not engaged at the time or at other times in the transportation of other property by motor vehicle for compensation: (a) transportation of property for or under the control of the United States government, or the state of North Carolina, or any political subdivision thereof, or any board, department or commission of the state, or any institution owned and supported by the state; (b) transportation in bulk of sand, gravel, dirt, debris, and other aggregates, or ready-mixed paving materials for use in street or highway construction or repair; (c) transportation of newspapers; (d) transportation of household effects of a family from one residence to another, or to or from a place of storage; (e) transportation of farm, dairy or orchard products from farm, dairy or orchard to warehouse, creamery, or other original storage or market; (f) transportation for and under the control of cooperative associations organized and operating under the Federal Agricultural Marketing Act, U. S. C. A. Title 12, section 1141(j), or under the State Cooperative Marketing Act, chapter 54, subchapter 5, General Statutes of North Carolina of 1943, as amended, or for any federation of such cooperative associations; provided, such federation possesses no greater powers or purposes than such cooperative associations; (g) transportation of livestock, or fish, including shellfish and shrimp, but not including manufactured products thereof; (h) transportation of raw products of the forest, including firewood, logs, crossties, stavebolts, pulpwood, and rough lumber, but not including manufactured products therefrom; (i) pickup, delivery, and transfer service for railroads, express companies, water carriers and motor carriers in connection with their respective line-haul services within the commercial zone of any city or town, as defined by the commission between their terminals and places of collection or delivery of freight; (j) transportation by a bona fide private carrier, as defined in this article; (k) transportation of property when the movement is within a municipality, or within contiguous municipalities, and within a zone adjacent to and commercially a part of such municipality or contiguous municipalities; provided, the commission shall have power, in its discretion, in any particular case, to fix the limits of any such zone; provided, further, that nothing herein shall be construed as an abridgment of the police powers of any municipality over such operation wholly within any such municipality; (l) transportation of any commodity anywhere of a character not hauled in the ordinary course of business by a common carrier by motor vehicle.

(2) Nothing in this section or in this article shall be so construed as to deny the commission the right at any time to require of any person or carrier purporting to operate under the provisions of this section satisfactory proof that such person or carrier is, in fact, so operating, and to that end the commission may conduct such investigations and make such orders as it deems necessary to enforce compliance with this section. (1947, c. 1008, s. 4.)

§ 62-121.9. General powers and duties of the commission.—The commission is hereby vested with power and it shall be its duty:

(1) To supervise and regulate common carriers by motor vehicle as provided in this article, and to that end the commission may establish reasonable requirements with respect to continuous and adequate service, uniform systems of accounts, records, reports and the preservation of records.

(2) To supervise and regulate contract carriers as provided in this article, and to that end the commission may establish reasonable requirements with respect to uniform systems of accounts, records, reports and the preservation of records, but shall not require, and nothing in this article shall be construed to require, contract carriers to become common carriers.

(3) To supervise and regulate motor carriers, as defined in this article, in all matters affecting the relationship between such carriers, or the relationship between such carriers and the shipping public, in any manner necessary to promote harmony among such carriers, safety and efficiency of service to the public.

(4) To determine, upon its own motion, or upon motion by a motor carrier, or any other party in interest, whether the transportation in intrastate commerce performed by any motor carrier or class of motor carriers lawfully engaged in operation in this state is in fact of such nature, character, or quantity as not substantially to affect or impair uniform regulation by the commission of transportation by motor carriers engaged in intrastate commerce in effectuating the transportation policy declared in this article. Upon so finding, the commission shall issue a certificate of exemption to such motor carrier or class of motor carriers which, during the period such certificate shall remain effective and unrevoked, shall exempt such carrier or class of motor carriers from compliance with the provisions of this article, and shall attach to such certificate such reasonable terms and conditions as the public interest may require. At any time after the issuance of any such certificate of exemption, the commission may by order revoke all or any part thereof, if it shall find that the transportation in intrastate commerce performed by the carrier or class of carriers designated in such certificate will be, or shall have become, or is reasonably likely to become, of such nature, character, or quantity as in fact substantially to affect or impair uniform regulation by the commission of intrastate transportation by motor carriers in effectuating the transportation policy declared in this article. Upon

revocation of any such certificate, the commission shall restore to the carrier or carriers affected thereby, without further proceedings, the authority, if any, to operate in intrastate commerce held by such carrier or carriers at the time the certificate of exemption pertaining to such carrier or carriers became effective. No certificate of exemption shall be denied, and no order of revocation shall be issued, under this paragraph, except after reasonable opportunity for hearing to interested parties.

(5) To administer, execute, and enforce all the provisions of this article, to make and enforce all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration.

(6) For the purpose of the administration of the provisions of this article, to inquire into the management of the business of motor carriers and into the management of the business of persons controlling, controlled by, or under common control with, motor carriers to the extent that such persons have a pecuniary interest in the business of one or more motor carriers, and the commission shall keep itself informed as to the manner and method in which the same are conducted, and may obtain from such carriers and persons such information as the commission deems necessary to carry out the provisions of this article.

(7) To prescribe qualifications and maximum hours of service of employees of carriers, and safety of operation and equipment, and in the interest of uniformity of intrastate and interstate rules and regulations applicable within the state of North Carolina with respect to maximum hours of service of truck drivers and/or their helpers, and safety of operation and equipment, the commission may adopt and enforce the rules and regulations adopted and promulgated by the Interstate Commerce Commission with respect thereto, insofar as the commission finds the same to be practical and advantageous for application in this state, and to that end the commission may avail itself of the assistance of any other agency of the state having special knowledge of such matters, to make such investigations and tests as may be deemed necessary to promote safety of equipment and operation of trucks upon the highways.

(8) To relieve the highways of all undue burdens and safeguard traffic thereon by promulgating and enforcing reasonable rules, regulations and orders designed and calculated to minimize the dangers attending transportation on the highways of all commodities including explosives or highly inflammable or combustible liquids, substances or gases.

(9) The commission may from time to time establish such just and reasonable classifications of groups of carriers included in the term "common carrier by motor vehicle" or contract carrier by motor vehicle as the special nature of the service performed by such carriers shall require; and such just and reasonable rules, regulations, and requirements, consistent with the provisions of this article, to be observed by such carriers so classified or grouped, as the commission deems necessary or desirable in the public interest.

(10) Upon complaint in writing to the commission by any person, organization, or body politic, or upon its own initiative without complaint, the commission may investigate whether any motor carrier has failed to comply with any provision of this article, or with any requirement pursuant thereto; and if the commission finds upon such investigation, after due notice and hearing, that the motor carrier has failed to comply with any such provision or requirement, the commission shall issue an appropriate order to compel the carrier to comply therewith. The commission may dismiss such complaint without investigation when it is of the opinion that the complainant does not state reasonable grounds for investigation and action on its part. (1947, c. 1008, s. 5.)

§ 62-121.10. Issuance of certificates in lieu of outstanding certificates.—It shall be the duty of the commission under this article to issue a certificate, as a matter of course and without further proceedings, to each carrier operating on the effective date of this article under a certificate heretofore issued by the commission, granting to each such carrier the same operating rights held and exercised by it under its outstanding certificate, including amendments thereto which have heretofore been or may hereafter be authorized by the commission on applications heard before the effective date of this article, and such certificate shall be deemed issued until prepared and actually issued by the commission, and in the issuance of such certificate to a regular route common carrier of general commodites, the commission may, in its discretion, delete therefrom any or all so-called "closed door operations"; that is to say, any or all restrictions appearing in such carrier's outstanding certificate which prohibit such carrier from receiving and/or delivering freight at certain points, or between certain points, along the highways over which such carrier is authorized to perform regular route operations; provided, that nothing herein shall relieve any common carrier by motor vehicle from compliance with the provisions of §§ 62-121.18, 62-121.19 and 62-121.20 within such reasonable time as the commission may require. (1947, c. 1008, s. 6.)

§ 62-121.11. Issuance of certificates to qualified common carriers by motor vehicle operating on and continuously since January 1st, 1947.—(1) Generally.—Subject to § 62-121.20, if any carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on January 1st, 1947, over the route or routes or within the territory for which application is made under this section, and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on January 1st, 1947, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the commission shall issue a certificate to such carrier without requiring further proof that public convenience and necessity will be served by such operation, if such carrier qualifies itself in the following manner.

(2) Duty of Carrier.—This section shall not apply to a carrier unless the carrier on or before the effective date of this article files with the commission on forms furnished by it an application under oath for a certificate under this section,

giving such information and in such detail as the commission may require, including the following:

(a) The full name and address of each person owning an interest in the transportation business of the carrier, the date when each such interest was acquired if subsequent to January 1st, 1946, and the name and address of the carrier's predecessor in interest, if any.

(b) A full and complete report of the operations of the carrier or its predecessor for one or more full calendar months duing the year 1946 chosen by the carrier as being representative of the nature, extent, and frequency of its continuous operations from January 1st, 1947, to the date the application is filed, which report for the month or months covered shall give the date of each intrastate shipment, the waybill number, or other identification number, if any, the point of origin, point of destination, a general description of the commodity transported, its weight and the transportation charges received.

(c) An accurate description of the highways over which and the termini between which the carrier, during the month or months covered by its report, performed regular route operations.

(d) An accurate description of the territory within which the carrier, during the month or months covered by its report, performed irregular route operations.

(e) The make, type, and carrying capacity of each truck or other units of equipment owned, operated by, or licensed in name of the carrier or predecessor in interest, for the years 1946 and 1947, respectively.

(f) A current balance sheet showing the assets, liabilities, and net worth of the carrier.

(3) Duty of Commission.—The commission shall issue a certificate to such carrier authorizing the regular route operations and the irregular route operations for which application is made, as provided in this section, but only to the extent that the commission finds from the application that the operations of such carrier were reasonably frequent and continuous throughout the period covered by the report of operations filed with and made a part of the application, and to that end the application so filed shall be received in evidence by the commission; provided, however, the commission may require such supporting or additional evidence as it may desire as to the verity of the facts stated in the application; provided, further, that the commission may deny such certificate upon a finding from competent evidence that the applicant is unfit, or otherwise disqualified, to perform the service for which application is made. In the event no protest is filed within such time as may be prescribed by the rules of the commission, the necessary findings may be made and certificate issued without a hearing. (1947, c. 1008, s. 7.)

§ 62-121.12. Issuance of permits to qualified contract carriers operating on and continuously since January 1st, 1947.—(1) Generally.—Subject to § 62-121.20, if any carrier or predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on January 1st, 1947, over the route or routes, or within the territory for which application is made under this section, and has so operated since that time, or, if engaged in furnishing seasonal service only, was in bona fide operation on January 1st, 1947, during the season ordinarily covered by its operations, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the commission shall issue a permit to such carrier, if such carrier qualifies itself in the following manner.

(2) Duty of Carrier.—This section shall not apply to a carrier unless the carrier on or before the effective date of this article files with the commission on forms furnished by it an application under oath for a permit under this section, giving such information and in such detail as the commission may require, including the following:

(a) The full name and address of each person owning an interest in the transportation business of the carrier.

(b) The number of consignors served as a contract carrier during the month of January, 1947, and the points of origin and points of destination from and to which the carrier operated during said month.

(c) The make, type and carrying capacity of each truck, or other unit of equipment, owned, operated by, or licensed in the name of the carrier during the month of January, 1947, and for each month thereafter up to the filing of said application.

(d) A true copy of each contract between the carrier and a shipper in force on the date of such application. (No such contract shall be open to inspection by other carriers or by the public, except by order of court or by order of the commission in a proceeding involving the violation of some law or valid regulation of the commission in which such contract becomes material.)

(e) A current balance sheet showing the assets, liabilities, and net worth of the carrier.

(3) Duty of Commission.—The commission shall issue a permit to such carrier, authorizing operations for which application is made under this section, but only to the extent that the commission finds from the application that the applicant was a bona fide contract carrier on January 1st, 1947, and has continued to so operate since that time, seasonal service and unavoidable interruptions considered; and to that end, the application so filed shall be received in evidence by the commission; provided, however, the commission may require such supporting or additional evidence as it may desire as to the verity of the facts stated in the application; provided further, that the commission may deny such permit upon a finding from competent evidence that the applicant is unfit or otherwise disqualified to perform the service for which application is made. In the event no protest is filed within such time as may be prescribed by the rules of the commission, the necessary findings may be made and permit issued without a hearing. (1947, c. 1008, s. 8.)

§ 62-121.13. Issuance of certificates to persons whose operations were abandoned because of service with the armed forces.—(1) Any person who was regularly engaged in the transportation business as a common carrier by motor vehicle subsequent to January 1st, 1940, of which such person was a principal owner, and who abandoned such transportation business because of entry into the armed forces of the United States, shall be entitled to a certificate, as provided in this sec-

tion, authorizing the operations so abandoned; provided, however, that such person on or before the effective date of this article files with the commission on forms furnished by it an application under oath for a certificate under this section, giving such information and in such detail as the commission may require, including the following:

(a) The full name and address of each person owning an interest in such transportation business at the time the same was abandoned and the interest owned by each.

(b) The date when such business was abandoned, the date when the applicant entered the armed forces, and the date when he was discharged therefrom.

(c) The names and addresses of the shippers served by the applicant during one or more full calendar months of the last year of regular operations chosen by the applicant as being fairly representative of the nature, extent, and frequency of his operations at the time the same were abandoned, and the points to and from which shipments were made by the applicant for the month or months so chosen.

(d) An accurate description of the highways over which, and the termini between which, such person performed regular route operations during the calendar month or months chosen, as herein provided.

(e) An accurate description of the territory within which such person performed irregular route operations during the calendar month or months chosen, as herein provided.

(f) The make, type, and carrying capacity of each truck or other unit of equipment owned, operated by, or licensed in the name of the applicant during the last month of regular operations.

(g) A current balance sheet showing the assets, liabilities and net worth of the applicant.

(2) If the commission finds from the application that the applicant abandoned a bona fide operation as a common carrier by motor vehicle under the conditions set out in this section, it shall issue a certificate to such applicant authorizing the regular route operations and the irregular route operations for which application is made, as provided in this section, but only to the extent that it finds from the application that the operations of such person were reasonably frequent and continuous throughout the period covered by its application, seasonal service and unavoidable interruptions considered, and to that end, the application so filed shall be received in evidence by the commission; provided, however, the commission may require such supporting or additional evidence as it may desire as to verity of the facts stated in the application; provided further, the commission may deny such certificate upon a finding from competent evidence that the applicant is unfit or otherwise disqualified to perform the service for which application is made. In the event no protest is filed within such time as may be prescribed by the rules of the commission, the necessary findings may be made and certificate issued without a hearing. (1947, c. 1008, s. 9.)

§ 62-121.14. Issuance of temporary authority.—Upon the filing of an application in good faith for a certificate, or permit, as provided in §§ 62-121.11, 62-121.12 and 62-121.13, respectively, the commission shall, pending its final decision on the application, issue to the applicant appropriate temporary authority to operate as a common carrier by motor vehicle, or as a contract carrier by motor vehicle, as the case may be, under such just and reasonable conditions and limitations as the commission deems necessary or desirable to impose in the public interest; provided, however, that pending such final decision on the application, the applicant shall comply with all the provisions of this article, and with the lawful orders, rules and regulations of the commission promulgated thereunder, applicable to holders of certificates or permits, and upon failure of an applicant so to do, after reasonable notice from the commission requiring compliance therewith in the particulars set out in the notice, and after hearing, the application may be dismissed by the commission without further proceedings, and temporary authority issued to such applicant revoked. (1947, c. 1008, s. 10.)

§ 62-121.15. Applications and hearings.—(1) Except as otherwise provided in §§ 62-121.8, 62-121.10 to 62-121.14 and 62-121.21, no person, after the effective date of this article, shall engage in the transportation of property in intrastate commerce or continue in any such operations until and unless such person shall have applied to and obtained from the commission a certificate or permit authorizing such operations, and it shall be unlawful for any person to knowingly or wilfully operate in intrastate commerce in any manner contrary to the provisions of this article, or of the rules and regulations of the commission made pursuant thereto.

(2) Applications for certificates or permits shall be made to the commission in writing on forms furnished by the commission, shall be verified under oath by the applicant, and shall contain such information and in such form and detail as the commission may require.

(3) Upon filing of an application for a certificate or a permit, the commission shall, within a reasonable time, fix a time and place for hearing such application not less than thirty (30) days after such filing. The commission shall cause notice of the time and place of hearing to be given by mail to the applicant, to other motor carriers holding certificates or permits and operating in the territory proposed to be served by the applicant, to other carriers who have pending applications to so operate, and to rail carriers operating in such territory.

(4) The notice herein required shall be given at least twenty (20) days prior to the date fixed for the hearing and shall be deemed given on the date the same is mailed, but failure of any such person, other than the applicant, to receive any such notice shall not, for that reason, invalidate the action of the commission in granting or denying such application.

(5) The commission may, by general regulation, require parties desiring to protest the granting an application for a certificate or permit, in whole or in part, to mail or deliver to the commission and to the applicant, within such reasonable time prior to the date fixed for the hearing as the commission may by regulation require,

written protests under oath specifying the grounds for such protests and the particular way and manner in which the protestant will be adversely affected by the granting of the application. If no such protest is filed within the time required, the commission may make the necessary findings and issue the certificate or permit without a hearing; otherwise, except as provided in §§ 62-121.10 to 62-121.13, no certificate or permit shall be issued, or amended so as to enlarge the scope of operations, without a hearing on an application therefor, as provided in this section.

(6) If the application is for a certificate, the burden of proof shall be upon the applicant to show to the satisfaction of the commission, (a) that a public demand and need exists for the proposed service in addition to existing authorized transportation service, and (b) that the applicant is fit, willing and able to properly perform the proposed service, consideration being given to the financial ability of the applicant to furnish adequate service and to the probability of its continuation.

(7) If the application is for a permit, the commission shall give due consideration to (a) whether the proposed operations conform with the definition in this article of a contract carrier, (b) whether the proposed operations will unreasonably impair the efficient public service of carriers operating under certificates and/or rail carriers, (c) whether the proposed service will unreasonably impair the use of the highways by the general public, (d) whether the applicant is fit, willing and able to properly perform the service proposed as a contract carrier, (e) whether the proposed operations will be consistent with the public interest and the transportation policy declared in this article, and (f) other matters tending to qualify or disqualify the applicant for a permit. (1947, c. 1008, s. 11.)

§ 62-121.16. Terms and conditions of certificate.—Any certificate issued under this article shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with repect to the operations of the carrier, the requirements established by the commission under § 62-121.9; provided, however, that no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require. (1947, c. 1008, s. 12.)

§ 62-121.17. Issuance of permits, terms and conditions.—The commission shall specify in the permit, or amendment thereto, the business of the contract carrier covered thereby and the scope thereof and shall attach to it, at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the commission under § 62-121.9; provided, that no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contacts within the scope of the permit, as the development of the business and the demands of the public may require. (1947, c. 1008, s. 13.)

§ 62-121.18. Issuance of partnership certificates or permits.—No certificate or permit shall be issued under this article to two or more individuals until such individuals shall have executed a partnership agreement and recorded the same in the office of the clerk of the superior court in the county in which the principal office of the partnership is located, a certified copy of which agreement shall be filed with the commission. (1947, c. 1008, s. 14.)

§ 62-121.19. The same or similar trade names prohibited.—No carrier holding or operating under a certificate or permit issued under this article shall adopt or use the same trade name used by any other such carrier, or the name of any corporation holding or operating under a certificate or permit, or any name so similar to the trade or corporate name of another carrier as to mislead or confuse the public, and the commission may, upon complaint, or upon its own initiative, in any such case require the carrier to discontinue the use of such trade name, preference being given to the carrier first adopting and using such trade name. (1947, c. 1008, s. 15.)

§ 62-121.20. Dual operations.—Unless, for good cause shown, the commission shall find, or shall have found, that both a certificate and a permit may be so held consistently with the public interest and with the transportation policy declared in this article:

(1) No person, or any person controlling, controlled by, or under common control with such person, shall hold a certificate as a common carrier authorizing operation for the transportation of property by motor vehicle over a route or within a territory, if such person, or any such controlling person, controlled person, or person under common control, holds a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory; and

(2) No person, or any person controlling, controlled by, or under common control with such person, shall hold a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over a route or within a territory, if such person, or any such controlling person, controlled person, or person under common control, holds a certificate as a common carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory. (1947, c. 1008, s. 16.)

§ 62-121.21. Emergency operating authority.—To meet unforeseen emergencies, the commission

may, upon its own initiative, or upon written request by any shipper, group or organization of shippers, department or agency of the state, or of any county, city or town, with or without a hearing, grant appropriate authority to any owner of a duly licensed truck or trucks, whether such owner holds a certificate or permit or not, to transport such commodities between such points, or within such area, during the period of the emergency and to the extent necessary to relieve the same, as the commission may fix in its order granting such authority: provided, the commission finds from such request, or from its own knowledge of conditions, that a real emergency exists and that relief to the extent authorized in its order is immediate, pressing and necessary in the public interest, and that the carrier so authorized has the necessary equipment and is willing to perform the emergency service as prescribed by the order. (1947, c. 1008, s. 17.)

§ 62-121.22. Deviation from regular route operations.—Any common carrier by motor vehicle, now or hereafter holding a certificate issued by the commission authorizing the transportation of general commodities over regular routes between fixed termini, may, under such rules and regulations as the commission may prescribe, (1) transport from origin to destination, over any convenient highway or highways, shipments in truckloads originating at or destined to points on the regular routes of such carrier, and (2) move shipments in truckloads from any point on its regular routes to any other points on its regular routes over any convenient highway or highways between such points, whether over the routes of another carrier or not, where such movement over the carrier's own routes would otherwise be unnecessarily circuitous. In no event shall the operation of empty equipment by any carrier over any route or highway be construed as a violation of the rights of any carrier. (1947, c. 1008, s. 18.)

§ 62-121.23. Security for protection of the public.—No certificate or permit shall be issued to any motor carrier, or remain in force until such carrier shall have procured and filed with the commission such security for the protection of the public as the commission shall by regulation determine and require. (1947, c. 1008, s. 19.)

§ 62-121.24. Joinder of causes of action.—To expedite the settlement of claims between shippers and motor carriers, a shipper may join in the same complaint against a motor carrier any number of claims for overcharges, or a motor carrier may join in the same complaint any number of claims against a shipper for undercharges, whether such claims arose at the same time or in the course of shipments at different times; provided, that each such claim shall be so identified that the same and the allegations with respect thereto may be distinguished from other claims so joined in the complaint, and in cases in which the right of subrogation may be invoked the judgment shall specify the amount of recovery, if any, on each such claim. For the purpose of jurisdiction under this section the aggregate amount set out in the complaint shall be deemed the sum in controversy. (1947, c. 1008, s. 20.)

§ 62-121.25. Notice of claims and limitations for loss, damage or injury to goods.—Any claim for loss, damage, or injury to goods while in the possession of a carrier shall be filed by the claimant with the adverse party in writing within nine (9) months after the same occurred, and the cause of action with respect thereto shall be deemed to have accrued at the expiration of thirty (30) days after the date of such notice, and action for recovery thereon may be commenced immediately thereafter or at any time within two (2) years after notice in writing shall have been given to the claimant by the adverse party that the claim or any part thereof specified in such notice has been disallowed, and neither party shall by any rule, regulation, contract, or otherwise, provide for a shorter time for filing such claims, or for commencing actions thereon than the periods set out in this section. (1947, c. 1008, s. 21.)

§ 62-121.26. Transfers of certificates and permits.—No certificate or permit issued under the provisions of this article shall be sold, assigned, pledged, transferred, or any rights thereunder leased, nor shall any merger or combination affecting any motor carrier be made through acquisition of control by stock purchases or otherwise, except after application to and written approval by the commission, and no sale of a certificate or permit shall be approved by the commission until the seller shall have filed with the commission a statement under oath of all debts and claims against the seller, of which such seller has any knowledge or notice, (a) for gross receipt taxes, use or privilege taxes, due or to become due the state, as provided in the current Revenue Act, (b) for wages due employees of the seller, other than salaries of officers, (c) for unremitted C. O. D. collections due shippers, (d) for loss or damages of goods transported, or received for transportation, (e) for overcharges on property transported, and (f) for interline accounts due other carriers, together with a bond payable to the state, executed by a surety company authorized to do business in the state, in an amount double the aggregate of all such debts and claims, conditioned upon the payment of the same within the amount of such bond as the amounts and validity of such debts and claims are established by agreement of the parties, or by judgment; provided, that it shall be considered against the policy declared in § 62-121.5 for any person to obtain a certificate or permit for the purpose of transferring the same to another, and an offer of such transfer within one year after the same was obtained shall be prima facie evidence that such certificate or permit was obtained for the purpose of sale. (1947, c. 1008, s. 22.)

§ 62-121.27. Suspension or revocation of certificates and permits.—(1) Certificates and permits issued under the provisions of this article shall be effective from the date issued unless otherwise specified therein, and shall remain in effect until terminated under the terms thereof, or until suspended or revoked as herein provided.

(2) Any certificate or permit may be suspended or revoked, in whole or in part, in the discretion of the commission, upon application of the holder thereof; or may be suspended or revoked, in whole or in part, upon complaint, or upon the commission's own initiative, after notice and hearing, for willful failure to comply with any

provision of this article, or with any lawful order, rule, or regulation of the commission promulgated thereunder, or with any term, condition, or limitation of such certificate or permit; provided, however, that any such certificate or permit may be suspended by the commission upon notice to the holder or lessee thereof without a hearing for any one or more of the following causes:

(a) For failure to provide and keep in force at all times security for the protection of the public as required in § 62-121.23.

(b) For failure to file and keep on file with the commission applicable tariffs or schedules of charges as required in §§ 62-121.29 and 62-121.30.

(c) For failure to pay any gross receipt taxes, use or privilege taxes, due the state of North Carolina within thirty (30) days after demand in writing from the agency of the state authorized by law to collect the same; provided, that this paragraph shall not apply to instances in which there is a bona fide controversy as to tax liability.

(d) For failure for a period of sixty (60) days after execution to pay any final judgment rendered by a court of competent jurisdiction against any holder or lessee of a certificate or permit for any debt or claim specified in (a) to (f), inclusive, in § 62-121.26.

(e) For failure to begin operations as authorized by the commission within the time specified by order of the commission, or for suspension of authorized operations for a period of thirty (30) days without the written consent of the commission. (1947, c. 1008, s. 23.)

§ 62-121.28. Rates and charges of common carriers.—(1) It shall be the duty of every common carrier by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in intrastate commerce; to establish, observe, and enforce just and reasonable regulations and practices relating thereto, and to the manner and method of presenting, marking, packing and delivering property for transportation in intrastate commerce, the facilities for such transportation, and all other matters relating to or connected with the transportation of property in intrastate commerce.

(2) Except under special conditions and for good cause shown every common carrier by motor vehicle authorized to transport general commodities over regular routes shall establish reasonable through routes and joint rates, charges, and classifications with other such common carriers by motor vehicle, and, with the approval of the commission, may do so with irregular route common carriers by motor vehicle, common carriers by railroad and/or express and/or water. In case of joint rates and charges between common carriers of any class or kind whatsoever, it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein, which shall not unduly prefer or prejudice any of such participating carriers. Upon investigation and for good cause, the commission may, in its discretion, prohibit the establishment of joint rates or service.

(3) All charges made for services rendered or to be rendered by any common carrier by motor vehicle in the transportation of property in intrastate commerce or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service, or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in intrastate commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, place, locality, territory, or description of traffic, in any respect whatsoever, or to subject any particular person, place, locality, territory, or description of traffic, to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever; provided, however, that this paragraph shall not be construed to apply to discriminations, prejudices, or disadvantage to the traffic of any other carrier of whatever description.

(4) Any person, organization, or body politic may make complaint in writing to the commission that any such rate, charge, classification, rule, regulation, or practice in effect or proposed to be put into effect, is or will be in violation of this section or of § 62-121.29. Whenever, after hearing, upon complaint or in an investigation on its own initiative, the commission shall be of the opinion that any individual or joint rate or charge, demanded, charged, or collected by any common carrier or carriers by motor vehicle, or by any such common carrier or carriers in conjunction with any common carrier or carriers by railroad and/or express and/or water, for transportation of property in intrastate commerce, or any classification, rule, regulation, or practice whatsoever of such carrier or carriers affecting such rate or charge or the value of the service thereunder, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the lawful rate or charge, or the minimum or maximum, or the minimum and maximum rate or charge thereafter to be observed, or the lawful classification, rule, regulation, or practice thereafter to be made effective.

(5) Whenever, after hearing, upon complaint or upon its own initiative the commission is of the opinion that the divisions of joint rates or charges applicable to the transportation of property in intrastate commerce by common carriers by motor vehicle or by such carriers in conjunction with common carriers by railroad and/or express and/or water, are or will be unjust, unreasonable, inequitable or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers or any of them or otherwise established), the commission shall by order prescribe the just, reasonable, and equitable division thereof to be received by the several carriers; and in cases where the joint rate or charge was established pursuant to a finding or order of the commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable or unduly preferential or prejudicial, the commission may also by order determine what would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers and require adjustment to be made in accordance therewith.

The order of the commission may require the adjustment of divisions between the carriers in accordance with the order from the date of filing the complaint or entry of order of investigation or such other dates subsequent as the commission finds justified, and in the case of joint rates prescribed by the commission, the order as to divisions may be made effective as a part of the original order.

(6) Whenever there shall be filed with the commission any schedule stating a new individual or joint rate, charge, or classification for the transportation of property in intrastate commerce by any common carrier or carriers by motor vehicle or by any such carrier or carriers in conjunction with the common carrier or carriers by railroad and/or express and/or water, or any rule, regulation, or practice affecting such rate or charge or the value of the service thereunder, the commission is hereby authorized and empowered upon complaint of any interested party or upon its own initiative at once, and, if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate or charge, or such rule, regulation, or practice, and pending such hearing and the decision thereon, the commission, by filing such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reason for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate or charge, or such rule, regulation, or practice, but not for a longer period in the aggregate than 180 days beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the rate, charge, classification, rule, regulation, or practice goes into effect, the commission may make such order with respect thereto as would be proper in a proceeding instituted after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate or charge or classification, rule, regulation, or practice shall go into effect at the end of such period. At any hearing involving a change in the rate, charge, or classification, or any rule, regulation, or practice, the burden of proof shall be upon the carrier to show that the proposed changed rate, charge, classification, rule, regulation, or practice is just and reasonable.

(7) In the exercise of its power to prescribe just and reasonable rates and charges for the transportation of property in intrastate commerce by common carriers by motor vehicle, and classifications, regulations, and practices relating thereto, the commission shall give due consideration, among other factors, to the inherent advantages of transportation by such carriers; to the effect of rates upon movement of traffic by the carrier or carriers for which rates are prescribed; to the need in the public interest of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service; to the need of revenues sufficient to enable such carriers under honest, economical, and efficient management to provide such service.

(8) Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith. (1947, c. 1008, s. 24.)

§ 62-121.29. Tariffs of common carriers.—(1) Every regular route common carrier of general commodities by motor vehicle shall file with the commission, and print, and keep open for public inspection tariffs showing all rates and charges for the transportation of property in intrastate commerce, and all services in connection therewith between points on its own routes and between points on its own routes and points on the routes of other such common carriers, and if it establishes joint rates and charges with common carriers by railroad and/or express and/or water, then in that event it shall include in its tariffs so filed such joint rates and charges.

(2) Every irregular route common carrier by motor vehicle shall file with the commission, and print, and keep open for public inspection tariffs showing all rates and charges for the transportation of property in intrastate commerce between points within the area of its authorized operations, and if it establishes joint rates and charges with common carriers by railroad and/or express and/or water, then in that event it shall include in its tariffs so filed such joint rates and charges between points within the area of its own authorized operation and points on the line or route of such carriers by railroad and/or express and/or water.

(3) The tariffs required by this section or permitted thereunder with respect to joint rates and charges with common carriers by railroad and/or express and/or water shall be stated in lawful money of the United States and shall be published, filed, and posted in such form and manner and shall contain such information as the commission by regulation may prescribe; and the commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations. Any tariff so rejected by the commission shall be void and its use shall be unlawful.

(4) No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property in intrastate commerce or for any service in connection therewith between points enumerated in such tariff than the rates, and charges, specified in the tariffs in effect at the time; and no such carrier shall refund or remit in any manner or by any device, directly or indirectly, or through any agent or otherwise, any portion of the rates or charges so specified, or extend to any person any privilege or facilities for transportation of property in intrastate commerce except such as are specified in its tariffs.

(5) No change shall be made in any rate, charge, or classification, or any rule, regulation, or practice affecting such rate, charge or classification, or the value of the service thereunder, specified in any effective tariff of a common carrier by motor vehicle except after 30 days' notice of the proposed change filed and posted in accordance with this section. Such notice shall plainly state the change proposed to be made and the time when such change will take effect. The commission may, in its discretion and for good cause shown, allow such change upon notice less

than that herein specified or modify the requirements of this section with respect to the posting and filing of tariffs, either in specific instances or by general order applicable to special or peculiar circumstances or conditions.

(6) No common carrier by motor vehicle, unless otherwise provided by this article, shall engage in the transportation of property in intrastate commerce, unless the rates and charges upon which the same are transported by such carrier have been filed and published in accordance with the provisions of this article. (1947, c. 1008, s. 25.)

§ 62-121.30. Schedules of contract carriers.—(1) It shall be the duty of every contract carrier to establish and observe reasonable minimum rates and charges for any service rendered or to be rendered in the transportation of property or in connection therewith, and to establish and observe reasonable regulations and practices to be applied in connection with said reasonable minimum rates and charges. It shall be the duty of every contract carrier to file with the commission, publish, and keep open for public inspection, in the form and manner prescribed by the commission, schedules containing the minimum rates or charges of such carrier actually maintained and charged for the transportation of property in intrastate commerce, and any rule, regulation, or practice affecting such rates or charges and the value of the service thereunder. No such contract carrier, unless otherwise provided by this article, shall engage in the transportation of property in intrastate commerce unless the minimum charges for such transportation by said carrier have been published, filed, and posted in accordance with the provisions of this article. No reduction shall be made in any such charge either directly or by means of any change in any rule, regulation, or practice affecting such charge or the value of service thereunder, except after 30 days' notice of the proposed change filed in the aforesaid form and manner, but the commission may, in its discretion and for good cause shown, allow such change upon less notice, or modify the requirements of this paragraph with respect to posting and filing of such schedules, either in particular instances or by general order applicable to special or peculiar circumstances or conditions. Such notice shall plainly state the change proposed to be made and the time when such change will take effect. No such carrier shall demand, charge, or collect a less compensation for such transportation than the charges filed in accordance with this paragraph, as affected by any rule, regulation, or practice so filed, or as may be prescribed by the commission from time to time, and it shall be unlawful for any such carrier, by the furnishing of special services, facilities, or privileges, or by any other device whatsoever, to charge, accept, or receive less than the minimum charges so filed or prescribed; provided, that any such carrier or carriers, or any class or group thereof, may apply to the commission for relief from the provisions of this paragraph, and the commission may, after hearing, grant such relief to such extent and for such time, and in such manner as in its judgment is consistent with the public interest and the transportation policy declared in this article.

(2) Whenever, after hearing, upon complaint or upon its own initiative, the commission finds that any minimum rate or charge of any contract carrier by motor vehicle, or any rule, regulation, or practice of any such carrier affecting such minimum rate or charge, or the value of the service thereunder, for the transportation of property or in connection therewith, contravenes the transportation policy declared in this article, or is in contravention of any provision of this article, the commission may prescribe such just and reasonable minimum rate or charge, or such rule, regulation, or practice as in its judgment may be necessary or desirable in the public interest and to promote such policy and will not be in contravention of any provision of this article. Such minimum rate or charge, or such rule, regulation, or practice, so prescribed by the commission, shall give no advantage or preference to any such carrier in competition with any common carrier by motor vehicle subject to this article, which the commission may find to be undue or inconsistent with the public interest and the transportation policy declared in this article, and the commission shall give due consideration to the cost of the services rendered by such carriers, and to the effect of such minimum rate or charge, or such rule, regulation, or practice, upon the movement of traffic by such carriers. All complaints shall state fully the facts complained of and the reasons for such complaint and shall be made under oath.

(3) Whenever there shall be filed with the commission by any such contract carrier any schedule stating a charge for a new service or a reduced charge, directly or by means of any rule, regulation, or practice, for the transportation of property in intrastate commerce, the commission is hereby authorized and empowered upon complaint of interested parties or upon its own initiative at once and, if it so orders, without answer or other formal pleading by the interested party, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such charge, or such rule, regulation, or practice, and pending such hearing and the decision thereon the commission, by filing with such schedule and delivering to the carrier affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such charge, or such rule, regulation, or practice, but not for a longer period in the aggregate than 180 days beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the charge, or rule, regulation, or practice goes into effect, the commission may make such order with reference thereto as would be proper in a proceeding instituted after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change in any charge or rule, regulation, or practice shall go into effect at the end of such period. The rule as to burden of proof specified in § 62-121.28, (6) shall apply to this paragraph. (1947, c. 1008, s. 26.)

§ 62-121.31. Liability for damage to property in transit.—Every common carrier by motor vehicle receiving property for transportation in intrastate commerce shall issue a bill of lading therefor, and shall be liable to the lawful holder thereof for

any loss, damage, or injury to such property caused by it, or by any carrier participating in the haul when transported on a through bill of lading, and any such carrier delivering said property so received and transported shall be liable to the lawful holder of said bill of lading or to any party entitled to recover thereon for such loss, damage, or injury, notwithstanding any contract or agreement to the contrary; provided, however, the commission may, by regulation or order, authorize or require any such common carrier, to establish and maintain rates related to the value of shipments declared in writing by the shipper, or agreed upon as the release value of such shipments; such declaration or agreement to have no effect other than to limit liability and recovery to an amount not exceeding the value so declared or released, in which case, any tariff filed pursuant to such regulation or order shall specifically refer thereto; provided further, that nothing in this section shall deprive any lawful holder of such bill of lading of any remedy or right of action which such holder has under existing law; provided further, that the carrier issuing such bill of lading, or delivering such property so received and transported, shall be entitled to recover from the carrier on whose route the loss, damage, or injury shall have been sustained, the amount it may be required to pay to the owners of such property. (1947, c. 1008, s. 27.)

§ 62-121.32. Accounts, records and reports.— (1) The commission is hereby authorized to require annual, periodical, or special reports from all motor carriers, and lessors (as defined in this section), to prescribe the manner and form in which such reports shall be made, and to require from such carriers, and lessors, specific and full, true, and correct answers to all questions upon which the commission may deem information to be necessary. Such annual reports shall give an account of the affairs of the carrier, or lessor, in such form and detail as may be prescribed by the commission. The commission may also require any motor carrier to file with it a true copy of any contract, agreement, or arrangement between such carrier and any other carrier or person in relation to any traffic affected by the provisions of this article. The commission shall not, however, make public any contract, agreement, or arrangement between a contract carrier and a shipper, or any of the terms or conditions thereof, except as a part of the record in a formal proceeding where it considers such action consistent with the public interest; provided, that if it appears from an examination of any such contract that it fails to conform to the published schedule of the contract carrier as required by § 62-121.30, the commission may, in its discretion, make public such of the provisions of the contract as the commission considers necessary to disclose such failure and the extent thereof.

(2) Said annual reports shall contain all the required information for the period of twelve months ending on the thirty-first day of December in each year, unless the commission shall specify a different date, and shall be made out under oath and filed with the commission at its office in Raleigh within three months after the close of the year for which the report is made, unless additional time be granted in any case by the commission. Such periodical or special reports as may be required by the commission under paragraph (1) hereof shall also be under oath, whenever the commission so requires.

(3) The commission may prescribe for motor carriers the classes of property for which depreciation charges may properly be included under operating expenses, and the rate or rates of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The commission may, when it deems necessary, modify the classes and rates so prescribed. When the commission shall have exercised its authority under the foregoing provisions of this paragraph, motor carriers shall not charge to operating expenses any depreciation charges on classes of property other than those prescribed by the commission, or charge with respect to any class of property a rate of depreciation other than that prescribed therefor by the commission, and no such carrier shall include under operating expenses any depreciation charge in any form whatsoever other than as prescribed by the commission.

(4) The commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by motor carriers, and lessors, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys; and it shall be unlawful for such carriers, and lessors, to keep any accounts, records, and memoranda contrary to any rules, regulations, or orders of the commission with respect thereto. The commission may issue orders specifying such operating, accounting, or financial papers, records, books, blanks, stubs, correspondence, or documents of motor carriers, or lessors, as may after a reasonable time be destroyed, and prescribing the length of time they shall be preserved. The commission or its duly authorized special agents, accountants, or examiners shall at all times have access to and authority, under its order, to inspect and examine any and all lands, buildings, or equipment of motor carriers, and lessors; and shall have authority to inspect and copy any and all accounts, books, records, memoranda, correspondence, and other documents of such carriers, and lessors, and such accounts, books, records, memoranda, correspondence, and other documents of any person controlling, controlled by, or under common control with any such carrier, as the commission deems relevant to such person's relation to or transactions with such carrier. Motor carriers, lessors, and persons shall submit their accounts, books, records, memoranda, correspondence, and other documents for the inspection and copying authorized by this paragraph, and motor carriers, and lessors, shall submit their lands, buildings, and equipment for examination and inspection, to any duly authorized special agent, accountant, auditor, inspector, or examiner of the commission upon demand and the display of proper credentials.

(5) As used in this section, the words "keep" and "kept" shall be construed to mean made, prepared, or compiled, as well as retained; the term "lessor" means a lessor of any right to operate as a motor carrier; and the term "motor carrier," or "lessor," includes a receiver or trustee

of any such motor carrier, or lessor. (1947, c. 1008, s. 28.)

§ 62-121.33. Orders, notices and service of process.—(1) It shall be the duty of every motor carrier operating under a certificate or permit issued under the provisions of this article to file with the commission a designation in writing of the name and post office address of a person upon whom or which service of notices or orders may be made under this article. Such designation may from time to time be changed by like writing similarly filed. Service of notices or orders in proceedings under this article may be made upon a motor carrier by personal service upon it or upon the person so designated by it, or by registered mail, return receipt requested, addressed to it or to such person at the address filed. In proceedings before the commission involving the lawfulness of rates, charges, classifications, or practices, service of notice upon the person or agent who has filed a tariff or schedule in behalf of such carrier shall be deemed to be due and sufficient service upon the carrier.

(2) Except as otherwise provided in this article, all orders of the commission shall take effect within such reasonable time as the commission may prescribe and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the commission, or be suspended or set aside by a court of competent jurisdiction. (1947, c. 1008, s. 29.)

§ 62-121.34. Unlawful operation.—(1) Any person, whether carrier, or any officer, employee, agent or representative thereof, knowingly and willfully violating any provisions of this article or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate or permit, for which a penalty is not otherwise herein provided, shall be guilty of a misdemeanor, and upon conviction thereof be fined not more than $100.00 for the first offense and not more than $500.00 for any subsequent offense.

(2) If any motor carrier operates in violation of any provision of this article (except as to the reasonableness of rates or charges and the discriminatory character thereof), or of any rule, regulation, requirement, or order thereunder, or of any term or condition of any certificate or permit, the commission or its duly authorized agent may apply to the resident superior court judge of any judicial district where such motor carrier operates, or to any superior court judge holding court in any such judicial district, for the enforcement of such provision of this article, or of such rule, regulation, requirement, order, term, or condition; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such carrier or its officers, agents, employees, and representatives from further violation of such provision of this article or of such rule, regulation, requirement, order, term, or condition and enjoining upon it or them obedience thereto.

(3) Any person, whether carrier, shipper, consignee, or any officer, employee, agent, or representative thereof, who shall knowingly offer, grant, or give or solicit, accept, or receive any rebate, concession, or discrimination in violation of any provision of this article, or who by means of any false statement or representation, or by the use of any false or fictitious bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, deposition, lease, or bill of sale, or by any other means or device, shall knowingly and willfully assist, suffer or permit any person or persons, natural or artificial, to obtain transportation of property subject to this article for less than the applicable rate, or charge, or who shall knowingly and willfully by any such means or otherwise fraudulently seek to evade or defeat regulation as in this article provided for motor carriers, shall be deemed guilty of a misdemeanor and upon conviction thereof be fined not more than $500.00 for the first offense and not more than $2,000.00 for any subsequent offense.

(4) It shall be unlawful for any special agent, accountant, auditor, inspector, or examiner to knowingly and willfully divulge any fact or information which may come to his knowledge during the course of any examination or inspection made under authority of § 62-121.32, except as he may be directed by the commission or by a court or judge thereof.

(5) It shall be unlawful for any motor carrier engaged in intrastate commerce or any officer, receiver, trustee, lessee, agent, or employee of such carrier, or for any other person authorized by such carrier, to receive information, knowingly to disclose to, or permit to be acquired by any person other than the shipper or consignee without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such motor carrier for such transportation, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor; and it shall also be unlawful for any person to solicit or knowingly receive any such information which may be so used.

(6) Nothing in this article shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any court, or to any officer or agent of the state or of the government of the United States, in the exercise of his power, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crimes or to another carrier, or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers.

(7) Any motor carrier, or other person, or any officer, agent, employee, or representative thereof, who shall willfully fail or refuse to make a report to the commission as required by this article, or to make specific and full, true, and correct answer to any question within thirty days from the time it is lawfully required by the commission so to do, or to keep accounts, records, and memoranda in the form and manner prescribed by the commission, or shall knowingly and willfully falsify, destroy, mutilate, or alter any such report, account, record, or memorandum, or shall knowingly and willfully neglect or fail to

make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of the carrier, or person required under this article to keep the same, or shall knowingly and willfully keep any accounts, records, or memoranda contrary to the rules, regulations, or orders of the commission with respect thereto, shall be deemed guilty of a misdemeanor and upon conviction thereof be subject for each offense to a fine of not more than $5,000.00. As used in this subsection the words "kept" and "keep" shall be construed to mean made, prepared, or compiled, as well as retained. (1947, c. 1008, s. 30.)

§ 62-121.35. Collection of rates and charges.—No common carrier by motor vehicle shall deliver or relinquish possession at destination of any freight transported by it in intrastate commerce until all tariff rates and charges thereon have been paid, except under such rules and regulations as the commission may from time to time prescribe to govern the settlement of all such rates and charges, including rules and regulations for weekly or monthly settlement, and to prevent unjust discrimination or undue preference or prejudice; provided, that the provisions of this section shall not be construed to prohibit any such carrier from extending credit in connection with rates and charges on freight transported for the United States, for any department, bureau, or agency thereof, or for the state, or political subdivision thereof. Where any common carrier by motor vehicle is instructed by a shipper or consignor to deliver property transported by such carrier to a consignee other than the shipper or consignor, such consignees shall not be legally liable for transportation charges in respect of the transportation of such property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and had no beneficial title in the property, and (b) prior to delivery of the property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of the property. In such cases the shipper and consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner shall be liable for such additional charges, irrespective of any provisions to the contrary in the bill of lading or in the contract under which the shipment was made. If the consignee has given to the carrier erroneous information as to who is the beneficial owner, such consignee shall himself be liable for such additional charges, notwithstanding the foregoing provisions of this section. On shipments reconsigned or diverted by an agent who has furnished the carrier with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. (1947, c. 1008, s. 31.)

§ 62-121.36. Allowance to shippers for transportation services.—If the owner of property transported under the provisions of this article directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in the tariffs or schedules filed in the manner provided in this article and shall be no more than is just and reasonable; and the commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order. (1947, c. 1008, s. 32.)

§ 62-121.37. Embezzlement of C. O. D. shipments.—Property received by any motor carrier to be transported in intrastate commerce and delivered upon collection on such delivery and remittance to the shipper of the sum of money stated in the shipping instructions to be collected and remitted to the shipper, and the money collected upon delivery of such party, is hereby declared to be held in trust by any carrier having possession thereof or the carrier making the delivery or collection, and upon failure of any such carrier to account for the property so received, either to the shipper to whom the collection is payable or the carrier making delivery to any carrier handling the property or making the collection, within fifteen (15) days after demand in writing by the shipper, or carrier, or upon failure of the delivering carrier to remit the sum so directed to be collected and remitted to the shipper, within fifteen (15) days after collection is made, shall be prima facie evidence that the property so received, or the funds so received, has been willfully converted by such carrier to its own use, and the carrier so offending shall be guilty of a felony and upon conviction shall be punished by fine or imprisonment, or both, in the discretion of the court, and such carrier may be indicted, tried, and punished in the county in which such shipment was delivered to the carrier, or in any other county into or through which such shipment was transported by such carrier. (1947, c. 1008, s. 33.)

§ 62-121.38. Evidence; joinder of surety.—No report by any carrier of any accident arising in the course of the operations of such carrier, made pursuant to any requirement of the commission, and no report by the commission of any investigation of any such accident, shall be admitted as evidence, or used for any other purpose in any suit or action for damages growing out of any matter mentioned in such report or investigation; nor shall the discharge by any carrier of any truck driver or other employee after any such accident be offered or admitted in evidence for any purpose in any suit or action against such carrier for damages arising out of any such accident; nor shall any insurance company or surety executing any insurance policy, bond, or other security for the protection of the public, as provided in § 62-121.23, or as provided in § 62-121.26, be joined with the assured carrier in any action or suit for damages, debt, or claim thereby secured; nor shall evidence of any such policy, bond, or other security be offered or received in any such action or suit against the carrier, but the surety or insurer shall

be obligated within the amount of such policy, bond or other security to pay any final judgment against the carrier. (1947, c. 1008, s. 34.)

§ 62-121.39. Interstate carriers.—(1) This article shall apply to persons and vehicles engaged in interstate commerce over the highways of this state, and the commission may, in its discretion, require such carriers to file with it copies of their respective interstate authority, registration of their vehicles operated in this state, and the observance of such reasonable rules and regulations as the commission may deem advisable in the administration of this article and for the protection of persons and property upon the highways of the state, except insofar as the provisions of this article may be inconsistent with, or shall contravene, the constitution and laws of the United States.

(2) The commission or its authorized representative is authorized to confer with and hold joint hearings with the authorities of other states or with the Interstate Commerce Commission or its representatives in connection with any matter arising under this article, or under the Federal Motor Carrier Act, which may directly or indirectly affect the interests of the people of this State or the transportation policy declared by this article or by the Interstate Commerce Act. (1947, c. 1008, s. 35.)

§ 62-121.40. Fees and charges.—The following fees and charges shall be paid to the commission under the provisions of this article:

(1) $25.00 with each application for a certificate or permit, and with each application for an amendment to a certificate or permit for new or additional operating rights, but credit shall be given for fees paid on applications filed under the existing law and heard after this article becomes effective.

(2) $10.00 for each application for approval of a sale, assignment, pledge, hypothecation, transfer of a certificate or permit, or lease of any right or interest under a certificate or permit, or for approval of any merger combination or change of control of the operating rights under a certificate of permit through stock transfer or otherwise.

(3) $1.00 for registration of each motor vehicle of a certificate or permit holder added to its rolling equipment after the effective date of this article.

(4) Twenty-five cents for annual re-registration of each motor vehicle operated by a certificate or permit holder.

(5) Such reasonable charges for copies of transcripts of testimony, or for copies of other papers, records, or documents, or for certifying records, as the commission shall prescribe in its rules of practice and procedure. All fees and charges received by the commission under this section shall be in addition to any other tax or fee provided by law and shall be paid forthwith to the state treasurer. (1947, c. 1008, s. 36.)

§ 62-121.41. Allocation of funds. — Sufficient funds shall be provided in the budget and allocated to the commission to be disbursed under the supervision of the director of the budget for the administration and enforcement of the provisions of this article, including the employment of such additional personnel as may be required for that purpose. (1947, c. 1008, s. 37.)

§ 62-121.42. Title.—This article shall be known and may be cited as the North Carolina Truck Act. (1947, c. 1008, s. 38.)

Art. 6C. Bus Act of 1949.

§ 62-121.43. Short title.—This article shall be known and may be cited as The Bus Act of 1949. (1949, c. 1132, s. 1.)

Local Modification.—Session Laws 1949, c. 1132, § 39 provides that chapter 532 of the Session Laws of 1947, authorizing the board of commissioners of Cabarrus county to license and regulate all vehicles operated for hire in unincorporated cities and towns in said county, shall remain in full force and effect.

Effective Date.—Section 40 of the act inserting this article provides that it shall be effective on October 1st, 1949, except that subsection 13 of § 62-121.48 shall be effective as of April 22, 1949; provided, however, this article shall not apply to any proceeding which has been heard and is awaiting a decision of the commission or in which the commission has entered its decision or order prior to the effective date.

Editor's Note.—For a discussion of this article, see 27 N. C. Law Rev. 467.

As to application of former article of similar import, see City Coach Co. v. Gastonia Transit Co., 227 N. C. 391, 42 S. E. (2d) 398.

§ 62-121.44. Declaration of policy.—Upon investigation, it has been determined that the transportation of passengers by motor carriers for compensation over the public highways of the state is a business affected with a public interest, and is hereby declared to be the policy of the state of North Carolina among other things, to provide fair and impartial regulation of motor carriers of passengers in the use of the public highways in such a manner as to promote, in the interest of the public, the inherent advantages of highway transportation; to promote adequate economical and efficient service to all of the communities of the state by motor carriers engaged in the transportation of passengers over the public highways for compensation; to encourage the establishment and maintenance of reasonable charges for transportation services without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to encourage and promote harmony among motor carriers of passengers, between such carriers and carriers of passengers by rail or water, and between all carriers of passengers and the traveling public; to foster a coordinated state-wide motor carrier service; to conform with the national transportation policy and the Federal Motor Carrier Act in so far as the same may be found practical and adequate for application to intrastate commerce; and to cooperate with other states and with the federal government in promoting and coordinating intrastate and interstate commerce by motor carriers. (1949, c. 1132, s. 2.)

§ 62-121.45. Delegation of jurisdiction.—Full power and authority to administer and enforce the provisions of this article, and to make and enforce reasonable and necessary rules and regulations to that end, are hereby vested in the North Carolina utilities commission. (1949, c. 1132, s. 3.)

§ 62-121.46. Definitions.—When used in this article, unless the language or context clearly indicate that different meanings are intended:

(1) "Broker" means any person not included in the term "motor carrier" and not a bona fide

employee or agent of any such carriers, who or which as principal or agent engages in the business of selling or offering for sale any transportation by motor carrier, or negotiates for or holds himself, or itself, out by solicitation, advertisement, or otherwise, as one who sells, provides, furnishes, contracts, or arranges for such transportation for compensation, either directly or indirectly.

(2) "Certificate" means a certificate of public convenience and necessity issued by the commission pursuant to the provisions of this article to a common carrier by motor vehicle.

(3) "Charter party" means a group of persons who, pursuant to a common purpose and under a single contract, and at a fixed charge for the vehicle in accordance with the carrier's tariff, lawfully on file with the commission, have acquired the exclusive use of a passenger carrying motor vehicle to travel together as a group from a point of origin to a specified destination or for a particular itinerary, either agreed upon in advance or modified by the chartering group after having left the place of origin.

(4) "Commission" means the North Carolina utilities commission.

(5) "Common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in intrastate commerce of passengers for compensation over regular routes and between fixed termini.

(6) "Contract carrier by motor vehicle" means any person not included in the definition of "common carrier by motor vehicle" which, under individual contracts or agreements, engages in the transportation by motor vehicle of passengers in intrastate commerce for compensation. Such contracts (a) must be in writing, (b) must provide for the transportation of particular persons or group of persons, (c) must be bilateral and impose specific obligations upon both the carrier and the other contracting parties, (d) must cover a series of trips in contrast to a single trip, and (e) a copy of which must be preserved by the carrier until terminated by its terms and at least one year thereafter.

(7) "Highway" means any road or street in this state used by the public or dedicated or appropriated to public use.

(8) "Intrastate commerce" means commerce between points and over a route or within a territory wholly within this state, which commerce is not a part of a prior or subsequent movement to or from points outside of this state in interstate or foreign commerce, and includes all transportation of passengers by motor vehicle within this state for compensation in interstate or foreign commerce which has been exempted from regulation under Part II, the Interstate Commerce Act, regulating motor carriers.

(9) "Intrastate operations" means the transportation of passengers by motor vehicle for compensation in intrastate commerce.

(10) "Interstate commerce" means commerce between any place in this state and any place in another state or between places in this state through another state, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, water, or air.

(11) "Motor carrier" includes a common carrier by motor vehicle and a contract carrier by motor vehicle.

(12) "Motor vehicle", "vehicle", or "bus" means any vehicle, machine, tractor, semi-trailer, or any combination thereof determined by the commission, which is propelled or drawn by mechanical power and used upon the highways within this state in the transportation of passengers for compensation in intrastate commerce.

(13) "Municipality" means any collection of people incorporated pursuant to the provisions of section 4, article 8, of the Constitution of North Carolina.

(14) "Permit" means a permit issued by the commission pursuant to the provisions of this article to a contract carrier by motor vehicle.

(15) "Person" means a corporation, individual, copartnership, company, association, or any combination of individuals or organizations doing business as a unit, and includes any trustee, receiver, assignee, or personal representative thereof.

(16) "Service", "transportation", and "operations" mean the transportation of passengers by a motor carrier over the highways of this state in intrastate commerce for compensation, and includes all services, vehicles, equipment and facilities used in connection therewith.

(17) "State" means the state of North Carolina.

(18) "Town" means any unincorporated community, or collection of people having a geographical name by which it may be generally known and is so generally designated. (1949, c. 1132, s. 4.)

§ 62-121.47. Exemptions from regulations.—(1) Nothing in this article shall be construed to include persons and vehicles engaged in one or more of the following services if not engaged at the time or other times in the transportation of other passengers by motor vehicle for compensation: (a) transportation of passengers for or under the control of the United States government, or the state of North Carolina, or any political subdivision thereof, or any board, department or commission of the state, or any institution owned and supported by the state; (b) transportation of passengers by taxicabs or other motor vehicles performing bona fide taxicab service and carrying not more than six passengers in a single vehicle at the same time and not operated on a regular route or between fixed termini; provided, no taxicab while operating over the regular route of a common carrier outside of a town or a municipality and a residential and commercial zone adjacent thereto, as such zone may be determined by the commission as provided in (h) of this paragraph, shall solicit passengers along such route, but nothing herein shall be construed to prohibit a taxicab operator from picking up passengers along such route upon call, sign or signal from prospective passengers, (c) transportation by motor vehicles owned or operated by or on behalf of hotels while used exclusively for the transportation of hotel patronage between hotels and local railroad or other common carrier stations; (d) transportation of passengers to and from airports and passenger airline terminals when such transportation is incidental to transportation by aircraft; (e) transportation of passengers

by trolley buses operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street railway service; (f) transportation by motor vehicles used exclusively for the transportation of passengers to or from religious services; (g) transportation of bona fide employees of an industrial plant to and from their regular employment; (h) transportation of passengers when the movement is within a town or municipality exclusively, or within contiguous towns or municipalities and within a residential and commercial zone adjacent to and a part of such town or municipality or contiguous towns or municipalities; provided, the commission shall have power in its discretion, in any particular case, to fix the limits of any such zone.

The commission shall have and retain jurisdiction to fix rates and charges of carriers operating under (e) and (h) of this subsection, and shall have jurisdiction to hear and determine controversies with respect to extensions and services, and the commission's rules of practice shall include appropriate provisions for bringing such controversies before the commission and for the hearing and determination of the same, provided nothing in this paragraph shall include taxicabs.

(2) The commission may conduct investigations to determine whether any person or carrier purporting to operate under the exemption provisions of this section is, in fact, so operating, and make such orders as it deems necessary to enforce compliance with this section.

(3) None of the provisions of this section nor any of the other provisions of this article shall apply to motor vehicles used for the transportation of passengers to or from religious services and/or in the transportation of bona fide employees of an industrial plant to and from places of their regular employment.

(4) Provided, that venue for any action commenced to enforce compliance with the terms of this article against any person, firm or corporation purporting to operate under any of the exemptions provided in this section shall be in one of the counties of the judicial district wherein the violation is alleged to have taken place and such person, firm or corporation shall be entitled to trial by jury. (1949, c. 1132, s. 5.)

§ 62-121.48. General powers and duties of the commission.—The commission is hereby vested with power and it shall be its duty:

(1) To supervise and regulate common carriers by motor vehicle and to that end the commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage, newspapers, mail, and light express, uniform system of accounts, records and reports and preservation of records.

(2) To supervise and regulate contract carriers by motor vehicle, and to that end the commission may establish reasonable requirements with respect to uniform systems of accounts, records and reports and preservation of records.

(3) To supervise and regulate motor carriers, as defined in this article, in all matters affecting the relationship between such carriers, or the relationship between such carriers and the public, in any manner necessary to promote harmony along such carriers, safety and efficiency of service to the public.

(4) To supervise the operation of passenger bus stations in any manner necessary to promote harmony among the carriers using such stations and efficiency of service to the traveling public.

(5) To transmit to the legislature, from time to time, such recommendations as to additional legislation relating to such carriers as the commission may deem necessary.

(6) To prescribe qualifications and maximum hours of service of drivers and their helpers, and rules regulating safety of operation and equipment; and in the interest of uniformity of intrastate and interstate rules and regulations applicable within the state of North Carolina with respect to maximum hours of service of vehicle drivers and their helpers, and safety of operation and equipment, the commission may adopt and enforce the rules and regulations adopted and promulgated by the Interstate Commerce Commission with respect thereto, in so far as the commission finds the same to be practical and advantageous for application in this State and not in conflict with this article. In order to promote safety of operation of motor carriers, the commission may avail itself of the assistance of any other agency of the state having special knowledge of such matters and it may make such investigations and tests as may be deemed necessary to promote safety of equipment and operation of vehicles upon the highways.

(7) For the purpose of carrying out the provisions of this article, the commission may avail itself of the special information of the state highway and public works commission in promulgating safety requirements and in considering applications for certificates or permits with particular reference to conditions of the public highway or highways involved, and the ability of the said public highway or highways to carry added traffic; and the state highway and public works commission, upon request of the commission, shall furnish such information.

(8) The commission shall maintain in its offices a docket of pending proceedings under this article, separate from dockets of other proceedings, which docket shall at all times be open for public inspection and for the information of all persons having an interest therein. The commission shall cause to be filed and recorded in said docket of pending proceedings, immediately upon the institution thereof, the title of the proceedings, the names of the parties thereto, a brief description of the purpose thereof and any other information deemed to be material to the identification of any official file containing all the original pleadings, petitions and other official records pertaining thereto. The commission shall also maintain an official register in its offices, in which shall be recorded all general orders, rules, regulations and requirements made and entered by the commission under the provisions of this article, which register shall at all times be open for inspection by the public and any person having an interest therein. The commission may from time to time, and in its discretion, cause all of its general orders, rules, regulations and requirements promulgated under the provisions of this article to be printed either separately or in conjunction with other official orders, rules, regulations and requirements of the

commission promulgated by it as authorized by law, and to distribute the same for the information of the public and the guidance of all persons affected thereby.

(9) Before the commission shall prescribe or fix any rate, charge, or classification of traffic, and before it shall make any order, rule, regulation or requirement directed against any one or more motor carriers by name, the motor carrier or carriers to be affected by such rate, charge, classification, order, rule, regulation or requirement, shall first be given, by the commission, at least twenty days notice of the time and place when and where the contemplated action in the premises will be considered and disposed of, and such carriers shall be afforded a reasonable opportunity to introduce evidence and to be heard thereon, and shall have process to enforce the attendance of witnesses, to the end that justice may be done. Before the commission shall make or prescribe any general order, rule, regulation or requirement not directed against any specific motor carrier or carriers by name, the contemplated general order, rule, regulation or requirement shall first be published in substance not less than once each week for four consecutive weeks in one or more newspapers of general circulation published in the city of Raleigh, North Carolina, together with notice of the time and place when and where the commission will hear any objections which may be urged by any interested persons against the proposed order, rule, regulation or requirement, and shall forthwith record in its docket of pending proceedings a copy of such notice or description thereof sufficient to advise all interested persons of the time and place of such hearing and shall mail at least thirty days prior to such hearing, a copy of said notice to each motor carrier operating in this state under the provisions of this article. Every such general order, rule, regulation or requirement made and entered by the commission shall be forthwith recorded verbatim in its official register, showing thereon the effective date of such general order, rule, regulation or requirement which shall be not less than ten days subsequent to the entry thereof in said official register and shall also file a copy of same with the secretary of state as required by chapter 143, article 18, General Statutes of North Carolina, of 1943. The commission may, without prior notice and hearing, make and enter any order, rule, regulation, or requirement, not affecting rates, charges, or tariffs, upon a unanimous finding by the commission of the existence of an emergency and order such order, rule, regulation or requirement in effect upon notice given to each affected motor carrier by registered mail, pending a hearing thereon as provided in this subsection. Any such emergency order, rule, regulation or requirement shall be subject to continuation, modification, change, or revocation after notice and hearing as in this section provided and all such emergency orders, rules, regulations, and requirements shall be supplanted and superseded by any final order, rule, regulation or requirement entered by the commission after such notice and hearing.

(10) The commission shall also regulate brokers and make and enforce reasonable requirements respecting their licenses, financial responsibility, accounts, records, reports, operations and practices.

(11) Upon complaint in writing to the commission by any person, organization, or body politic, or upon its own initiative without complaint, the commission may investigate whether any motor carrier has failed to comply with any provisions of this article, or with any rate, charge, classification, order, rule, regulation or requirement prescribed or fixed by the commission pursuant thereto; and if the commission finds upon such investigation, after due notice and hearing that the motor carrier has failed to comply with any such provision of this article, or with any such rate, charge, classification, order, rule, regulation or requirement prescribed or fixed by the commission pursuant thereto, the commission shall issue an appropriate order to compel the carrier to comply therewith. The commission may dismiss such complaint without investigation when it is of the opinion that the complainant does not state reasonable grounds for investigation and action on its part.

(12) The commission and its duly authorized inspectors and agents shall have authority at any time to enter upon the premises of any motor carrier, subject to the provisions of this article, for the purpose of inspecting any motor vehicles and equipment used by such motor carriers in the transportation of passengers, and to prohibit the use by any motor carrier of any motor vehicle or parts thereof or equipment thereon adjudged by such agents and inspectors to be unsafe for use in the transportation of passengers upon the public highways of this state; and when such agents or inspectors shall discover any motor vehicle of such motor carrier in actual use upon the highways in the transportation of passengers to be unsafe or any parts thereof or any equipment thereon to be unsafe, such agents or inspectors may, if they are of the opinion that further use of such vehicle, parts or equipment are imminently dangerous, stop such vehicle and require the operator thereof to discontinue its use and to substitute therefor a safe vehicle, parts or equipment at the earliest possible time and place, having regard for both the convenience and the safety of the passengers. When an inspector or agent stops a motor vehicle on the highway, under authority of this section, and the motor vehicle is in operative condition and its further movement is not dangerous to the passengers and to the users of the highways, it shall be the duty of the inspector or agent to guide the vehicle to the nearest point for substitution or correction of the defect. Such agents or inspectors shall also have the right to stop any motor vehicle which is being used upon the public highways for the transportation of passengers by a motor carrier subject to the provisions of this article and to eject therefrom any driver or operator who shall be operating or be in charge of such motor vehicle while under the influence of intoxicating liquors. It shall be the duty of all inspectors and agents of the commission to make a written report, upon a form prescribed by the commission, of inspections of all motor equipment and a copy of each such written report, disclosing defects in such equipment, shall be served promptly upon the motor carrier operating the same, either in person by the inspector or agent or by mail.

Such agents and inspectors shall also make and serve a similar written report in cases where a motor vehicle is operated in violation of the laws of this state or of the orders, rules and regulations of the commission. Except as provided in this subsection safety rules and regulations shall be enforced as provided in subsection (11).

(13) All general orders, rules, regulations and requirements promulgated by the commission prior to the enactment of this article affecting motor carriers shall remain in full force and effect until revoked, modified, or changed as provided in this subsection. Prior to October 1, 1949, the commission shall mail notice to all motor carriers subject to regulation under this article and shall publish notice of time and place of hearing in one or more newspapers of general circulation published in the city of Raleigh, that the commission will at the time and place fixed in said notice consider and decide what revisions, modifications and changes in said general orders, rules, regulations and requirements are necessary to make the same comply with the provisions of the article, or deemed reasonably necessary in the administration of this article. Said orders, rules, regulations and requirements as amended, modified, changed or readopted shall then become effective on October 1, 1949. The commission may at the same time and place also consider and adopt such new general orders, rules, regulations and requirements as it may find necessary for the effective administration of this article, but notice and hearing shall be provided with respect to any such new orders, rules, regulations or requirements, as provided in subsection (9) of this section. (1949, c. 1132, s. 6.)

§ 62-121.49. Issuance of certificates in lieu of outstanding certificates.—Notwithstanding any exemptions contained in § 62-121.47 of this article, it shall be the duty of the commission to issue a certificate, as a matter of course and without further proceedings, to any person holding a certificate issued by the commission prior to the effective date of this article and in force on such date, granting to each such person the same operating rights held and exercised by it, under its outstanding certificate, including amendments thereto which have heretofore been or may hereafter be authorized by the commission on applications heard before the effective date of this article, and such certificate shall be deemed issued until prepared and actually issued by the commission. Nothing in this section shall relieve any common carrier from compliance with the provisions of §§ 62-121.56, 62-121.57 and 62-121.58 within such reasonable time as the commission may require. (1949, c. 1132, s. 7.)

§ 62-121.50. Issuance of permits to qualified contract carriers operating on and continuously since October 1, 1948.—(1) Generally.—Subject to §§ 62-121.56, 62-121.57 and 62-121.58, if any carrier or predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on October 1st, 1948, over the route or routes, or within the territory for which application is made under this section, and has so operated since that time except for interruptions of service over which the applicant or its predecessor in interest had no control, the commission shall issue a permit to such carrier, if such carrier qualifies itself in the following manner:

(2) Duty of Carrier.—This section shall not apply to a carrier unless the carrier shall before October 1, 1949, file with the commission on forms furnished by it an application under oath for a permit under this section, giving such information and in such detail as the commission may require, including the following:

(a) The full name and address of each person owning an interest in the transportation business of the carrier.

(b) The make, type and carrying capacity of each vehicle, or other unit of equipment, owned, operated by, or licensed in the name of the carrier during the month of October, 1948, and at the time of filing application.

(c) A true copy of each contract in force on the date of such application between the carrier and the other contracting party or parties whom the carrier is serving. No such contract shall be open to inspection by other carriers or by the public, except by order of court, or by order of the commission in a proceeding involving the violation of some law or valid regulation of the commission in which such contract becomes material or in a proceeding conducted under this section.

(d) A current balance sheet showing the assets, liabilities, and net worth of the carrier.

(3) Duty of Commission.—The burden shall be upon each applicant for a permit as a contract carrier under this section to satisfy the commission that the applicant was operating as a contract carrier, as defined in this article, on October 1, 1948, and has continued to so operate since that time, seasonal service and unavoidable interruptions considered; and to that end the commission may require the applicant to furnish further supporting evidence in addition to that set forth in the application. The commission may deny such permit upon a finding from substantial evidence that the applicant is unfit or otherwise disqualified to perform the service for which the application is made. Any motor carrier subject to the provisions of this article may file protest to the issuance of a permit under this section and in such event the application shall be set for hearing at a time and in a manner prescribed by the rules of the commission. When no protest is filed within the time as may be prescribed by the rules of the commission, the commission may proceed to issue or decline to issue the permit without a hearing. (1949, c. 1132, s. 8; c. 1283.)

§ 62-121.51. Issuance of temporary authority.—Upon the filing of an application in good faith for a permit, as provided in § 62-121.50, the commission shall, pending its final decision on the application, issue to the applicant appropriate temporary authority to operate as a contract carrier by motor vehicle, under such just and reasonable conditions and limitations as the commission deems necessary or desirable to impose in the public interest; provided, however, that pending such final decision on the application, the applicant shall comply with all the provisions of this article, and with the lawful orders, rules and regulations of the commission promulgated thereunder, applicable to holders of permits, and

upon failure of an applicant so to do, after reasonable notice from the commission requiring compliance therewith in the particulars set out in the notice, and after hearing, the application may be dismissed by the commission without further proceedings, and the temporary authority issued to such applicant revoked. (1949, c. 1132, s. 9.)

§ 62-121.52. Applications and hearings.—(1) Except as otherwise provided in §§ 62-121.47, 62-121.49 to 62-121.51, and 62-121.59, no person, after the effective date of this article, shall engage in the transportation of passengers in intrastate commerce or continue in any such operations until and unless such person shall have applied to and obtained from the commission a certificate or permit authorizing such operations, and it shall be unlawful for any person knowingly or willfully to operate in intrastate commerce in any manner contrary to the provisions of this article, or of the rules and regulations of the commission made pursuant thereto.

(2) Applications for certificates or permits shall be made to the commission in writing on forms furnished by the commission, shall be verified under oath by the applicant, and shall contain such information and in such form and detail as the commission may require.

(3) Upon filing of an application for a certificate or a permit, the commission shall, within a reasonable time fix a time and place for hearing such application. The commission shall cause notice of the time and place of hearing to be given by mail to the applicant, to other motor carriers holding certificates or permits to operate in the territory proposed to be served by the applicant, and to other motor carriers who have pending applications to so operate. The notice herein required shall be given at least twenty (20) days prior to the date fixed for such hearing, but the failure of any such person, other than applicant, to receive any such mailed notice shall not, for that reason, invalidate the action of the commission in granting or denying the application.

(4) The commission shall cause notice of the time and place of such hearing, together with a brief description of the purpose of said hearing and the exact route or routes and authority applied for, to be published not less than once each week for two successive weeks in one or more newspapers of general circulation in the territory proposed to be served. A copy of the notice by mail, required by subsection three (3) and a copy of the published notice required by this subsection shall be forthwith recorded in the commission's docket of pending proceedings. In addition to the fees required to be paid by the applicant by the provisions of this article, such applicant shall, prior to the hearing upon his application, be required to pay into the office of the commission the cost, as determined by the commission, of the notices herein required to be published or mailed by the commission.

(5) Any motor carrier desiring to protest the granting of an application for a certificate or permit, in whole or in part, may become a party to such proceeding by filing with the commission, not less than ten (10) days prior to the date fixed for the hearing, unless the time be extended by order of the commission, its protest in writing under oath, containing a general statement of the grounds for such protest and the manner in which the protestant will be adversely affected by the granting of the application, in whole or in part. Such protestant may also set forth in his protest its proposal, if any, to render, either alone or in conjunction with other motor carriers, the service proposed by the applicant, either in whole or in part. Upon the filing of such protest it shall be the duty of the protestant to file four copies with the commission, one of which copies the commission shall cause to be forthwith mailed to the applicant. The protestant shall be required, at the time of filing such protest, to pay into the office of the commission a filing fee of five dollars ($5.00). When no protest is filed with the commission within the time herein limited, or as extended by order of the commission, the commission may proceed to hear the application and make the necessary findings of fact and issue or decline to issue the certificate or permit applied for without further notice. Persons other than motor carriers shall have the right to appear before the commission and give evidence in favor of or against the granting of any application, and with permission of the commission may be accorded the right to examine and cross-examine witnesses. No certificate or permit shall be amended so as to enlarge or in any manner extend the scope of operations of a motor carrier without complying with the provisions of this section.

(6) If the application is for a certificate, the burden of proof shall be upon the applicant to show to the satisfaction of the commission, (a) that public convenience and necessity requires the proposed service in addition to existing authorized transportation service, and (b) that the applicant is fit, willing and able to properly perform the proposed service, and (c) that the applicant is solvent and financially able to furnish adequate service on a continuing basis.

(7) No certificate shall be granted to an applicant proposing to serve a route already served by a previously authorized motor carrier unless and until the commission shall find from the evidence that the service rendered by such previously authorized motor carrier or carriers on said routes is inadequate to meet the requirements of public convenience and necessity; and if the commission shall find that the service being rendered by such certificate holder or holders on said routes is inadequate to meet the requirements of public convenience and necessity, such certificate holder or holders who have protested the application as provided in subsection (5) of this section, shall be given reasonable time to remedy such inadequacy before any certificate shall be granted to an applicant proposing to operate on such routes, unless the commission finds that the previously authorized carrier, filing such protest, is either financially unable, or otherwise unqualified, or is unwilling to render, on a continuing basis, the service applied for or the service found by the commission to meet the requirements of public convenience and necessity. In all cases in which applications affect local intracity bus service the commission shall give consideration to all interests involved and make appropriate provision for the protection thereof, and to that end local intracity operators shall have the right to be heard

as protestants, or intervenors, under such rules of practice as the commission may provide.

(8) A certificate for the transportation of passengers may include authority to transport in the same vehicle with passengers the baggage of such passengers, newspapers, express parcels or United States mail when authorized so to do by the government of the United States of America; or to transport baggage of passengers in a separate vehicle. The commission, in its discretion, may require through joint routes and rates for the transportation of newspapers and express parcels.

(9) Common carriers by motor vehicle transporting passengers under a certificate issued by the commission may operate to any place in this state, pursuant to charter party or parties, trips originating on such common carriers' authorized routes or in the territory served by its routes under such reasonable rules and regulations as the commission may prescribe.

(10) If the application is for a permit, the commission shall give due consideration to (a) whether the proposed operations conform with the definition in this article of a contract carrier. (b) whether the proposed operations will unreasonably impair the efficient public service of carriers operating under certificates, (c) whether the proposed service will unreasonably impair the use of the highways by the general public, (d) whether the applicant is fit, willing and able to properly perform the service proposed as a contract carrier, (e) whether the proposed operations will be consistent with the public interest and the transportation policy declared in this article, and (f) other matters tending to qualify or disqualify the applicant for a permit.

(11) After the issuance of a certificate or permit as provided in this section, such certificate or permit may thereafter be amended, changed or modified, by requiring the holder to furnish more or less transportation service, or by changing the routes over which service has been authorized, or by imposing other reasonable terms, conditions, restrictions, and limitations as public convenience and necessity or reasonable regulation of bus traffic upon the highways may require; provided, that the procedure in all such cases as to notice and hearing shall be the same as provided in this section for the issuance of a certificate or permit.

(12) The commission shall by general order, or rule, having regard for the public convenience and necessity, provide for the abandonment or permanent or temporary discontinuance of transportation service previously authorized in a certificate. (1949, c. 1132, s. 10.)

Duplication of Service.—Under a former article of similar import, it was held that the commission might, in its discretion, grant a franchise which would duplicate in whole or in part a previously authorized similar class of service; and, when it was shown to the satisfaction of the commission that the existing operations were not providing sufficient service reasonably to meet the public convenience and necessity and the existing operators, after thirty days' notice, failed to provide the service required by the commission, it would be the duty of the commission to do so. State v. Carolina Coach Co., 224 N. C. 390, 30 S. E. (2d) 328.

Municipality Has No Power to Grant Franchise.—A municipality granted an exclusive franchise for the operation of a motor bus transportation service over specified streets within the city and "such other routes, with the consent and approval of the city council" as the public transportation might require. Thereafter the municipality approved a request for an additional route along a public highway from a point within the city to a point ⅞ of a mile beyond the corporate limits. Held that the "approval" of the proposed route did not amount to the granting of a franchise by the city since by former article 6 of this chapter the utilities commission alone had the power to grant the franchise over the route in controversy, and held further that the city had no authority to grant such a franchise either under § 160-203, or by virtue of its implied powers. City Coach Co. v. Gastonia Transit Co., 227 N. C. 391, 42 S. E. (2d) 398.

§ 62-121.53. Terms and conditions of certificate.—Any certificate issued under this article shall specify the service to be rendered and the routes over which, the fixed termini between which, and the intermediate points at which the motor carrier is authorized to operate; and there shall, at the time of issuance, be attached to the privileges granted by the certificate such reasonable terms, conditions, restrictions, and limitations as the public convenience and necessity may require. The commission may, from time to time, rewrite a certificate previously authorized for the purpose of conforming the description of routes and services with changes which have been made resulting from changes made in the designation and location of highways or in changes made pursuant to amendments lawfully ordered by the commission. (1949, c. 1132, s. 11.)

§ 62-121.54. Issuance of permits, terms and conditions.—The commission shall specify in the permit, or amendment thereto, the business of the contract carrier covered thereby and the scope thereof and shall attach to it, at the time of issuance, such reasonable terms, conditions, and limitations consistent with the service of a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the commission under § 62-121.48; provided, that no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, as the development of the business and the demands of the public may require. (1949, c. 1132, s. 12.)

§ 62-121.55. Application for broker's license.—(1) No person shall engage in the business of a broker in intrastate operations within this state unless such person holds a broker's license issued by the commission.

(2) The commission shall prescribe the form of application and such reasonable requirements and information as may in its judgment be necessary.

(3) Upon the filing of an application for license the commission may fix a time and place for the hearing of the application and require such notices, publications, or other service as it may prescribe by general rule or regulation.

(4) A license shall be issued to any qualified applicant therefor authorizing the whole or any part of the operations covered by the application if it is found that the applicant is fit, willing and able properly to perform the service proposed and to conform to the provisions of this article and the requirements, rules and regulations of the commission thereunder, and that the proposed service, to the extent to be authorized by the license, is or will be consistent with the public interest and policy declared herein.

(5) The commission shall have the same authority over persons operating under and holding a brokerage license as it has over motor carriers under this article, and shall require a broker

to furnish bond or other security approved by the commission and sufficient for the protection of travelers by motor vehicle. (1949, c. 1132, s. 13.)

§ 62-121.56. Issuance of partnership certificates or permits.—No certificate or permit shall be issued under this article to two or more individuals until such individuals shall have executed a partnership agreement and recorded the same in the office of the clerk of the superior court in the county in which the principal office of the partnership is located, and filed a certified copy of such agreement with the commission. (1949, c. 1132, s. 14.)

§ 62-121.57. The same or similar trade names prohibited.—No carrier holding or operating under a certificate or permit issued under this article shall adopt or use the same trade name used by any other such carrier, or the name of any corporation holding or operating under a certificate or permit, or any name so similar to the trade or corporate name of another carrier as to mislead or confuse the public, and the commission may, upon complaint, or upon its own initiative, in any such case require the carrier to discontinue the use of such trade name, preference being given to the carrier first adopting and using such trade name. (1949, c. 1132, s. 15.)

§ 62-121.58. Dual operations.—From and after the effective date of this article, unless the commission, in its discretion, finds that the public interest so requires, no person or any person controlling, controlled by, or under common control with such person, shall hold both a certificate as a common carrier and permit as a contract carrier. (1949, c. 1132, s. 16.)

§ 62-121.59. Emergency operating authority.—To meet unforeseen emergencies, the commission may, upon its own initative, or upon written request by any person, department or agency of the state, or of any county, city or town, with or without a hearing, grant appropriate authority to any owner of a duly licensed vehicle or vehicles, whether such owner holds a certificate or permit or not, to transport passengers, baggage, mail, newspapers and light express between such points, or within such area during the period of the emergency and to the extent necessary to relieve the same, as the commission may fix in its order granting such authority; provided, that unless the emergency is declared by the General Assembly or under its authority, the commission shall find from such request, or from its own knowledge of conditions, that a real emergency exists and that relief to the extent authorized in its order is immediate, pressing and necessary in the public interest, and that the carrier so authorized has the necessary equipment and is willing to perform the emergency service as prescribed by the order. In all cases, under this section, the commission shall first afford the holders of certificates or permits operating in the territory affected an opportunity to render the emergency service. Upon the termination of the emergency the operating privileges so granted shall automatically expire and the commission shall forthwith withdraw all operating privileges granted to any person under this section. (1949, c. 1132, s. 17.)

§ 62-121.60. Deviation from regular route operations.—A common carrier by motor vehicle operating under a certificate issued by the commission may occasionally deviate from the routes over which it is authorized to operate under the certificate, under such general or special rules and regulations as the commission may prescribe. (1949, c. 1132, s. 18.)

§ 62-121.61. Insurance or bond required.—(1) The commission shall, in granting a certificate or permit, require the applicant to procure and file with the commission acceptable liability and property damage insurance in a company licensed to do business in this state; or, in lieu of such insurance may accept bond with solvent surety, on such motor vehicles to be used in such service, in such amount as the commission may determine, insuring passengers and the public receiving personal injury by reason of an act of negligence arising from the operation of any motor vehicle by the applicant upon the public highways of this state; and insuring the passengers and the public receiving personal injury by reason of any act of negligence arising from the operation of any motor vehicle by the applicant upon the route designated in the applicant's certificate or permit, whether such motor vehicle shall be specifically named, numbered or designated in the insurance policy or bond, or not, and whether such motor vehicle be in regular or temporary use by the applicant. Such policy, or bond, shall contain such other conditions, provisions and limitations as the commission may prescribe, and shall be kept in full force and effect.

(2) Before final judgment has been rendered by a court of competent jurisdiction, in any cause arising from the operation under any certificate or permit, no attachment shall lie against motor vehicles used in such operation by any motor vehicle carrier, who has filed with the commission such damage liability policy, or bond, so long as such policy or bond is in full force and effect.

(3) In any action in the courts arising out of damage to person or property, the assurer shall not be joined in the action against the assured; but upon final judgment against the assured, the assurer shall be liable within the limitations of the policy for the amount recovered and all court costs.

(4) The commission may permit the filing by any licensed assurer of a uniform master insurance policy contract, the terms of which shall conform to the foregoing, and when approved and accepted by the commission, shall be applicable to all insurance policy contracts filed by such assurer for motor vehicle carriers under this article, and thereafter, so long as the master policy contract shall remain in force, carriers under this article may be permitted to file certificates, in such form as the commission may prescribe, evidencing fleet coverage under the term of such master policy instead of filing a separate individual policy contract in each case. The commission, when satisfied that passengers and the public will be fully protected against damage or loss, in the exercise of its discretion, may permit a common carrier or a contract carrier to become a self-insurer upon such terms and conditions as the commission may prescribe.

(5) Brokers shall be required to file bond to cover financial responsibility not in excess of amounts required by the Interstate Commerce Commission. (1949, c. 1132, s. 19.)

§ 62-121.62. Transfers of certificates and permits.—No certificates or permits issued under the provisions of this article shall be sold, assigned, pledged, transferred, or any rights thereunder leased, nor shall any merger or combination affecting any motor carrier be made through acquisition of control by stock purchases or otherwise, except after application to and written approval by the commission as in this section provided. The applicant shall give not less than ten (10) days written notice of such application by registered mail to all connecting and competing carriers. When the commission is of the opinion that the transaction is consistent with the purposes of this article, the commission may, in the exercise of its discretion, grant its approval, provided, however, that when such transaction will result in a substantial change in the service and operations of any motor carrier party to the transaction, or will substantially affect the operations and services of any other motor carrier, the commission shall not grant its approval except upon notice and hearing as required in § 62-121.52 upon an application for an original certificate or permit. In all cases arising under this section it shall be the duty of the commission to require the successor carrier to satisfy the commission that the operating debts and obligations of the seller, assignor, pledgor, lessor or transferor, including taxes due the state of North Carolina or any political subdivision thereof are paid or the payment thereof is adequately secured. The commission may attach to its approval of any transaction arising under this section such other conditions as the commission may determine are necessary to effectuate the purposes of this article. It shall be considered against the policy declared in § 62-121.44 for any person to obtain a certificate or permit for the purpose of transferring the same to another, and an offer of such transfer within one year after the same was obtained shall be prima facie evidence that such a certificate or permit was obtained for the purpose of sale. (1949, c. 1132, s. 20.)

§ 62-121.63. Suspension or revocation of certificates and permits.—(1) The certificates and permits issued under the provisions of this article shall be effective from the date issued unless otherwise specified therein, and shall remain in effect until terminated under the terms thereof, or until suspended or revoked as herein provided.

(2) Any certificate or permit may be suspended or revoked, in whole or in part, upon complaint or upon the commission's own initiative, after notice and hearing, for willful failure to comply with any provision of this article, or with any lawful order, rule, or regulation of the commission promulgated thereunder, or with any term, condition, or limitation of such certificate or permit; provided, however, that any such certificate or permit may be suspended or revoked by the commission upon notice to the holder or lessee thereof without a hearing for any one or more of the following causes:

(a) For failure to comply with § 62-121.61.

(b) For failure to file and keep on file with the commission applicable tariffs or schedules of charges as required in §§ 62-121.64, 62-121.65 and 62-121.66.

(c) For failure to pay any gross receipt taxes, use or privilege taxes, due the state of North Carolina within six months after demand in writing from the agency of the state authorized by law to collect the same; provided, that this paragraph shall not apply to instances in which there is a bona fide controversy as to tax liability.

(d) For failure to begin operations as authorized by the commission within the time specified by order of the commission, or for suspension of authorized operations for a period of thirty (30) days without the written consent of the commission. (1949, c. 1132, s. 21.)

§ 62-121.64. Rates and charges of common carriers.—(1) It shall be the duty of every common carrier of passengers by motor vehicle to establish reasonable through routes with other such common carriers and to provide safe and adequate service, equipment, and facilities for the transportation of passengers; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges and just and reasonable regulations and practices relating thereto, and to the issuance, form, and substance of tickets, the carrying of personal, sample and excess baggage, the facilities for transportation, and all other matters relating to or connected with the transportation of passengers; and in case of such joint rates, fares, and charges, to establish just, reasonable and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any such participating carriers.

(2) All charges made for services rendered or to be rendered by any common carrier by motor vehicle in the transportation of passengers in intrastate commerce or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service, or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in intrastate commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, place, locality, territory, or description of traffic, in any respect whatsoever, or to subject any particular person, place, locality, territory, or description of traffic, to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever; provided, however, that this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

(3) Any person, state board, organization, or body politic may make complaint in writing to the commission that any such rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of § 62-121.65. Whenever, after hearing upon complaint or in an investigation on its own initiative, the commission shall be of the opinion that any individual or joint rate, fare, or charge, demanded, charged, or collected by any common carrier or carriers by motor vehicle or by any

common carrier or carriers by motor vehicle in conjunction with any common carrier or carriers by railroad and/or express, and/or water, and/or air, or any classification, rule, regulation, or practice whatsoever of such carrier or carriers affecting such rate, fare, or charge or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the lawful rate, fare, or charge or the maximum or minimum, or maximum and minimum rate, fare, or charge thereafter to be observed, or the lawful classification, rule, regulation, or practice thereafter to be made effective and the commission shall, whenever deemed by it to be necessary or desirable in the public interest, after hearing, upon complaint or upon its own initiative without a complaint, establish through routes, and joint rates, fares, charges regulations, or practices, applicable to the transportation of passengers by common carriers by motor vehicle, or the maxima or minima, or maxima and minima, to be charged, and the terms and conditions under which such through routes shall be operated.

(4) Whenever, after hearing, upon complaint or upon its own initiative, the commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers by common carriers in conjunction with common carriers by railroad and/or express, and/or water, and/or air are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the commission shall by order prescribe the just, reasonable and equitable divisions thereof to be received by the several carriers; and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the commission may also by order determine what would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. The order of the commission may require the adjustment of divisions between the carriers, in accordance with the order, from the date of filing the complaint or entry of order of investigation or such other date subsequent as the commission finds justified and, in the case of joint rates prescribed by the commission, the order as to divisions may be made effective as a part of the original order.

(5) Whenever there shall be filed with the commission any schedule stating a new individual or joint rate, fare, charge, or classification for the transportation of passengers by a common carrier or carriers by motor vehicle, or by any such carrier or carriers in conjunction with a common carrier or carriers by railroad and/or express, and/or water and/or air or any rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the commission is hereby authorized and empowered upon complaint of any interested party or upon its own initiative at once and, if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such rule, regulation, or practice, and pending such hearing and the decision thereon the commission, by filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, or charge, or such rule, regulation, or practice, but not for a longer period than one hundred eighty days beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice goes into effect, the commission may make such order with reference thereto as would be proper in a proceeding instituted after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change or rate, fare, or charge, or classification, rule, regulation, or practice shall go into effect at the end of such period. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable.

(6) In any proceeding to determine the justness or reasonableness of any rate, fare, or charge of any such carrier, there shall not be taken into consideration or allowed as evidence any elements of value of the property of such carrier, good will, earning power, or the certificate under which such carrier is operating; and in applying for and receiving a certificate under this part any such carrier shall be deemed to have agreed to the provisions of this paragraph, on its own behalf and on behalf of all transferees on such certificate.

(7) In the exercise of its power to prescribe just and reasonable rates, fares, and charges for the transportation of passengers by common carriers by motor vehicle, and classifications, regulations, and practices relating thereto, the commission shall give due consideration, among other factors, to the inherent advantages of transportation by such carriers; to the effect of rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable such carriers, under honest, economical, and efficient management, to provide such service.

(8) Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith. (1949, c. 1132, s. 22.)

§ 62-121.65. Tariffs of common carriers.—(1) Every common carrier by motor vehicle shall file with the commission, and print, and keep open to public inspection, tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith, of passengers between points on its own route and points on the route of any such carrier, or on the route of any common carrier by railroad and/or express

and/or water and/or air when a through route and joint rate shall have been established. Such rates, fares, and charges shall be stated in terms of lawful money of the United States. The tariffs required by this section shall be published, filed, and posted in such form and manner, and shall contain such information, as the commission by regulations shall prescribe; and the commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations. Any tariff so rejected by the commission shall be void and its use shall be unlawful.

(2) No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in connection therewith between the points enumerated in such tariff than the rates, fares, and charges specified in the tariffs in effect at the time; and no such carrier shall refund or remit in any manner or by any device, directly or indirectly, or through any agent or broker or otherwise, any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transportation in intrastate commerce except such as are specified in its tariffs.

(3) No change shall be made in any rate, fare, charge, or classification, or any rule, regulation, or practice affecting such rate, fare, charge, or classification, or the value of the service thereunder, specified in any effective tariff of a common carrier by motor vehicle, except after thirty days' notice of the proposed change filed and posted in accordance with paragraph (1) of this section. Such notice shall plainly state the change proposed to be made and the time when such change will take effect. The commission may, in its discretion and for good cause shown, allow such change upon notice less than that herein specified or modify the requirements of this section with respect to posting and filing of tariffs either in particular instances or by general order applicable to special or peculiar circumstances or conditions.

(4) No common carrier by motor vehicle, unless otherwise provided by this article, shall engage in the transportation of passengers unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provision of this article. (1949, c. 1132, s. 23.)

§ 62-121.66. Rates and charges of contract carriers; schedules.—(1) It shall be the duty of every contract carrier to establish and observe reasonable minimum rates and charges for any service rendered or to be rendered in the transportation of passengers or in connection therewith, and to establish and observe reasonable regulations and practices to be applied in connection with said reasonable minimum rates and charges. It shall be the duty of every contract carrier to file with the commission, publish, and keep open for public inspection, in the form and manner prescribed by the commission, schedules containing the minimum rates or charges of such carrier actually maintained and charged for the transportation of passengers in intrastate commerce, and any rule, regulation, or practice affecting such rates or charges and the value of the service thereunder. No such contract carrier, unless otherwise provided by this article, shall engage in the transportation of passengers in intrastate commerce unless the minimum charges for such transportation by said carrier have been published, filed, and posted in accordance with the provisions of this article. No reduction shall be made in any such charge either directly or by means of any change in any rule, regulation, or practice affecting such charge or the value of service thereunder, except after thirty days' notice of the proposed change filed in the aforesaid form and manner, but the commission may, in its discretion and for good cause shown, allow such change upon less notice, or modify the requirements of this paragraph with respect to posting and filing of such schedules, either in particular instances or by general order applicable to special or peculiar circumstances or conditions. Such notice shall plainly state the change proposed to be made and the time when such change will take effect. No such carrier shall demand, charge, or collect a less compensation for such transportation than the charges filed in accordance with this paragraph, as affected by any rule, regulation, or practice so filed, or as may be prescribed by the commission from time to time, and it shall be unlawful for any such carrier, by the furnishing of special services, facilities, or privileges, or by any other device whatsoever, to charge, accept, or receive less than the minimum charges so filed or prescribed; provided, that any such carrier or carriers, or any class or group thereof, may apply to the commission for relief from the provisions of this paragraph, and the commission may, after hearing, grant such relief to such extent and for such time, and in such manner as in its judgment is consistent with the public interest and the transportation policy declared in this article.

(2) Whenever, after hearing, upon complaint or upon its own initiative, the commission finds that any minimum rate or charge of any contract carrier by motor vehicle, or any rule, regulation, or practice of any such carrier affecting such minimum rate or charge, or the value of the service thereunder, for the transportation of passengers or in connection therewith, contravenes the transportation policy declared in this article, or is in contravention of any provision of this article, the commission may prescribe such just and reasonable minimum rate or charge, or such rule, regulation, or practice as in its judgment may be necessary or desirable in the public interest and to promote such policy and will not be in contravention of any provision of this article. Such minimum rate or charge, or such rule, regulation, or practice, so prescribed by the commission, shall give no advantage or preference to any such carrier in competition with any common carrier by motor vehicle subject to this article, which the commission may find to be undue or inconsistent with the public interest and the transportation policy declared in this article, and the commission shall give due consideration to the cost of the services rendered by such carriers, and to the effect of such minimum rate or charge, or such rule, regulation, or practice, upon the movement of traffic by such carriers. All complaints shall state fully the facts complained of

and the reasons for such complaint and shall be made under oath.

(3) Whenever there shall be filed with the commission by any such contract carrier any schedule stating a charge for a new service or a reduced charge, directly or by means of any rule, regulation, or practice, for the transportation of passengers in intrastate commerce, the commission is hereby authorized and empowered upon complaint of interested parties or upon its own initiative at once and, if it so orders, without answer or other formal pleading by the interested party, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such charge, or such rule, regulation, or practice, and pending such hearing and the decision thereon the commission, by filing with such schedule and delivering to the carrier affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such charge, or such rule, regulation, or practice, but not for a longer period in the aggregate than one hundred eighty days beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the charge, or rule, regulation, or practice goes into effect, the commission may make such order with reference thereto as would be proper in a proceeding instituted after it had become effective. If the proceeding has not been concluded and order made within the period of suspension, the proposed change in any charge or rule, regulation, or practice shall go into effect at the end of such period, provided, the carrier may voluntarily suspend such schedule, rule, regulation or practice for further periods beyond the one hundred eighty days and until the proceeding be concluded.

(4) At any hearing before the commission under this paragraph, the burden of proof shall be upon the carrier to show that the changed rate, fare, charge, or classification or rule, regulation or practice, or the proposed changed rate, fare, charge, or classification, or the proposed rule, regulation, or practice, is just and reasonable. (1949, c. 1132, s. 24.)

§ 62-121.67. Accounts, records and reports.— (1) The commission is hereby authorized to require annual, periodical, or special reports from all motor carriers, brokers, and lessors (as defined in this section), to prescribe the manner and form in which such reports shall be made, and to require from such carriers, brokers and lessors, specific and full, true, and correct answers to all questions upon which the commission may deem information to be necessary. Such annual reports shall give an account of the affairs of the carrier, broker, or lessor, in such form and detail as may be prescribed by the commission. The commission may also require any motor carrier or broker to file with it a true copy of any contract, agreement, or arrangement between such carrier and any other carrier or person in relation to any traffic affected by the provisions of this article. The commission shall not, however, make public any contract, agreement, or arrangement under the terms of which a contract carrier undertakes to transport passengers, or any of the terms or conditions thereof, except as a part of the record in a formal proceeding where it considers such action consistent with the public interest; provided, that if it appears from an examination of any such contract that it fails to conform to the published schedule of the contract carrier as required by § 62-121.66, the commission may, in its discretion, make public such of the provisions of the contract as the commission considers necessary to disclose such failure and the extent thereof.

(2) Said annual reports shall contain all the required information for the period of twelve months ending on the thirty-first day of December in each year, unless the commission shall specify a different date, and shall be made out under oath and filed with the commission at its office in Raleigh within three months after the close of the year for which the report is made, unless additional time be granted in any case by the commission. Such periodical or special reports as may be required by the commission under paragraph (1) hereof shall also be under oath, whenever the commission so requires.

(3) The commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by motor carriers, brokers, and lessors, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys; and it shall be unlawful for such carriers, brokers, and lessors, to keep any accounts, records, and memoranda contrary to any rules, regulations, or orders of the commission with respect thereto. The commission may issue orders specifying such operating, accounting, or financial papers, records, books, blanks, stubs, correspondence, or documents of motor carriers, brokers, or lessors, as may after a reasonable time be destroyed, and prescribing the length of time they shall be preserved. The commission or its duly authorized special agents, accountants, or examners shall at all times have access to and authority, under its order, to inspect and examine any and all lands, buildings, or equipment of motor carriers, brokers, and lessors; and shall have authority to inspect and copy any and all accounts, books, records, memoranda, correspondence, and other documents of such carriers, brokers, and lessors, and such accounts, books, records, memoranda, correspondence, and other documents of any person controlling, controlled by, or under common control with any such carrier, as the commission deems relevant to such person's relation to or transactions with such carrier. Motor carriers, brokers, lessors, and persons shall submit their accounts, books, records, memoranda, correspondence, and other documents for the inspection and copying authorized by this paragraph, and motor carriers, brokers, and lessors, shall submit their lands, buildings, and equipment for examination and inspection, to any duly authorized special agent, accountant, auditor, inspector, or examiner of the commission upon demand and the display of proper credentials.

(4) As used in this section, the words "keep", and "kept" shall be construed to mean made, prepared, or compiled, as well as retained; the term "lessor" means a lessor of any right to operate as a motor carrier; and the term "motor carrier", "broker", or "lessor", includes a receiver or trustee of any such motor carrier, broker, or lessor. (1949, c. 1132, s. 25.)

§ 62-121.68. Designation of process agent; service of notices and orders.—It shall be the duty of every motor carrier operating under a certificate or permit issued under the provisions of this article to file with the commission a designation in writing of the name and post office address of a person upon whom or which service of notices or orders may be made under this article. Such designation may from time to time be changed by like writing similarly filed. Service of notices or orders in proceedings under this article may be made upon a motor carrier by personal service upon it or upon the person so designated by it, or by registered mail, return receipt requested, addressed to it or to such person at the address filed. In proceedings before the commission involving the lawfulness of rates, charges, classifications, or practices, service of notice upon the person or agent who has filed a tariff or schedule in behalf of such carrier shall be deemed to be due and sufficient service upon the carrier. (1949, c. 1132, s. 26.)

§ 62-121.69. Free transportation.—No carrier shall, directly or indirectly, issue, give, tender, or honor any free fares except to its bona fide officers, agents, commission agents, employees, and members of their immediate families, and such persons as the commission may designate in its employ, or the employ of the motor vehicle department for the inspection of equipment and supervision of traffic upon the highways of the state: Provided, that motor carriers under this article may exchange free transportation within the limits of this section. (1949, c. 1132, s. 27.)

§ 62-121.70. Depots and stations.—Upon notice and hearing and upon a finding by the commission that public convenience and necessity so requires, the commission is authorized and empowered to compel any motor carrier operating under the provisions of this article and serving any municipality or town to establish and maintain a passenger depot or station for the security, accommodation and convenience of the traveling public. When two or more carriers operating under the provisions of this article shall serve any municipality or town, the commission is authorized and empowered to require such carriers to establish and maintain a union passenger depot or station for the security, accommodation and convenience of the traveling public, and to unite in the joint undertaking and expense of securing, erecting, constructing and maintaining such union passenger depot or station, commensurate with the business and revenue of such motor carriers, on such terms, regulations, provisions and conditions as the commission shall prescribe: Provided, that whenever the commission shall require that a union depot or station shall be provided, it shall first allow the carriers required to provide such station an opportunity to submit to the commission for approval any agreement between or among such carriers for the securing, construction, maintenance and operation of such station or depot. The commission shall approve such agreement or agreements, if the same be, in the commission's discretion, reasonable and just and in the public interest. (1949, c. 1132, s. 28.)

§ 62-121.71. Separation of races.—The commission shall require every common carrier by motor vehicle to provide separate but substantially equal accommodations for the white and colored races at passenger stations or waiting rooms where the carrier receives passengers of both races, and on all common carriers by motor vehicles operating on a route or routes over which such carrier transports passengers of both races. Provided, that any requirement as to separate accommodation for the races shall not apply to specially chartered motor vehicles or to negro servants and attendants and their employers, or to officers or guards transporting prisoners. (1949, c. 1132, s. 29.)

Nature of Segregation Provisions.—Former sections 62-109 and 62-118, of similar import to this section and § 62-121.72, did not purport to deal with the enforcement of segregation, but made it mandatory on the part of the utilities commission to require transportation companies to provide equal accommodations for the white and colored races, in order that the settled policy of this state, which calls for the segregation of the white and colored races in the public institutions of the state, and on our intrastate transportation systems, might be enforced. State v. Johnson, 229 N. C. 701, 51 S. E. (2d) 186.

§ 62-121.72. Unlawful operation.—(1) Any person, whether carrier, or any officer, employee, agent or representative thereof, knowingly and willfully violating any provision of this article or any rule, regulation, requirement, or order thereunder, or any term of condition of any certificate or permit, for which a penalty is not otherwise herein provided, shall be guilty of a misdemeanor, and upon conviction thereof be fined not more than one hundred dollars ($100.00) for the first offense and not more than five hundred dollars ($500.00) for any subsequent offense.

(2) If any motor carrier, or any other person or corporation, shall operate a motor vehicle for the transportation of passengers for compensation in violation of any provision of this article, except as to the reasonableness of rates or charges and the discriminatory character thereof, or shall operate in violation of any rule, regulation, requirement or order of the commission, or of any term or condition of any certificate or permit, the commission or any holder of a certificate or permit duly issued by the commission may apply to the resident superior court judge of any judicial district where such motor carrier or other person or corporation so operates, or to any superior court judge holding court in such judicial district, for the enforcement of any provision of this article, or of any rule, regulation, requirement, order, term or condition of the commission. Such court shall have jurisdiction to enforce obedience to this article or to any rule, order, or decision of the commission by a writ of injunction or other process, mandatory or otherwise, restraining such carrier, person or corporation, or its officers, agents, employees and representatives from further violation of this article or of any rule, order, regulation, or decision of the commission.

(3) Any person, whether carrier, passenger, shipper, consignee, or any officer, employee, agent, or representative thereof, who shall knowingly offer, grant, or give or solicit, accept, or receive any rebate, concession, or discrimination in violation of any provision of this article, or who by means of any false statement or representation, or by the use of any false or fictitious bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, deposition, lease, or bill of

sale, or by any other means or device, shall knowingly and willfully by any such means or otherwise fraudulently seek to evade or defeat regulations as in this article provided for motor carriers, shall be deemed guilty of a misdemeanor and upon conviction thereof be fined not more than five hundred dollars ($500.00) for the first offense and not more than two thousand dollars ($2,000.00) for any subsequent offense.

(4) It shall be unlawful for any special agent, accountant, auditor, inspector, or examiner to knowingly and willfully divulge any fact or information which may come to his knowledge during the course of any examination or inspection made under authority of § 62-121.67 of this article, except as he may be directed by the commission or by a court or judge thereof. Nothing in this article shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any court, or to any officer or agent of the state or of the government of the United States, in the exercise of his power, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crimes or to another carrier, or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers.

(5) Any motor carrier, or other person, or any officer, agent, employee, or representative thereof, who shall willfully fail or refuse to make a report to the commission as required by this article, or other applicable law, or to make specific and full, true, and correct answer to any question within thirty days from the time it is lawfully required by the commission so to do, or to keep accounts, records, and memoranda in the form and manner prescribed by the commission, or shall knowingly and willfully falsify, destroy, mutilate, or alter any such report, account, record, or memorandum, or shall knowingly and willfully neglect or fail to make true and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of the carrier, or person required under this article to keep the same, or shall knowingly and willfully keep any accounts, records, or memoranda contrary to the rules, regulations, or orders of the commission with respect thereto, shall be deemed guilty of a misdemeanor and upon conviction thereof be subject for each offense to a fine of not more than five thousand dollars ($5,000.00). As used in this subsection the words "kept" and "keep" shall be construed to mean made, prepared, or compiled, as well as retained. It shall be the duty of the commission to prescribe and enforce such general rules and regulations as it may deem necessary to compel all motor carriers to keep accurate records of all revenue received by them to the end that any tax levied and assessed by the state of North Carolina upon revenues may be collected. Any agent or employee of a motor carrier who shall willfully and knowingly make a false report or record of fares, charges, or other revenue received by a carrier or collected in its behalf shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned, or both, in the discretion of the court. (1949, c. 1132, s. 30.)

As to right of common carrier to apply to court for injunctive relief against wrongful acts of another carrier under former article 6 of this chapter, repealed and superseded by this article, see Burke Transit Co. v. Queen City Coach Co., 228 N. C. 768, 47 S. E. (2d) 297.

§ 62-121.73. Evidence; liability of surety or insurer.—No report by any motor carrier of any accident arising in the course of the operations of such carrier, made pursuant to this article or to any requirement of the commission, and no report by the commission of any investigation of any such accident, shall be admitted as evidence, or used for any other purpose in any suit or action for damages growing out of any matter mentioned in such report or investigation; nor shall the discharge by any carrier of any vehicle driver or other employee after any such accident be offered or admitted in evidence for any purpose in any suit or action against such carrier for damages arising out of any such accident. No evidence of any policy, bond or other security required under § 62-121.61 shall be offered or received in any such action or suit against a motor carrier, but the surety or insurer shall be obligated within the amount of such policy, bond or other security to pay any final judgment against the carrier. (1949, c. 1132, s. 31.)

§ 62-121.74. Interstate carriers.—(1) Except in so far as the provisions of this article may be inconsistent with, or shall contravene, the constitution and laws of the United States this article shall apply to persons and vehicles engaged in interstate commerce over the highways of this state; and the commission may, in its discretion, require such carriers to file with it copies of their respective interstate authority, registration of their vehicles operated in this state, and the observance of such reasonable rules and regulations as the commission may deem advisable in the administration of this article and for the protection of persons and property upon the highways of this state.

(2) The commission or its authorized representative is authorized to confer with and hold joint hearings with the authorities of other states or with the Interstate Commerce Commission or its representatives in connection with any matter arising under this article, or under the Federal Motor Carrier Act, which may directly or indirectly affect the interests of the people of this state or the transportation policy declared by this article. (1949, c. 1132, s. 32.)

§ 62-121.75. Fees and charges.—The following fees and charges shall be paid to the commission under the provisions of this article:

(1) Twenty-five dollars ($25.00) with each application for a certificate or permit, and with each application for the amendment to a certificate or permit for new or additional operating rights, but credit shall be given for fees paid on applications filed under the existing law and heard after this article becomes effective.

(2) Ten dollars ($10.00) for each application for approval of a sale, assignment, pledge, hypothecation, transfer of a certificate or permit, or lease of any right or interest under a certificate or permit, or for any approval of any merger combination or change of control of the operating rights under a certificate of permit through stock transfer or otherwise.

(3) One dollar ($1.00) for registration of each

motor vehicle of a certificate or permit holder added to its rolling equipment after the effective date of this article.

(4) Twenty-five cents ($.25) for annual re-registration of each motor vehicle operated by a certificate or permit holder.

(5) Twenty-five dollars ($25.00) filing fee for each broker and twenty-five dollars ($25.00) each year thereafter for each such broker in addition to any other tax or fee provided by law.

(6) Such reasonable charges for copies of transcripts of testimony, or for copies of other papers, records, or documents, or for certifying records, as the commission shall prescribe in its rules of practice and procedure. All fees and charges received by the commission under this section shall be in addition to any other tax or fee provided by law and shall be paid forthwith to the state treasurer. (1949, c. 1132, s. 33.)

§ 62-121.76. Applicability of Utilities Commission Procedure Act of 1949; appeals.—Except as otherwise provided in this article, the Utilities Commission Procedure Act of 1949, codified as G. S. §§ 62-11 to 62-26.15, shall apply to and govern the procedure in all cases and proceedings before the commission arising under this article, including appeals from the commission's orders and decisions. (1949, c. 1132, s. 34.)

§ 62-121.77. Construction of article.—Nothing herein contained shall be construed to relieve any motor carrier, as herein defined, from any regulation otherwise imposed by law or lawful authority, and this article shall not be construed to relieve any such motor carrier from any obligation or duty imposed by chapter 20 of the General Statutes of North Carolina of 1943, as amended. (1949, c. 1132, s. 35.)

§ 62-121.78. Allocation of funds.— Sufficient funds shall be provided in the budget and allocated to the commission to be disbursed under the supervision of the director of the budget for the administration and enforcement of the provisions of this article, including the employment of such additional personnel as may be required for that purpose. (1949, c. 1132, s. 36.)

§ 62-121.79. Repeal of inconsistent acts.—This article regulating motor carriers of passengers, mail and light express and chapter 1008, Public Laws of 1947, now article 6b, chapter 62, General Statutes of North Carolina of 1943, regulating motor carriers of property shall be construed as superseding article 6, chapter 62 of the General Statutes of North Carolina of 1943 and said article 6 is hereby repealed. All other acts or parts of acts relating to motor carriers as defined in this article and in conflict or inconsistent with this article are hereby repealed to the extent of such conflict or inconsistency. (1949, c. 1132, s. 38.)

Art. 7. Rate Regulation.

§ 62-122. Commission to fix rates for public utilities.

Fees and Charges Made by Municipality.—The North Carolina utilities commission has no jurisdiction under paragraph 3 of this section to fix or supervise the fees and charges to be made by a municipality for connections with a city sewerage system, either within or without its corporate limits. Atlantic Constr. Co. v. Raleigh, 230 N. C. 365, 53 S. E. (2d) 165.

§ 62-123. Rates established deemed just and reasonable.

Where Rates Re-Established upon Reconsideration.—Where the utilities commission, after due notice and hearing, had established rates for intrastate shipments of pulpwood which it found to be just and reasonable, and thereafter upon petition of defendant and other carriers for reconsideration, the rate so established was ordered "to remain in full force and effect," it was held that by virtue of this section these rates so established must be deemed the only just and reasonable rates for this commodity over defendant's lines, rendering it unlawful for defendant to charge a greater amount. State v. Atlantic Coast Line R. Co., 224 N. C. 283, 287, 29 S. E. (2d) 912.

§ 62-125. Hearing before utilities commission upon request for change of rates, etc.—Whenever there shall be filed with the utilities commission any schedule stating a change in any new individual or joint rate, fare, charge, or classification for the transportation of passengers or property by a public carrier or carriers by railroad, or express, or highway, or water, or any rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the commission is hereby authorized and empowered upon complaint of any interested party or upon its own initiative at once and, if it so orders, without answer or formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such rule, regulation, or practice, and pending such hearing and the decision thereon the commission, by filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing and its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, fare, or charge, or such rule, regulation, or practice, for a period of ninety days, and if the proceeding has not been concluded and a final order made within such period, the commission may, from time to time, extend the period of suspension by order, but not for a longer period in the aggregate than one hundred and eighty days beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice goes into effect, the commission may make such order with reference thereto as would be proper in a proceeding instituted after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, or charge, or classification, rule, regulation, or practice, may go into effect at the end of such period. At any hearing involving a rate, fare, charge, or classification, changed or sought to be changed, or involving a rule, regulation, or practice, resulting in a change, the burden of proof shall be upon the carrier to show that the changed rate, fare, charge, or classification, or rule, regulation, or practice, or the proposed changed rate, fare, charge, or classification, or the proposed rule, regulation, or practice, is just and reasonable. (1939, c. 365, s. 3; 1941, c. 97; 1945, c. 725.)

The 1945 amendment substituted in line three the words "a change" for the words "an increase" and made similar changes in the last sentence of the section.

Pending further investigation into the reasonableness of a rate which has been established by the commission as the only just and reasonable rate for that commodity, the rate so fixed should not be superseded by a higher rate

by the railroad, in violation of an order in the proceeding forbidding it, except after proper determination of the reasonableness of the increase desired. State v. Atlantic Coast Line R. Co., 224 N. C. 283, 288, 29 S. E. (2d) 912.

§ 62-126. Notice required for change in rates, etc.—No change shall be made in any rate, fare, charge, or classification, nor shall any change be made in any rule, regulation, or practice, which has been published and filed by any of the transportation companies named in the preceding section, except upon not less than thirty days' notice to the commission and the public: Provided, that the commission may, in its discretion, and for good cause shown, authorize the publication and filing of changed rates, fares, charges, or classification, or rules, regulations, or practices, upon less than thirty days' notice. (1939, c. 365, s. 4; 1941, c. 97; 1945, c. 725.)

Editors Note.—Prior to the 1945 amendment notice was required only where there was an increase in rate.

The requirement of this section that the thirty days' notice of an increase in rates to be given the utilities commission properly may be implemented by rule of the commission requiring that the notice be in writing in triplicate. State v. Atlantic Coast Line R. Co., 224 N. C. 283, 289, 29 S. E. (2d) 912.

The utilities commission's rules of practice and procedure, promulgated under legislative authority, require a defendant, if it desires the vacation or modification of a previous order, to file a written notice of intention to make changes resulting in increases, which would seem to implement the requirements of this section that thirty days' notice of an increase be given the commission. State v. Atlantic Coast Line R. Co., 224 N. C. 283, 29 S. E. (2d) 912.

Art. 8. Railroad Freight Rates.

§ 62-135. Charging or receiving greater rates forbidden.

Cross References.—

As to charging higher rates after rates re-established upon reconsideration, see § 62-123.

Art. 9. Penalties and Actions.

§ 62-142. Refusing to obey orders of commission.

Cited in State v. Atlantic Coast Line R. Co., 224 N. C. 283, 29 S. E. (2d) 912.

Chapter 63. Aeronautics.

Sec.

Art. 2. State Regulation.

63-14. [Repealed.]

Art. 5. Aeronautics Commission; Federal Regulations.

63-38 to 63-44. [Repealed.]
63-45. Enforcement of article.
63-46. [Repealed.]
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Art. 6. Public Airports and Related Facilities.

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Art. 1. Municipal Airports.

§ 63-2. Cities and towns authorized to establish airports.

Cited in Turner v. Reidsville, 224 N. C. 42, 29 S. E. (2d) 211.

§ 63-4. Joint airports established by cities and towns and counties.

Section Not Repealed or Modified.—This section, permitting municipalities to act jointly in creation of an airport authority is not repealed or modified, or its authority in any way affected by the supplementary public-local and private acts under which the purpose and policy of this section are carried out in the creation of a single airport authority to serve three municipalities. Greensboro-High Point Airport Authority v. Johnson, 226 N. C. 1, 10, 36 S. E. (2d) 803.

The legislature has power to create a municipal authority to construct, maintain and operate an airport, and county and cities located therein may lawfully join in the construction, maintenance and operation of an airport if each of them is benefited by it. Greensboro-High Point Airport Authority v. Johnson, 226 N. C. 1, 36 S. E. (2d) 803.

Art. 2. State Regulation.

§ 63-11. Sovereignty in space.

Stated in United States v. Causby, 328 U. S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206.

§ 63-12. Ownership of space.

Flight of Planes over Property as Taking.—Holding that flights by planes at low levels over plaintiff's land deprived plaintiffs of use and enjoyment of their property and constituted "taking" entitling them to compensation was not inconsistent with this section. United States v. Causby, 328 U. S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206, discussed in 25 N. C. Law Rev. 64.

§ 63-13. Lawfulness of flight.—Flight in aircraft over the lands and waters of this State is lawful, unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be injurious to the health and happiness, or imminently dangerous to persons or property lawfully on the land or water beneath. The landing of an aircraft on the lands or waters of another, without his consent, is unlawful, except in the case of a forced landing. For damages caused by a forced landing, however, the owner or lessee of the aircraft or the aeronaut shall be liable as provided in § 63-14. (1929, c. 190, s. 4; 1947, c. 1001, s. 1.)

Editor's Note.—The 1947 amendment inserted in line seven the words "injurious to the health and happiness, or."

Stated in United States v. Causby, 328 U. S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206.

§ 63-14: Repealed by Session Laws 1947, c. 1069, s. 3.

§ 63-18. Dangerous flying a misdemeanor. — Any aeronaut or passenger who, while in flight over a thickly inhabited area or over a public gathering within this State, shall engage in trick or acrobatic flying, or in any acrobatic feat, or shall except while in landing or taking off, fly at

such a low level as to disturb the public peace or the rights of private persons in the enjoyment of their homes, or injure the health, or endanger the persons or property on the surface beneath, or drop any object except loose water or loose sand ballast, shall be guilty of a misdemeanor and punishable by a fine of not more than five hundred dollars ($500.00) or imprisonment for not more than one year, or both. (1929, c. 190, s. 9; 1947, c. 1001, s. 2.)

Editor's Note.—The 1947 amendment struck out the words "endanger the persons" formerly appearing in line six and inserted in lieu thereof the words "disturb the public peace or the rights of private persons in the enjoyment of their homes, or injure the health, or endanger the persons or property."

Art. 4. Model Airport Zoning Act.

§ 63-29. Definitions.

(3) "Political subdivision" means any municipality, city, town, county, or any municipal corporation, authority or commission created by the general assembly of North Carolina for the purpose of owning, operating or regulating any airport or airports.

(1945, c. 300.)

Editor's Note.—Prior to the 1945 amendment subsection (3) read as follows: "'Political subdivision' means any municipality, city, county, or town." As only this subsection was affected by the amendment the rest of the section is not set out.

See note under § 63-31.

§ 63-31. Adoption of airport zoning regulations.

(4) The jurisdiction of each political subdivision is hereby extended to the promulgating, adopting, administering and enforcement of airport zoning regulations to protect the approaches of any airport or landing field which is owned by said political subdivision, although the area affected by the zoning regulations may be located outside the corporate limits of said political subdivision. In case of conflict with any airport zoning or other regulations promulgated by any political subdivision, the regulations adopted pursuant to this section shall prevail.

(1945, c. 300.)

Editor's Note.—Session Laws 1945, c. 635, struck out subsection (6) of this section.

Session Laws 1945, c. 300 purports to amend only subsection (3) of section 63-29 and then proceeds to set out the amended subsection and an additional subsection numbered (4), which is the one appearing above. The amendatory act makes no reference to this section and only by reading it in conjunction with the amended act can it be surmised that an amendment of this section was intended. Therefore, there is some doubt as to whether this section has been amended.

Art. 5. Aeronautics Commission; Federal Regulations.

§§ 63-38 to 63-44: Repealed by Session Laws 1949, c. 865, s. 1.

§ 63-45. Enforcement of article.—It shall be the duty of every state, county and municipal officer charged with the enforcement of state and municipal laws to enforce and assist in the enforcement of this article. (1945, c. 198, s. 8.)

§ 63-46: Repealed by Session Laws 1949, c. 865, s. 2.

§ 63-47. Enforcement of regulations of Civil Aeronautics Administration.—In the general public interest and safety, the safety of persons receiving instructions concerning or operating, using or traveling in aircraft, and of persons and property on the ground, and in the interest of aeronautical progress, the public officers of the state, counties and cities shall enforce the rules and regulations of the Civil Aeronautics Administration. (1945, c. 198, s. 10.)

Art. 6. Public Airports and Related Facilities.

§ 63-48. Definitions.—For the purpose of this article the following words, terms, and phrases shall have the meanings herein given, unless otherwise specifically defined, or unless another intention clearly appears, or the context otherwise requires:

(a) "Aeronautics" means transportation by aircraft; the operation, construction, repair, or maintenance of aircraft, aircraft power plants and accessories, including the repair, packing, and maintenance of parachutes; the design, establishment, construction, extension, operation, improvement, repair, or maintenance of airports, restricted landing areas, or other air navigation facilities, and air instruction.

(b) "Aircraft" means any contrivance now known, or hereafter invented, used or designed for navigation of or flight in the air.

(c) "Public aircraft" means an aircraft used exclusively in the service of any government or of any political subdivision thereof, including the government of any state, territory, or possession of the United States, or the District of Columbia, but not including any government owned aircraft engaged in carrying persons or property for commercial purposes.

(d) "Civil aircraft" means any aircraft other than a public aircraft.

(e) "Airport" means any area of land or water, except a restricted landing area, which is designed for the landing and take-off of aircraft, whether or not facilities are provided for the shelter, servicing, or repair of aircraft, or for receiving or discharging passengers or cargo, and all appurtenant areas used or suitable for airport buildings or other airport facilities, and all appurtenant rights of way, whether heretofore or hereafter established.

(f): Repealed by Session Laws 1949, c. 865, s. 3.

(g) "State" or "this state" means the state of North Carolina.

(h) "Restricted area" means any area of land, water, or both, which is used or is made available for the landing and take-off of aircraft, the use of which shall, except in case of emergency, be only as provided from time to time by the commission.

(i) "Air navigation facility" means any facility other than one owned or controlled by the federal government, used in, available for use in, or designed for use in aid of air navigation, including airports, restricted landing areas, and any structures, mechanisms, lights, beacons, marks, communicating systems, or other instrumentalities or devices used or useful as an aid, or constituting an advantage or convenience to the safe taking-off, navigation, and landing of aircraft, or the safe and efficient operation or maintenance of an airport or restricted landing area, and any combination of any or all of such facilities.

(j) "Air navigation" means the operation or navigation of aircraft in the air space over this state, or upon any airport or restricted landing area within this state.

(k) "Operation of aircraft" or "operate aircraft" means the use of aircraft for the purpose of air navigation and includes the navigation or piloting of aircraft. Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the capacity of owner, lessee, or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft within the meaning of the statutes of this state.

(l) "Airman" means any individual who engages, as the person in command, or as pilot, mechanic, or member of the crew, in the navigation of aircraft while underway and (excepting individuals employed outside the United States, any individual employed by a manufacturer of aircraft, aircraft engines, propellers, or appliances to perform duties as inspector or mechanic in connection therewith, and any individual performing inspection or mechanical duties in connection with aircraft owned or operated by him) any individual who is directly in charge of the inspection, maintenance, overhauling, or repair of aircraft engines, propellers, or appliances; and any individual who serves in the capacity of aircraft dispatcher or air traffic control tower operator.

(m) "Air instruction" means the imparting of aeronautical information by any aeronautics instructor or in or by any air school or flying club.

(n) "Air school" means any person engaged in giving or offering to give instruction in aeronautics, either in flying or ground subjects, or both, for or without hire or reward, and advertising, representing, or holding himself out as giving or offering to give such instruction. It does not include any public school or university of this state, or any institution of higher learning duly accredited and approved for carrying on collegiate work.

(o) "Aeronautics instructor" means any individual engaged in giving instruction or offering to give instruction in aeronautics, either in flying or ground subjects, or both, for hire or reward, without advertising such occupation, without calling his facilities an "air school" or anything equivalent thereto, and without employing or using other instructors. It does not include any instructor in any public school or university of this state, or any institution of higher learning duly accredited and approved for carrying on collegiate work, while engaged in his duties as such instructor.

(p) "Flying club" means any person other than an individual which, neither for profit nor reward, owns, leases, or uses one or more aircraft for the purpose of instruction or pleasure, or both.

(q) "Person" means any individual, firm, partnership, corporation, company, association, joint stock association, or body politic; and includes any trustee, receiver, assignee, or other similar representative thereof.

(r) "State airway" means a route in the navigable air space over and above the lands or water of this state designated by the commission as a route suitable for air navigation.

(s) "Navigable air space" means air space above the minimum altitudes of flight prescribed by the laws of this state, or by regulations of the commission consistent therewith.

(t) "Municipality" means any county, city, or town of this state, and any other political subdivision, public corporation, authority, or district in this state, which is or may be authorized by law to acquire, establish, construct, maintain, improve, and operate airports and other air navigation facilities.

(u) "Airport protection privileges" means easements through, or other interests in, air space over land or water, interests in airport hazards outside the boundaries of airports or restricted landing areas, and other protection privileges, the acquisition or control of which is necessary to insure safe approaches to the landing areas of airports and restricted landing areas and the safe and efficient operation thereof.

(v) "Airport hazard" means any structure, object of natural growth, or use of land, which obstructs the air space required for the flight of aircraft in landing or taking-off at any airport or restricted landing area or is otherwise hazardous to such landing or taking-off.

The singular shall include the plural, and the plural the singular. (1945, c. 490, s. 1; 1949, c. 865, s. 3.)

For discussion of the 1945 statute enacting this and the following sections, see 23 N. C. Law Rev. 327.

The 1949 act repealed subsection (f).

§ 63-49. Municipalities may acquire airports.—(a) Every municipality is hereby authorized, through its governing body, to acquire property, real or personal, for the purpose of establishing, constructing, and enlarging airports and other air navigation facilities and to acquire, establish, construct, enlarge, improve, maintain, equip, operate, and regulate such airports and other air navigation facilities and structures and other property incidental to their operation, either within or without the territorial limits of such municipality and within or without this state; to make, prior to any such acquisition, investigations, surveys, and plans; to construct, install, and maintain airport facilities for the servicing of aircraft and for the comfort and accomodation of air travelers; and to purchase and sell equipment and supplies as an incident to the operation of its airport properties. It may not, however, acquire or take over any airport or other air navigation facility owned or controlled by any other municipality of the state without the consent of such municipality. It may use for airport purposes any available property that is now or may at any time hereafter be owned or controlled by it. Such air navigation facilities as are established on airports shall be supplementary to and coordinated in design and operation with those established and operated by the federal government.

(b) All property needed by a municipality for an airport or restricted landing area, or for the enlargement of either, or for other airport purposes, may be acquired by purchase, gift, devise, lease or other means if such municipality is able to agree with the owners of said property on the terms of such acquisition, and otherwise by condemnation in the manner provided by the law under which such municipality is authorized to ac-

quire like property for public purposes, full power to exercise the right of eminent domain for such purposes being hereby granted every municipality both within and without its territorial limits. If but one municipality is involved and the charter of such municipality prescribes a method of acquiring property by condemnation, proceedings shall be had pursuant to the provisions of such charter and may be followed as to property within or without its territorial limits. The fact that the property needed has been acquired by any agency or corporation authorized to institute condemnation proceedings under power of eminent domain shall not prevent its acquisition by the municipality by the exercise of the right of eminent domain herein conferred when such right is exercised on the approach zone or on the airport site. For the purpose of making surveys and examinations relative to any condemnation proceedings, it shall be lawful to enter upon any land, doing no unnecessary damage. Provided that municipalities building airports after the ratification of this article shall not acquire by condemnation any property of any corporation engaged in the operation of a railroad or railroad bridge in this state if such property is used in the business of such corporation.

(c) Where necessary, in order to provide unobstructed air space for the landing and taking-off of aircraft utilizing airports or restricted landing areas acquired or operated under the provisions of this article, every municipality is authorized to acquire, in the same manner as is provided for the acquisition of property for airport purposes, easements through or other interests in air space over land or water, interests in airport hazards, or airport hazards outside the boundaries of the airports or restricted landing areas and such other airports protection privileges as are necessary to insure safe approaches to the landing areas of said airports or restricted landing areas and the safe and efficient operation thereof. It is also hereby authorized to acquire, in the same manner, land for the removal of airport hazards and the right of easement for a term of years or perpetually, to place or maintain suitable marks for the daytime marking and suitable lights for the nighttime marking of airport hazards, including the right of ingress or egress to or from such airport hazards for the purpose of maintaining and repairing such lights and marks. This authority shall not be so construed as to limit any right, power or authority to zone property adjacent to airports and restricted landing areas under the provisions of any law of this state.

(d) It shall be unlawful for anyone to build, rebuild, create, or cause to be built, rebuilt, or created any object, or plant, cause to be planted, or permit to grow higher any tree or trees or other vegetation which shall encroach upon any airport protection privileges acquired pursuant to the provisions of this section. Any such encroachment is declared to be a public nuisance and may be abated in the manner prescribed by law for the abatement of public nuisances, or the municipality in charge of the airport or restricted landing area for which airport protection privileges have been acquired as in this section provided, may go upon the land of others and remove any such encroachment without being liable for damages in so doing. (1945, c. 490, s. 2; c. 810.)

Editor's Note.—Session Laws 1945, c. 810 added the proviso at the end of subsection (b).

§ 63-50. Airports a public purpose.—The acquisition of any lands for the purpose of establishing airports or other air navigation facilities; the acquisition of airport protection privileges; the acquisition, establishment, construction, enlargement, improvement, maintenance, equipment and operation of airports and other air navigation facilities, and the exercise of any other powers herein granted to municipalities, are hereby declared to be public, governmental and municipal functions exercised for a public purpose and matters of public necessity, and such lands and other property, easements and privileges acquired and used by such municipalities in the manner and for the purposes enumerated in this article, shall and are hereby declared to be acquired and used for public, governmental and municipal purposes and as matter of public necessity. (1945, c. 490, s. 3.)

A municipality is liable for torts committed by it in the operation and maintenance of a municipal airport, since such activity is a proprietary or corporate function of the municipality, and this section, declaring such activity to be a public, governmental and municipal function exercised for a public purpose, does not purport to exempt it from tort liability. Rhodes v. Asheville, 230 N. C. 134, 52 S. E. (2d) 371.

§ 63-51. Prior acquisition of airport property validated.—Any acquisition of property within or without the limits of any municipality for airports and other air navigation facilities or of airport protection privileges heretofore made by any such municipality in any manner, together with the conveyance and acceptance thereof, is hereby legalized and made valid and effective. (1945, c. 490, s. 4.)

§ 63-52. Airport property and income exempt from taxation.—No municipality shall be required to pay any tax to the state of North Carolina or any other municipality on account of property, either real or personal, now owned or hereafter acquired for aeronautical purposes. (1945, c. 490, s. 5.)

§ 63-53. Specific powers of municipalities operating airports.—In addition to the general powers in this article conferred, and without limitation thereof, a municipality which has established or may hereafter establish airports, restricted landing areas or other air navigation facilities, or which has acquired or set apart or may hereafter acquire or set apart real property for such purpose or purposes is hereby authorized:

(a) To vest authority for the construction, enlargement, improvement, maintenance, equipment, operation and regulation thereof in an officer, a board or body of such municipality by ordinance or resolution which shall prescribe the powers and duties of such officer, board or body. The expense of such construction, enlargement, improvement, maintenance, equipment, operation and regulation shall be a responsibility of the municipality.

(b) To adopt and amend all needful rules, regulations and ordinances for the management, government and use of any properties under its

control whether within or without the territorial limits of the municipality; to appoint airport guards or police with full police powers; to fix by ordinance, penalties for the violation of said ordinances and enforce said penalities in the same manner in which penalties prescribed by other ordinances of the municipality are enforced. It may also adopt ordinances designed to safeguard the public upon or beyond the limits of private airports or landing strips within such municipality or its police jurisdiction against the perils and hazards of instrumentalities used in aerial navigation. Such ordinances shall be published as provided by general law or the charter of the municipality for the publication of similar ordinances. They must conform to and be consistent with the laws of this state and shall be kept in conformity, as nearly as may be, with the then current federal legislation governing aeronautics and the regulations duly promulgated thereunder and rules and standards issued from time to time pursuant thereto.

(c) To lease such airports or other air navigation facilities, or real property acquired or set apart for airport purposes, to private parties, to any municipal or state government or to the national government, or to any department of either thereof, for operation; to lease to private parties, to any municipal or state government or to the national government, or any department of either thereof, for operation or use consistent with the purpose of this article, space, area, improvements, or equipment on such airports; to sell any part of such airports, other air navigation facilities or real property to any municipal government, or to the United States or to any department or instrumentality hereof, for aeronautical purposes or purposes incidental thereto, and to confer the privileges of concessions of supplying upon its airports goods, commodities, things, services and facilities; provided that in each case in so doing the public is not deprived of its rightful, equal, and uniform use thereof.

(d) To sell or lease any property, real or personal, acquired for airport purposes and belonging to the municipality, which, in the judgment of its governing body, may not be required for aeronautic purposes in accordance with the laws of this state or the provisions of the charter of the municipality governing the sale or leasing of similar municipally owned property.

(e) To determine the charge or rental for the use of any properties under its control and the charges for any services or accommodations and the terms and conditions under which such properties may be used, provided that in all cases the public is not deprived of its rightful, equal, and uniform use of such property. Charges shall be reasonable and uniform for the same class of service and established with due regard to the property and improvements used and the expense of operation to the municipality. The municipality shall have and may enforce liens as provided by law for liens and enforcement thereof, for repairs to or improvement or storage or care of any personal property, to enforce the payment of any such charges.

(f) To exercise all powers necessarily incidental to the exercise of the general and special powers herein created. (1945, c. 490, s. 6.)

Where a night watchman at a municipal airport kills a person on the property in the nighttime, the question of whether he was acting in his capacity as servant or agent of the airport, or in his capacity as a police officer, is a question of fact to be determined by the jury on an issue raised by proper pleadings. Rhodes v. Asheville, 230 N. C. 134, 52 S. E. (2d) 371.

§ 63-54. Federal aid.—(a) A municipality is authorized to accept, receive, and receipt for federal moneys and other moneys, either public or private, for the acquisition, construction, enlargement, improvement, maintenance, equipment, or operation of airports and other air navigation facilities and sites therefor, and to comply with the provisions of the laws of the United States and any rules and regulations made thereunder for the expenditures of federal moneys upon such airports and other air navigation facilities.

(b) The governing body of any municipality is authorized, if necessary, to comply with any federal law or regulation of any agency thereof to designate the North Carolina Aeranautics Commission as its agent to accept, receive, and receipt for federal moneys in its behalf for airport purposes. Such moneys as are paid over by the United States government shall be paid over to said municipality under such terms and conditions as may be imposed by the United States government in making such grant.

(c) All contracts for the acquisition, construction, enlargement, improvement, maintenance, equipment or operation of airports or other air navigation facilities made by the municipality shall be made pursuant to the laws of this state governing the making of like contracts, provided, however, that where such acquisition, construction, improvement, enlargement, maintenance, equipment or operation is financed wholly or partly with federal moneys the municipality may let contracts in the manner prescribed by the federal authorities, acting under the laws of the United States and any rules or regulations made thereunder notwithstanding any other state law to the contrary. (1945, c. 490, s. 7.)

Editor's Note.—The commission referred to in subsection (b) has been abolished. See Session Laws 1949, c. 865, repealing §§ 63-38 to 63-44 and 63-46.

§ 63-55. Airports on public waters and reclaimed land.—(a) The powers herein granted to a municipality to establish and maintain airports shall include the power to establish and maintain such airports in, over, and upon any public waters of this state within the limits or jurisdiction of or bordering on the municipality, any submerged land under such public water, and any artificial or reclaimed land which before the artificial making or reclamation thereof constituted a portion of the submerged land under such public waters, and as well the power to construct and maintain terminal buildings, landing floats, causeways, roadways and bridges for approaches to or connecting with the airport, and landing floats and breakwaters for the protection of any such airport.

(b) All the other powers herein granted municipalities with reference to airports on land or granted to them with reference to such airports in, over, and upon public waters, submerged land under public waters, and artificial or reclaimed land. (1945, c. 490, s. 8.)

§ 63-56. Joint operation of airports.—(a) All

powers, rights and authority granted to any municipality in this article may be exercised and enjoyed by two or more municipalities either within or without the territorial limits of either or any of said municipalities and within or without this state, or by any municipality acting jointly with any other municipality therein either within or without this state, provided the laws of such other state permit such joint action.

(b) Any two or more municipalities may enter into agreements with each other, duly authorized by ordinance or resolution, as may be appropriate, for joint action pursuant to the provisions of this section. Concurrent action by the governing bodies of the municipalities involved shall constitute joint action.

(c) Each such agreement shall specify its term; the proportionate interest which each municipality shall have in the property, facilities and privileges involved, and the proportion of preliminary costs, costs of acquisition, establishment, construction, enlargement, improvement and equipment, and of expenses of maintenance, operation and regulation to be borne by each, and make such other provisions as may be necessary to carry out the provisions of this section. It shall provide for amendments thereof and for conditions and methods of termination; for the disposition of all or any part of the property, facilities and privileges jointly owned if said property, facilities and privileges, or any part thereof, shall cease to be used for the purposes herein provided or if the agreement shall be terminated, and for the distribution of the proceeds received upon any such disposition, and of any funds or other property jointly owned and undisposed of, and the assumption or payment of any indebtedness arising from the joint venture which remains unpaid, upon any such disposition or upon a termination of the agreement.

(d) Municipalities acting jointly as herein authorized may create a board from the inhabitants of such municipalities for the purpose of acquiring property for establishing, constructing, enlarging, improving, maintaining, equipping, operating and regulating the airports and other air navigation facilities and airport protection privileges to be jointly acquired, controlled, and operated. Such board shall consist of members to be appointed by the governing body of each municipality involved, the number to be appointed by each to be provided for by the agreement for the joint venture. Each member shall serve for such time and upon such terms and as to compensation, if any, as may be provided for in the agreement.

(e) Each such board shall organize, select officers for terms to be fixed by the agreement, and adopt and from time to time amend rules of procedure.

(f) Such board may exercise, on behalf of the municipalities acting jointly by which it is appointed, all the powers of each of such municipalities granted by this article, except as herein provided, subject, however, to such limitations as may be contained in the agreement between such municipalities. Real property, airports, restricted landing areas, air protection privileges, or personal property costing in excess of a sum to be fixed by the joint agreement, may be acquired, and condemnation proceedings may be instituted, only by authority of the governing bodies of each of the municipalities involved. The total amount of expenditures to be made by the board for any purpose in any calendar year shall be determined by the municipalities involved by the approval by each. No real property and no airport, other air navigation facility, or air protection privilege, owned jointly, shall be disposed of by the board, by sale, or otherwise, except by authority of the appointed governing bodies, but the board may lease space, area or improvements and grant concessions or airports for aeronautical purposes or purposes incidental thereto.

(g) Each municipality is authorized and empowered to enact such ordinances as are provided for by this article, and to fix by such ordinances penalties for the violation thereof, which ordinances shall have the same force and effect within the municipality which enacted them, and on any property controlled by it, either separately or jointly with another municipality, or adjacent thereto, whether within or without the territorial limits of it, or either or any of them, as ordinances of the municipality involved, and may be enforced in such municipality in like manner as are its other ordinances.

(h) Condemnation proceedings may be instituted in the names of two or more municipalities jointly, and the property acquired by such joint condemnation proceedings shall be held by the municipalities as tenants in common, each municipality being entitled to a pro rata interest in said property as the value of its contribution to the acquisition of said property bears to the total cost of acquiring said property, and in the event one municipality desires to acquire property for expansion of or addition to the facilities, and the other or others do not elect to join in the acquisition of such property, such municipality may institute condemnation proceedings in its name individually, and all property now owned or hereafter acquired by a municipal corporation for additions to or expansions of aeronautical facilities operated jointly shall be and remain the sole property of the municipal corporation acquiring same.

(i) For the purpose of providing funds for necessary expenditures in carrying out the provisions of this section, a joint fund shall be created and maintained, into which each of the municipalities involved shall deposit its proportionate share as provided by the joint agreement, and into which shall be paid the revenues obtained from the ownership, control and operation of the airports and other air navigation facilities jointly controlled.

(j) All disbursements from such fund shall be made by order of the board, subject, however, to such limitations as shall be contained in the agreement between such municipalities.

(k) Specific performance of the provisions of any joint agreement entered into as provided for in this section may be enforced as against any party thereto by the other party or parties thereto.

(l) In the event any property is now held or may hereafter be acquired by two or more municipalities for aeronautical purposes, and such municipalities do not agree upon the terms of an agreement, as heretofore provided, and shall not

agree to create a board as heretofore provided, then and in that event a board of not less than five nor more than seven members shall be created from the inhabitants of such municipalities, each municipality being entitled to appoint as nearly as possible the proportionate number of representatives on said board as the value of its contribution shall bear to the entire amount of money or property so held by such municipalities for aeronautical purposes. In determining the value of the contribution of any municipality, the value of any funds or property used for the development of said property or the building of facilities on said property shall be taken into consideration.

(m) The said board shall have all powers given by this article to boards created by agreements between municipalities, provided, however, that any funds appropriated by a municipality and turned over to the board for aeronautical purposes shall only be used for these purposes designated by the municipality furnishing such funds.

(n) The actions of such board shall be determined by a majority vote of the members thereof, and a majority of the members shall constitute a quorum for any meeting of the board, and such boards so created shall have full control of all revenues received by reason of the airport or other aeronautical facilities, and shall have power to expend all sums so received for such aeronautical purposes as the board deems proper, and pay over any surplus to the municipalities in proportion to their respective interests.

(o) In the event the aeronautical facilities or any part thereof shall cease to be used for aeronautical purposes, such of the facilities as are jointly owned by two or more municipalities shall be sold, and each municipality shall receive its pro rata proportion of the sums realized from the sale of facilities jointly owned.

(p) In the event aeronautical facilities are now owned or hereafter acquired by two or more municipalities, and are operated under a board as hereinabove provided, and one or more of such municipalities deem it advisable to expand or enlarge the facilities or invest more money in such facilities, all of the municipalities then having representation on the board shall be entitled, if they so desire, to contribute their pro rata part of such additional investment and maintain their pro rata representation on said board, provided, however, that if one or more of the municipalities involved shall fail to contribute its or their proportionate part of such additional investment, the representation of such municipality on such board shall be readjusted, to the end that the representation of each municipality on said board shall represent as nearly as possible its pro rata contribution to the entire investment.

Provided further that where one municipality at the time of the passage of this article shall have invested more than one half of the total investment in a jointly owned airport, then, and in that event the minority owner or owners shall be allowed five years from the date of the passage of this article in which to pay over to the majority owner a sum sufficient to equalize the amount of ownership of the present minority owner or owners with the total ownership of the majority owner. Provided further that this article shall not be construed to amend or impair in any respect contracts or agreements in effect at the time of the adoption of this article. (1945, c. 490, s. 9.)

§ 63-57. Powers specifically granted to counties.—(a) The purposes of this article are specifically declared to be county purposes as well as generally public, governmental and municipal.

(b) The powers herein granted to all municipalities are specifically declared to be granted to counties in this state, any other statute to the contrary notwithstanding. (1945, c. 490, s. 10.)

Operation of Airport Is Proprietary Function.—In operating and maintaining an airport a county engages in a proprietary or corporate function, in the exercise of which it is subject to tort liability. Rhodes v. Asheville, 230 N. C. 134, 52 S. E. (2d) 371.

§ 63-58. Municipal jurisdiction exclusive. Every airport and other air navigation facility controlled and operated by any municipality, or jointly controlled and operated pursuant to the provisions of this article, shall, subject to federal and state laws, rules, and regulations, be under the exclusive jurisdiction and control of the municipality or municipalities controlling and operating it, and no other municipality in which such airport or air navigation facility is located shall have any police jurisdiction of the same. (1945, c. 490, s. 11.)

Cited in Rhodes v. Asheville, 230 N. C. 134, 52 S. E. (2d) 371.

Chapter 65. Cemeteries.

Art. 1. Care of Rural Cemeteries.

Sec.

65-3. County commissioners to have control of abandoned cemeteries; trustees.

Art. 5. Removal of Graves.

65-13. Removal to enlarge or erect churches, etc., or to establish hydro-electric reservoirs, or to perform governmental functions.

65-14.1. Churches may remove graves under their custody to regular cemeteries.

Art. 7. Cemeteries Operated for Private Gain.

65-36. Funds for expenses of supervision.

Art. 8. Municipal Cemeteries.

Sec.

65-37. Authority to take possession of and continue the use of certain lands as cemetery.

65-38. Racial restrictions as to use of cemeteries for burial of dead.

65-39. Subdivision into burial plots; sale of lots and use of proceeds.

65-40. Appropriations for improvement and maintenance; application of existing laws.

Art. 1. Care of Rural Cemeteries.

§ 65-3. County commissioners to have control

of abandoned cemeteries; trustees.—The county commissioners of the various counties are required to take possession and control of all abandoned public cemeteries in their respective counties, to see that the boundaries and lines are clearly laid out, defined, and marked, and to take proper steps to preserve them from encroachment, and they are hereby authorized to appropriate from the general fund of the county whatever sums may be necessary from time to time for the above purposes.

The board of county commissioners of the various counties may appoint a board of trustees not to exceed five in number and to serve at the will of the board, and may impose upon such trustees the duties required of the board of commissioners by this article; and such trustees may accept gifts and donations for the purpose of upkeep and beautification of such cemeteries. (1917, c. 101, s. 3; 1947, c. 236; C. S. 5021.)

Editor's Note.—The 1947 amendment added the second paragraph.

Art. 5. Removal of Graves.

§ 65-13. Removal to enlarge or erect churches, etc., or to establish hydro-electric reservoirs, or to perform governmental functions.

If any municipality or other political subdivision of the state shall find it necessary, in order to perform its governmental functions and duties as prescribed by law, to remove graves from property owned by or in the custody and control of such municipality or other political subdivision of the state, or from property owned by individuals or corporations, whether known or unknown, such graves may be moved by such municipality or other political subdivision of the state after thirty days' notice to the relatives of the deceased persons, if any are known, and if none are known, then after publication of a notice of such intended removal once a week for four weeks in some newspaper having a general circulation in the county in which such property lies; and such graves when removed shall be removed to a suitable place in another cemetery, due care being taken to protect the tombstones and to place them properly so as to leave the graves in as good condition as before removal. All expense of the removal and acquisition of another burial site shall be borne by the municipality or other political subdivision of the state moving said graves. (1919, c. 245; 1927, c. 23, s. 1; 1937, c. 3; 1947, c. 168; C. S. 5030.)

Editor's Note.—The 1947 amendment added the above paragraph at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

§ 65-14.1. Churches may remove graves under their custody to regular cemeteries.—Where any church has assumed the care and custody of any grave or graves not located in a regular cemetery or burying ground, said church is authorized to remove said grave or graves and re-inter the remains in some cemetery or other suitable place in the same county to be selected by the next of kin of the deceased resident in that county or the welfare officer of the county or the clerk of the superior court of the county in the order named. Due care shall be taken to do said work of removal in a proper, decent and seemly manner, and if necessary, to furnish suitable coffins or boxes for re-interring said remains and due care shall be taken to remove, protect and replace all tombstones or other markers so as to leave the grave in as good condition as it was before removal. The work of removal shall be done under the supervision of the superintendent of welfare of the county, if one, and if not, under the supervision of the clerk of the superior court of the county. All the expenses of removal are to be borne by the church causing the grave to be removed. The church shall give the grave or graves at the location to which they are removed, the same care, custody and attention which it was obligated to give said grave or graves at the original location. (1947, c. 576.)

Art. 7. Cemeteries Operated for Private Gain.

§ 65-18. Cemeteries to which article applies.

Local Modification.—Durham: 1947, c. 471.

§ 65-30. Burial association commissioner to administer article; examinations.—This article shall be administered by the burial association commissioner of North Carolina, who shall make periodic examination of affairs of such cemeteries to ascertain whether they are in fact complying with the terms hereof. Examinations shall be made not less frequently than once a year and more frequently if by him deemed necessary. Such examination shall extend back into the business of the cemeteries as far as the burial association commissioner shall deem it necessary in order to show a true picture of the cemetery's financial condition. (1943, c. 644, s. 13; 1945, c. 351, s. 1.)

Editor's Note.—The 1945 amendment added the last sentence.

§ 65-36. Funds for expenses of supervision.—In order to meet the expenses of the supervision of the cemeteries herein provided for, the burial association commissioner shall assess each cemetery operating under the terms of this article, an equal amount sufficient to collect an aggregate of one thousand dollars ($1,000.00), which said amount shall be deposited and commingled with all other funds coming into the hands of the burial association commissioner and he may use said sum of money derived from this section in the discharge of the duties delegated to him by the laws of North Carolina. The assessments provided for in this section shall be due and payable on the first day of July, one thousand nine hundred and forty-five, and on the first day of July of each and every year thereafter. If any cemetery shall fail or refuse to pay the said assessment to the burial association commissioner within thirty (30) days after the making of said assessment, then and in that event the said burial association commissioner is hereby directed and empowered to cancel the license of such cemetery. (1945, c. 351, s. 2.)

Editor's Note.—The 1945 amendment repealed the former section, which exempted certain counties and cemeteries from the application of the article, and inserted in lieu thereof the present section.

Art. 8. Municipal Cemeteries.

§ 65-37. Authority to take possession of and continue the use of certain lands as cemetery.—In any case where property not under the control or in the possession of any church or religious

organization in any town or municipality has been heretofore set aside or used for cemetery purposes, and the trustees or owners named in the deed or deeds for said property have died, or are unknown, or the deeds of conveyance have been lost or misplaced and no record of title thereto has been found, and said property has been occupied and used for burial purposes for a time sufficient to identify its use as cemetery property, the municipality in which any such cemetery property is located is hereby authorized and empowered in its discretion to appropriate and take possession of all such land within its corporate limits which has heretofore been used for cemetery purposes and such adjoining land not held or owned by known claimants of title, and to cause the same to be surveyed and lines established and to designate and appropriate the said property as a cemetery, or burial ground. (1947, c. 821, s. 1.)

§ 65-38. Racial restrictions as to use of cemeteries for burial of dead.—In the event said property has been heretofore used exclusively for the burial of members of the negro race, then said cemetery or burial ground so established shall remain and be established as a burial ground for the negro race. In the event said property has been heretofore used exclusively for the burial of members of the white race, then said cemetery or burial ground so established shall remain and be established as a burial ground for the white race. (1947, c. 821, s. 2.)

§ 65-39. Subdivision into burial plots; sale of lots and use of proceeds.—Said town or municipality shall have power and authority in such cases to cause the same to be subdivided and to lay off and allot for family burial plots any property heretofore appropriated or used for burial purposes for or by different families without any charge therefor, and to cause the remainder of said property to be subdivided and laid off into lots; and shall have the power and authority to sell to any person or persons for burial purposes, any of said lots so subdivided and surveyed, except those heretofore appropriated as referred to in this section of this article, and use the proceeds of such sale for the improvement and upkeep of said cemetery property. (1947, c. 821, s. 3.)

§ 65-40. Appropriations for improvement and maintenance; application of existing laws.—In the event any town or municipality appropriates or takes possession of land used for cemetery purposes as set forth and described herein, it is further authorized and empowered to appropriate and use such funds as may be necessary and proper for the improvement and maintenance of said cemetery; and all statutes and ordinances heretofore enacted and passed relative to cemeteries in said town or municipality, are hereby made applicable to said cemetery property. (1947, c. 821, s. 4.)

Chapter 66. Commerce and Business.

Sec.

§ 66-20. Commissioner of revenue may require reports.

Editor's Note.—The word "consignors" in the sixth line of this section in original should be "consignees."

§ 66-65. Indemnity bonds required of agents, etc., to state maximum liability and period of liability.

For comment on this section, see 21 N. C. Law Rev. 362.

§ 66-67. Disposition by laundries and dry cleaning establishments of certain unclaimed clothing.—If any person shall fail to claim any garment, clothing or other article having a value of not more than seventy-five dollars ($75.00) delivered for laundering, cleaning or pressing to any laundry or dry cleaning establishment as defined in the General Statutes of North Carolina, § 105-85, or any dry cleaning establishment as defined in General Statutes of North Carolina, § 105-74, for a period of four months after the completion of the laundering or cleaning of such articles, the laundry or dry cleaning establishment shall have the right to dispose of such clothing, garment or article by whatever means it may choose, without liability or responsibility to the owner. Provided, however, that before such laundry or dry cleaning establishment may claim the benefit of this section it shall, at the time of receiving such clothes, garments or articles, have a notice setting forth the provisions of this section prominently displayed in a conspicuous place in the office, branch office or retail outlet where said clothes, garments or articles are received, if the same be received at an office, and in addition shall, at the time of receiving such clothes, garments or other articles, deliver to the owner thereof a ticket or receipt on the back of which shall be set forth the provisions of this section. (1947, c. 975.)

Chapter 67. Dogs.

Art. 2. License Taxes on Dogs.

§ 67-5. Amount of tax.

Editor's Note.—Session Laws 1947, c. 105, applicable only to Jackson county, repealed this article.

§ 67-13. Proceeds of tax to school fund; proviso, payment of damages; reimbursement by owner.

Provided, further, that all that portion of this section after the word, "collected" in line three, shall not apply to Alamance, Anson, Beaufort, Bladen, Caldwell, Chatham, Cleveland, Columbus, Currituck, Davie, Duplin, Durham, Gaston, Gates, Graham, Harnett, Hertford, Lincoln, McDowell, Moore, Nash, New Hanover, Perquimans, Robeson, Rowan, Rutherford, Scotland, Stokes, Transylvania, Union, Wayne and Yadkin counties. (1919, c. 77, s. 7; 1919, c. 116, s. 7; Pub. Loc. 1925, c. 54; Pub. Loc. 1927, cc. 18, 219, 504; 1929, cc. 31, 79; 1933, cc. 28, 387, 477, 526; 1935, c. 402; 1937, cc. 63, 75, 118, 282, 370; 1939, cc. 101, 153; 1941, cc. 8, 46, 132, 287; 1943, cc. 211, 371, 372; 1945, cc. 75, 107, 136, 465; 1947, c. 853, s. 1; C. S. 1681.)

Local Modification.—Burke: 1945, c. 245; Chowan, 1949, c. 219; Guilford: 1945, c. 138; Lee: 1949, c. 349; Onslow: 1949, c. 137; Sampson: 1949, c. 349; Tyrrell: 1949, c. 219; Wake: 1945, c. 561; Warren: 1947, c. 443.

Session Laws 1947, c. 853, s. 2 repealed Public Laws 1935, c. 50 relating to Alamance county and cited in original volume.

Editor's Note.—The 1945 amendments inserted "Nash," "Robeson," "Gaston" and "Cleveland," respectively, in the list of counties in the proviso. And the 1947 amendment inserted "Alamance". As the rest of the section was not changed it is not set out.

Chapter 68. Fences and Stock Law.

Art. 1. Lawful Fences.

§ 68-2. Local: Four and a half feet in certain counties.

Cited in McCoy v. Tillman, 224 N. C. 201, 29 S. E. (2d) 683.

Art. 2. Division Fences.

§ 68-6. Division fences maintainable jointly.

Quoted in McCoy v. Tillman, 224 N. C. 201, 29 S. E. (2d) 683.

§ 68-7. Remedy against delinquent owner.

Quoted in McCoy v. Tillman, 224 N. C. 201, 29 S. E. (2d) 683.

Art. 3. Stock Law.

§ 68-19. Local: How territory released from stock law.

Local Modification.—Jackson, as to Cashiers Township: 1949, c. 752, s. 3.

§ 68-23. Allowing stock at large in stock-law territory forbidden.

Duty to Restrain Stock.—This section imposes upon all persons the statutory duty of restraining their stock from running at large. McCoy v. Tillman, 224 N. C. 201, 206, 29 S. E. (2d) 683.

§ 68-24. Impounding stock at large in territory.

When and by Whom Stock May Be Impounded.—All persons are under the statutory duty of restraining their livestock from running at large, and when out of the pasture such stock are at large and subject to be taken up and impounded by any person, even though they are at large as a result of the negligence of the person who so impounds them, where the owner has knowledge of their being at large and neglects to restrain them. McCoy v. Tillman, 224 N. C. 201, 29 S. E. (2d) 683.

§ 68-25. Owner notified; sale of stock; application of proceeds.

Quoted in part in McCoy v. Tillman, 224 N. C. 201, 29 S. E. (2d)) 683.

§ 68-28. Impounded stock to be fed and watered.

Stated in McCoy v. Tillman, 224 N. C. 201, 29 S. E. (2d)) 683.

§ 68-29. Right to feed impounded stock; owner liable.

Cited in McCoy v. Tillman, 224 N. C. 201, 29 S. E. (2d) 683.

§ 68-38. Local: Depredations of domestic fowls in certain counties.

Chatham, 1945, c. 329.
Craven, 1945, c. 329.
Cumberland, 1945, c. 329.
Perquimans, 1949, c. 1221.
Washington, 1947, c. 222.

Editor's Note.—The 1945 amendment added Chatham, Craven and Cumberland to the list of counties appearing in this section. The 1947 amendment added Washington to the list, and the 1949 amendment added Perquimans. As no other change was made in the section it is not set out.

Chapter 69. Fire Protection.

Art. 4. Hotels; Safety Provisions.

Sec.
69-26. Administration.
69-27. Alarms, bells and gongs.
69-28. Watchman service.
69-29. Automatic sprinklers.
69-30. Interior stairways and vertical openings.
69-31. Fire extinguishers.
69-32. Alterations and decorations.
69-33. Careless or negligent setting of fires.
69-34. Penalty for non-compliance.
69-35. Unsafe buildings condemned.
69-36. Penalty for allowing unsafe building to remain occupied.
69-37. Penalty for removing notice from condemned building.
69-38. Construction of article.

Art. 1. Investigation of Fires and Inspection of Premises.

§ 69-7. Fire prevention and fire prevention day.

—It is the duty of the insurance commissioner and superintendent of public instruction, as far as practicable, to provide, except to schools taught in one-story houses, a pamphlet containing printed instructions for properly conducting fire drills in

schools, and the superintendent or principal of every public school in this state, except schools taught in one-story houses, shall conduct at least one fire drill every month during the regular school session, such fire drills to include all children and teachers and the use of all ways of egress, and the insurance commissioner and superintendent of public instruction shall further provide for the teaching of "Fire Prevention" in the colleges and schools of the state, and to arrange for a text-book adapted to such use. The ninth day of October of every year shall be set aside and designated as "Fire Prevention Day," and the governor shall issue a proclamation urging the people to a proper observance of the day, and the insurance commissioner shall bring the day and its observance to the attention of the officials of the municipalities of the state, and especially to the firemen, and where possible arrange suitable programs to be followed in its observance. (1915, c. 163, s. 5; 1925, c. 130; 1947, c. 781; C. S. 6080.)

Editor's Note.—
The 1947 amendment substituted "commissioner" for "commission" in line twelve.

Art. 4. Hotels; Safety Provisions.

§ 69-26. Administration.—For the purpose of administering and enforcing the provisions of this article, reference is made to article 9 of chapter 143 of the General Statutes of North Carolina, known as the North Carolina Building Code and all rights, powers, duties and authorities provided in said code shall apply and be in force in the administration and enforcement of this article except as may be specifically provided hereunder; and such rules, regulations, standards, classifications or restrictions necessary in the administration and enforcement hereof and appeals therefrom and thereupon shall be made in accordance with said article 9, chapter 143 of the General Statutes of North Carolina. (1947, c. 1066.)

§ 69-27. Alarms, bells and gongs.—In any hotel or other building of like occupancy, there shall be provided a manually operated fire alarm, bell or gong system, approved by the commissioner of insurance, suitable to arouse all occupants of such buildings if necessary in case of fire or other emergency and capable of being operated by one operation at the main desk or at the telephone switchboard. Where practicable, the alarm system shall be connected with the city fire alarm system and shall be subject to periodic inspection as directed by the commissioner of insurance. (1947, c. 1066.)

§ 69-28. Watchman service.—Every proprietor or keeper of any hotel or other building of like occupancy, two stories or more in height or designed to provide twenty or more rooms for sleeping accommodations shall provide or cause to be provided watchman service, utilizing a standard watch clock system in such manner so that each and every floor, corridor and accessible space, exclusive of rooms being occupied, shall be inspected at least once each hour between 10:00 p. m. and 6:00 a. m. Within the corporate limits of municipalities, this watchman service shall be satisfactory to the chief of the fire department and/or the commissioner of insurance. In every building subject to the provisions of this section, there shall be kept a record showing compliance therewith, and this record shall be subject to inspection by the commissioner of insurance or his deputies or the chief of the fire department. Provided that in lieu of a watchman service such hotel or other building of like occupancy may be provided with an automatic fire detection system approved by the commissioner of insurance and the North Carolina Building Code Council. (1947, c. 1066.)

§ 69-29. Automatic sprinklers.—(a) In any hotel or other building of like occupancy of B, C, D or E construction as defined in the North Carolina Building Code more than three stories in height, there shall be provided in such building an automatic sprinkler system to be of such design, construction and scope as may meet the approval of the North Carolina Building Code Council, provided, however, that if in the opinion of the commissioner of insurance any such building three stories or less in height shall not have ample and adequate protected fire escapes or exits, then he may require the responsible party to provide or cause to be provided in such building an approved automatic sprinkler system of such design, construction and scope as may be approved by the North Carolina Building Code Council.

(b) In any hotel or other building of like occupancy of A or A1 construction, as defined in the North Carolina Building Code, more than four stories in height, there shall be provision that such rooms or areas in such building as are occupied or used for such purposes as linen rooms, storage rooms, carpenter shop, upholstery and furniture repair shop, kitchens, laundries, paint shop, mattress renovation shops, basements and other areas of special fire hazard shall be cut off in a manner approved by the commissioner of insurance or his deputy or the chief of fire department of the city in which the building is located, and, in the discretion of said insurance commissioner or his deputy, the responsible party may be required to provide in such areas an approved automatic sprinkler system.

(c) In any hotel or other building of like occupancy of any type construction, wherein, under sub-paragraphs (a) and (b) above, an automatic sprinkler system is required to be installed, if, in the opinion of the commissioner of insurance or his deputy, reasonable life safety may be insured, such commissioner or his deputy may permit the installation of an approved automatic detection system in lieu of an automatic sprinkler system.

(d) A period of three years from the effective date of this article shall be allowed for compliance with the provisions of this section.

(e) The obligation of this article with respect to installation of alarms, bells or gongs and of automatic sprinklers or automatic fire detection systems shall rest upon the owner of the building as the lessor, or upon the operator thereof as the lessee, as the case may be, in accordance with the terms and provisions of the lease contract; and in the absence of any determining provision in such lease contract, or in the absence of any written lease, the obligation with respect to such installations shall be determined in accordance with the law of the state. (1947, c. 1066.)

§ 69-30. Interior stairways and vertical openings.—(a) In new or existing hotel buildings all interior stairways used as exits, except stairways from a lobby to a mezzanine and open stairways

permitted under subsection (b) below, shall be so enclosed as to provide a safe path of escape to the outside of the building without danger from fire or smoke, by means of enclosures and self closing doors having at least one hour fire resistance rating, or otherwise enclosed in a manner approved by the commissioner of insurance or his deputy, and any vertical openings other than stairways through which fire and smoke may spread from story to story, shall be enclosed in a manner approved by the commissioner of insurance or his deputy.

(b) In existing hotel buildings of less than four stories in height, the enclosure of floor openings as provided in subsection (a) above may be waived by the commissioner of insurance or his deputy if life safety is not endangered thereby. (1947, c. 1066.)

§ 69-31. Fire extinguishers.—Every proprietor or keeper of any hotel or other building of like occupancy shall provide and keep in proper operating condition at least two two and one-half (2½ gal.) gallon extinguishers on each floor utilized for sleeping purposes or at least one two and one-half gallon fire extinguisher for each fifteen (15) rooms utilized for sleeping purposes on each floor, whichever is the greater number. It shall further be the duty of every proprietor or keeper of any hotel or other building of like occupancy to insure that all employees working in said building shall be trained in the use of fire extinguishers and other fire fighting equipment located or installed in said building. (1947, c. 1066.)

§ 69-32. Alterations and decorations.—In all hotels or other buildings of like occupancy, located in a city which has a fire department, after the effective date of this article, no interior structural alteration, temporary or permanent, shall be made or no decorations or scenery shall be placed in the public spaces thereof without the prior approval and permit of the chief of fire department of that city. (1947, c. 1066.)

Editor's Note.—The act inserting this article became effective Sept. 1, 1947.

§ 69-33. Careless or negligent setting of fires. —Any person who in any fashion or manner negligently or carelessly sets fire to any bedding, furniture, draperies, house or household furnishings or other equipment or appurtenances in or to any hotel or other building of like occupancy shall be guilty of a misdemeanor and shall be subject to a fine of not less than $50.00 nor more than $500.00 or to imprisonment or to both fine and imprisonment in the discretion of the court. (1947, c. 1066.)

§ 69-34. Penalty for non-compliance. — Any owner, owners, proprietor or keeper of any hotel or other building of like occupancy who fails to comply with any of the foregoing provisions of this article shall be guilty of a misdemeanor and punished by fine of not less than $10.00 nor more than $50.00. Each day of non-compliance herewith shall constitute a separate offense. (1947, c. 1066.)

§ 69-35. Unsafe buildings condemned. — The commissioner of insurance is empowered to inspect or cause to be inspected any hotel or other building of like occupancy and any such building which shall be found to be especially dangerous to life, because of its liability to fire or in case of fire by reason of bad condition of walls, overloaded floors, defective construction, insufficient means of egress, decay or other causes shall be held to be unsafe and the commissioner of insurance shall affix or cause to be affixed a notice of dangerous character of the structure in a conspicuous place on the exterior wall of such building. (1947, c. 1066.)

§ 69-36. Penalty for allowing unsafe building to remain occupied.—If any person shall continue to use or occupy or permit the use or occupancy of any hotel or other building of like occupancy which has been condemned as unsafe and dangerous to life by the commissioner of insurance or his authorized deputy, after having been notified in writing of the unsafe and dangerous character of said building, and if such use and occupancy shall continue for a period as much as 30 days without remedying the conditions complained of to the satisfaction of the commissioner of insurance or the chief of the fire department of the city in which the building is located, such person shall be guilty of a misdemeanor and shall pay a fine of not less than $10.00 nor more than $50.00 for each day of such continued use and occupancy after the expiration of such 30 day period following such notice. Provided that such 30 day period may be enlarged (for good cause shown) by the commissioner of insurance or by the chief of the fire department of the city in which the building is located to such time as in his discretion he may find proper. (1947, c. 1066.)

§ 69-37. Penalty for removing notice from condemned building.—If any person, except by authority by the insurance commission, shall remove any condemnation notice which has been affixed to any hotel or other building of like occupancy, he shall be guilty of a misdemeanor and shall be fined not less than $10.00 nor more than $50.00 for each offense. (1947, c. 1066.)

§ 69-38. Construction of article.—Nothing in this article shall be construed to limit powers granted to and duties imposed upon the chiefs of fire departments and building inspectors by article 11, chapter 160 of the General Statutes of North Carolina, but the powers granted in this article shall be in addition thereto. (1947, c. 1066.)

Chapter 71. Indians.

§ 71-4. Rights of eastern band of Cherokee Indians to inherit, acquire, use and dispose of property.—Subject only to restrictions and conditions now existing or hereafter imposed under federal statutes and regulations, or treaties, contracts, agreements, or conveyances between such Indians and the federal government, the several members of the eastern band of Cherokee Indians residing in Cherokee, Graham, Swain, Jackson and other adjoining counties in North Carolina, and the lineal descendants of any bona fide member of such eastern band of Cherokee Indians, shall inherit, purchase, or otherwise lawfully acquire, hold, use, encumber, convey and alienate by will, deed, or any other lawful means, any property whatsoever as fully and completely in all respects as any other citizen of the state of North Carolina is authorized to inherit, hold, or dispose of such property. (1947, c. 978, s. 1.)

§ 71-5. Eligibility of members of eastern band of Cherokee Indians to hold office in tribal organization.—Any person who is a lineal descendant of any bona fide member of such eastern band of Cherokee Indians who is a member of said band and who is domiciled on the lands of the said eastern band of Cherokee Indians shall be eligible to hold any elective or appointive office or position within the tribal organization, including the position of chief, and may be elected or appointed and shall thereafter serve in such manner and for such time as a majority of the accredited membership of such eastern band of Cherokee Indians may decide at any election held for such purpose or appointment made by the accredited officials of said eastern band of Cherokee Indians. (1947, c. 978, s. 2.)

Chapter 72. Inns, Hotels and Restaurants.

§§ 72-8 to 72-29: Repealed by Session Laws 1945, c. 829, s. 4.

§ 72-31. License required.

What Must Be Shown to Convict of Operating a "Roadhouse."—This article is regulatory, involving police power as well as taxing power, and the words, "tourist camp, cabin camp, tourist home, roadhouse, public dance hall, or other similar establishment," in this section are qualified by the words "where travelers, transient guests, or other persons are or may be lodged for pay," so that to convict a person of operating a "roadhouse" and impose the penalties of § 72-43, it must be shown that such person lodged or offered to lodge transient guests. State v. Campbell, 223 N. C. 828, 28 S. E. (2d) 499.

§ 72-36. Registration of guest.

Cited in State v. Campbell, 223 N. C. 828, 28 S. E. (2d) 499.

§ 72-37. False registration and use for immoral purposes made misdemeanor.

Cited in State v. Campbell, 223 N. C. 828, 28 S. E. (2d) 499.

§ 72-43. Operation without license made misdemeanor.

See annotations under § 72-31.

Chapter 73. Mills.

Art. 1. Public Mills.

§ 73-1. Public mills defined.—Every grist or grain mill, however powered or operated, which grinds for toll is a public mill. (Rev., s. 2119; Code, s. 1846; R. C., c. 71, s. 1; 1777, c. 122, s. 1; 1947, c. 781; C. S. 2531.)

Editor's Note.—The 1947 amendment rewrote this section.

Art. 2. Condemnation for Mill by Owner of One Bank of Stream.

§ 73-13. Rebuilding mill after destruction.—If a water mill belonging to a person of unsound mind, a minor, or to one who is imprisoned, should fall, burn or be otherwise destroyed, such person and his heirs shall have three years from the removal of such disability within which to rebuild or repair such mill. (Rev., s. 2130; Code, s. 1857; 1903, c. 74, ss. 1, 2; 1868-9, c. 158, s. 9; 1947, c. 781; C. S. 2543.)

Editor's Note.—The 1947 amendment rewrote this section.

Chapter 74. Mines and Quarries.

Art. 4. Adjustment of Conflicting Claims.

§ 74-32. Liability for damage for trespass.

Applied in Vance v. Guy, 224 N. C. 607, 31 S. E. (2d) 766.

Chapter 75. Monopolies and Trusts.

§ 75-1. Combinations in restraint of trade illegal.

Cross References.—As to civil action for damages and injunction against violation of this chapter, see notes to § 75-5. For provision declaring certain agreements between employers and labor organizations to be illegal combinations in restraint of trade, see § 95-79.

§ 75-4. Contracts to be in writing.

Applied in Sonotone Corp. v. Baldwin, 227 N. C. 387, 42 S. E. (2d) 352.

§ 75-5. Particular acts defined.

Covenant Not to Sell Products Other Than Those of Lessor.—Lessee alleged that lessor covenanted not to sell any petroleum products other than those of lessee within a radius of 2,000 feet of the demised premises or from the demised premises. Held: There being no allegation that lessor agreed to purchase petroleum products from anyone, the provisions of paragraph 2 of this section are not applicable. Such a covenant apparently runs afoul of no statute. Grubb Oil Co. v. Garner, 230 N. C. 499, 53 S. E. (2d) 441.

Civil Action for Damages and Injunctive Relief.—While conspiracies in restraint of trade, and undertakings to destroy or injure the business of a competitor, with the purpose of attempting to fix the price when competition is removed, are made unlawful, these provisions do not prevent one whose business as a common carrier has been injured and threatened by any of the acts thus denounced from pursuing a remedy by civil action for damages and seeking the interposition of equity, if necessary to restrain wrongful acts which threaten irreparable loss. Burke Transit Co. v. Queen City Coach Co., 228 N. C. 768, 47 S. E. (2d) 297.

Chapter 76. Navigation.

Art. 6. Morehead City Navigation and Pilotage Commission.

Sec.

Art. 6. Morehead City Navigation and Pilotage Commission.

§ 76-59. Board of commissioners of navigation and pilotage.—A board of commissioners of navigation and pilotage for Old Topsail Inlet and Beaufort Bar to consist of three members, none of whom shall be licensed pilots, is hereby created. The members of the board shall be appointed by the Morehead City port commission, and their terms of office shall begin on the 15th day of July of the year in which they are appointed and continue for four years and until their successors shall be appointed and qualified. They shall be and are hereby declared to be commissioners for a special purpose, within the purview of section 7, article 14 of the constitution of North Carolina. It shall be the duty of the Morehead City port commission to appoint, on or before the 1st day of July, 1947, and on or before the 1st day of July every fourth year thereafter, the members of said board of commissioners. A majority of the board shall constitute a quorum and may act in all cases. The board shall have power to fill vacancies in its membership as they occur during their term, to appoint a clerk to record in a book, rules, orders and proceedings of the board, and the board shall have authority in all matters that may concern the navigation of waters from the Beaufort Sea Buoy to Morehead City, and out of the bar and inlet. (1947, c. 748.)

§ 76-60. Rules to regulate pilotage service.—The board shall from time to time make and establish such rules and regulations respecting the qualifications, arrangements, and station of pilots as to them shall seem most advisable, and shall impose such reasonable fines, forfeitures and penalties as may be prescribed for the purpose of enforcing the execution of such rules and regulations. The board shall also have power and authority to prescribe, reduce and limit the number of pilots necessary to maintain an efficient pilotage service for Old Topsail Inlet and Beaufort Bar, as in its discretion may be necessary: Provided, that the present number of two pilots now actively engaged in the service shall not be reduced except for cause or by resignation, disability, or death. The board shall have power and authority to organize all pilots licensed by it into a mutual association, under such reasonable rules and regulations as the board may prescribe; any licensed pilot refusing to become a member of such association shall be subject to suspension, or to have his license revoked, at the discretion of the board. (1947, c. 748.)

§ 76-61. Examination and licensing of pilots.—The board, or a majority of them, may from time to time examine, or cause to be examined, such persons as may offer themselves to be pilots for Old Topsail Inlet and Beaufort Bar, and shall give to such as are approved commissions under their hands and the seal of the board, to act as pilots for Old Topsail Inlet and Beaufort Bar; and the number of pilots so commissioned, not exceeding three at any one time, shall be left to the discretion of the board, but the limitation as to number herein shall not deprive the board of the power to issue license to any person who is a duly licensed pilot at the time of the passage of this article. (1947, c. 748.)

§ 76-62. Appointment and regulation of pilots' apprentices.—The board is hereby authorized to appoint in its discretion apprentices, and to make and enforce reasonable rules and regulations relating to apprentices. No apprentice shall be required to serve for a longer period than three years in order to obtain a license to pilot vessels of a draught of not exceeding fifteen feet, and

one year thereafter for a license to pilot vessels of any draught. No one shall be entered as an apprentice who is under the age of 21 years, nor shall the board license a pilot except upon written approval of two licensed pilots. (1947, c. 748.)

§ 76-62.1. Renewal of license; license fee.—All licenses shall be renewed annually upon payment of a fee of five dollars ($5.00); provided, the holder of such license shall have, during the year preceding the date of such renewal, complied with the provisions of this article and the reasonable rules and regulations prescribed by the board under authority hereof. (1947, c. 748.)

§ 76-63. Expenses of the board.—Each pilot, or the association of pilots, when organized as in this article provided, shall pay over to the board under such reasonable rules as the board shall prescribe two per cent (2%) of each and every pilotage fee received, for the purpose of providing funds to defray the necessary expenses of the board. (1947, c. 748.)

§ 76-64. Pilots to give bond.—Every person before being commissioned as a pilot shall give bond for the faithful performance of his duties, with two or more personal sureties or a bond in some surety company licensed to do business in North Carolina payable to the state of North Carolina in the sum of five hundred ($500.00) dollars; the board may, from time to time, and as often as it may deem necessary, enlarge the penalty of the bond, or require new or additional bonds to be given in a sum or sums not to exceed in all, one thousand ($1,000.00) dollars. Every bond taken of a pilot shall be filed with and preserved by the board in trust for every person, firm, or corporation, who shall be injured by the neglect or misconduct of such pilots, and any person, firm, or corporation so injured may severally bring suit for the damage by each one sustained. (1947, c. 748.)

§ 76-65. Permission to run as pilots on steamers; other ports.—The board shall have power to grant permission in writing to any pilot in good standing and authorized to pilot vessels, to run regularly as pilots on steamers running between Old Topsail Inlet and Beaufort Bar, and the port of Morehead City, and other ports of the United States, under such rules and regulations as the board shall prescribe. (1947, c. 748.)

§ 76-66. Cancellation of licenses.—The board shall have the power to call in and cancel the license of any pilot who has refused or neglected, except in case of sickness, his duty as a pilot. Any pilot who has been absent from the state for a longer period than six months in succession shall, upon his return, surrender his license to the board, or the board may declare the same void, except when such absence has been under permission from the board as provided above. (1947, c. 748.)

§ 76-67. Jurisdiction over disputes as to pilotage.—Each member of the board shall have power and authority to hear and determine any matter of dispute between any pilot and any master of a vessel, or between pilots themselves, respecting the pilotage of any vessel and any one of them may issue a warrant against any pilot for the recovery of any demand which one pilot may have against another, relative to pilotage, and for the recovery of any forfeiture or penalty provided by law, relating to pilotage in Old Topsail Inlet and Beaufort Bar, or provided by any by-law or rule or regulation enacted by the board by virtue of any such law, which warrant the sheriff or any constable in Carteret county, shall execute together with any other process authorized by this article. On any warrant issued as herein provided any one of said commissioners may give judgment for any sum not exceeding five hundred ($500.00) dollars, and may issue execution thereon, in like manner as is provided for the issuing of execution of judgments rendered by justices of the peace, which writ of execution shall be executed agreeably to the law regulating the levy and sale under executions issuing from courts of justices of the peace. Any member of the board shall have authority to issue summons for witnesses and to administer oaths, and hearings before any member of the board and any matters as provided in this section shall conform as nearly as may be to procedure provided by law in the courts of justices of the peace. From any judgment rendered by any member of the board, either party shall have the right of appeal to the superior court of Carteret county, in like manner as is provided for appeals on judgments of justices of the peace. (1947, c. 748.)

§ 76-68. Retirement of pilots from active service.—The board shall have and is hereby given authority in its discretion, and under such reasonable rules and regulations as it may prescribe, to retire from active service any pilot who shall become physically or mentally unfit to perform his duties as pilot, and to provide for such pilot or pilots so retired such compensation as the board shall deem proper: Provided, however, that no pilot shall be retired, for physical or mental disability, unless and until such pilot shall have first been examined by the public health officer or county physician of Carteret county, and such public health officer or physician shall have certified, either separately or jointly, to the board the fact of such physical or mental disability. (1947, c. 748.)

§ 76-69. When employment compulsory; rates of pilotage.—All vessels, coastwise or foreign, over 60 gross tons, shall on and after the 1st day of August, 1947, take a state licensed pilot from Beaufort Sea Buoy to Morehead City and from Morehead City to sea, and the rates of pilotage shall be such as may be prescribed from time to time by the board of commissioners.

Vessels calling at the port solely for the purpose of obtaining bunkers shall pay one-half of the fees prescribed by the said board. (1947, c. 748.)

§ 76-70. Pay for detention of pilots.—Every master of a vessel who shall detain a pilot at the time appointed so that he cannot proceed to sea, though wind and weather permit, shall pay such pilot ten dollars ($10.00) per day during the time of his actual detention, the pilot shall have due notice from the master or agent of said vessel. (1947, c. 748.)

§ 76-71. Vessels not liable for pilotage.—Any vessel coming into Morehead City from sea without assistance of a pilot, the wind and weather being such that such assistance or service could not have been reasonably given, shall not be liable

for pilotage inward from sea, and shall be at liberty to depart without payment of any pilotage, unless the service of a pilot be secured. (1947, c. 748.)

§ 76-72. First pilot to speak vessel to get fees.—The first licensed pilot speaking a vessel from a regularly numbered pilot boat of this board shall be entitled to the pilotage fees over Old Topsail Inlet and Beaufort Bar to Morehead City, and out to sea again. Provided, said pilot shall be ready and willing to serve as pilot when the vessel is ready to depart, due notice having been given by the master or agent to said pilot. (1947, c. 748.)

§ 76-73. Vessels entering for harborage exempt.—Any vessel coming in from sea for harbor shall not be required to take a pilot either from sea inward or back to sea. (1947, c. 748.)

Chapter 77. Rivers and Creeks.

§ 77-6. Gates and slopes discontinued.

Editor's Note.—In the history to this section the "C. E." should be "C. S."

Chapter 81. Weights and Measures.

Art. 1. Uniform Weights and Measures.

Sec.

Art. 2. Establishment and Use of Standards.

Art. 4. Public Weigh Masters.

Art. 5. Scale Mechanics.

Art. 7. Standard Weight Packages of Grits, Meal and Flour.

Sec.

Art. 1. Uniform Weights and Measures.

§ 81-1. Office of superintendent of weights and measures.—In order to protect the purchasers or sellers of any commodity and to provide one standard of weight and of measure of length and surface throughout the state, which must be in conformity with the standard of measure of length, surface, weight and capacity established by congress, the office of superintendent of weights and measures for the state of North Carolina is hereby established as hereinafter provided. (1927, c. 261, s. 1; 1945, c. 280, s. 1.)

Editor's Note.—The 1945 amendment inserted the words "or sellers" in line two and the words "weight and of" in line three.

§ 81-2. Administration of article.—The provisions of this article shall be administered by the State Department of Agriculture through a suitable person to be selected by the Commissioner of Agriculture and known as the Superintendent of Weights and Measures. For the purpose of administering and giving effect to the provisions of this article, the rules and codes of specifications and tolerances as adopted by the National Conference of Weights and Measures and recommended by the United States Bureau of Standards and approved by the North Carolina Department of Agriculture are hereby adopted; however, the Department of Agriculture is empowered to make such further rules and regulations as may be necessary to make effective the purposes and provisions of this article, and to fix and prescribe reasonable charges and fees for examining, testing, adjusting and certifying the correct, or incorrect, equipment used in the buying or selling of any commodity or thing, or any equipment used for hire or award, or in the computation of any charge for services rendered on the basis of weight or measure, or in the determination of weight or measure, when a charge is made for such determination. Such rules and regulations and fees and charges shall be published thirty days before such rules, regulations, fees and

charges become effective. (1927, c. 261, s. 2; 1931, c. 150; 1943, c. 762, s. 1; 1949, c. 984.)

Editor's Note.—The 1949 amendment rewrote the second sentence.

§ 81-2.1. Board of agriculture authorized to establish standards of weights and measures for commodities having none.—The board of agriculture is authorized, directed and empowered to establish by order (after public notice as may be determined by it), standards of weights and measures on any commodity in any instance where no standard has been established by the congress of the United States, or by the laws of the state of North Carolina, provided, however, that when a standard is established by congress, or by the laws of the state of North Carolina, such standard shall supersede the standard or standards established by the board of agriculture. Provided that this section does not authorize the board of agriculture to establish a standard log rule measure. (1945, c. 280, s. 1; 1949, c. 984.)

Editor's Note.—The 1949 amendment inserted the comma after the phrase in parentheses and struck out in the next line the word "and" formerly appearing after the word "commodity." It also changed "act" to "section' in the proviso.

§ 81-3. Employment of superintendent of weights and measures.—The Commissioner of Agriculture shall have authority to employ a superintendent of weights and measures and necessary assistants, local inspectors and such other employees as may be necessary in carrying out the provisions of this article, and fix and regulate their duties.

The person named as superintendent of weights and measures shall give bond to the state of North Carolina in the sum of ten thousand dollars to guarantee the faithful performance of his duties, the expense of said bond to be paid by the state and said bond to be approved as other bonds for the state officers. The superintendent of weights and measures shall, to safeguard the interests of the buyer and seller, require bond from other employees authorized under the first paragraph of this section in the amounts of not less than one thousand dollars for each employee designated as a local inspector or sealer of weights and measures. (1927, c. 261, ss. 3, 4; 1949, c. 984.)

Editor's Note.—The 1949 amendment inserted the words "and said bond" in line six of the second paragraph.

§ 81-4. Salaries and expenses.—All salaries and necessary expenses shall be paid as now provided for the other departments and agencies of the state government. (1927, c. 261, s. 5; 1931, c. 150; 1949, c. 984.)

Editor's Note.—The 1949 amendment substituted "paid" for "provided" in line two.

§ 81-5. Standard of work for local standard keepers.—When any town or county wishes to appoint a local standard keeper or inspector or sealer of weights and measures, the appointment and regulation of his work must be in keeping with the rules and regulations of the state department of agriculture and his work subject to supervision of the state superintendent of weights and measures. (1927, c. 261, s. 6; 1949, c. 984.)

Editor's Note.—The 1949 amendment inserted the comma after the word "measures" in line three.

§ 81-6. Receipts for fees; approved standards to be marked.—The state superintendent of weights and measures, or his deputies, or inspectors on his direction, shall, after examining any standards of weights or measures or other equipment used for determining the weight or measure of anything, issue to the owner of such measuring device or equipment a receipt for any fees collected and, when such measuring device or equipment is found to be accurate, stamp upon, or tag, the measuring instrument with the letters "N.C." and two figures representing the year in which the inspection was made. (1927, c. 261, s. 7; 1949, c. 984.)

Editor's Note.—The 1949 amendment substituted "equipment" for "apparatus."

§ 81-8. Standards of weights and measures.—The weights and measures received from the United States under joint resolution of Congress, approved June fourteenth, one thousand eight hundred and thirty-six, and July twenty-seventh, one thousand eight hundred and sixty-six, and such new weights and measures as shall be received from the United States as standards of weights and measures in addition thereto, or in renewal thereof, and such as shall be supplied by the state in conformity therewith and certified by the National Bureau of Standards shall be the state standards of weights and measures, and in addition thereto there shall be supplied from time to time such copies of these as may be deemed necessary.

(1949, c. 984.)

Editor's Note.—The 1949 amendment substituted "thirty-six" for "twenty-six" in line four of the first sentence. As only this sentence was changed the rest of the section is not set out.

§ 81-8.1. Authority to prescribe standards of weight or measurement for sale of milk or milk products.—The board of agriculture is hereby authorized and empowered to adopt and promulgate, after due notice and hearing, rules and regulations prescribing standards or units of weight or measurement by which milk, cream or other fluids containing milk or milk products may be sold at retail in bottles or other capped or sealed containers, and the sale thereof by any other standards or units of weight or measurement shall be unlawful. (1949, c. 982.)

§ 81-9. Supervision of weights and measures and weighing or measuring devices.—The state superintendent of weights and measures shall have and keep general supervision of the weights and measures and weighing or measuring devices offered for sale, sold, or in use in the state. He, or his deputies or inspectors at his direction, shall, upon written request of any citizen, firm, or corporation, or educational institution in the state, test or calibrate weights, measures and weighing or measuring devices used as standards in the state. (1927, c. 261, s. 10; 1949, c. 984.)

Editor's Note. — The 1949 amendment struck out "a" formerly appearing before "general" in line three. It also struck out the comma formerly appearing after "deputies" in line six.

§ 81-14.2. Commodities to be sold by weight, measure or numerical count.—It shall be unlawful to sell except for immediate consumption by the purchaser, on the premises of the seller, liquid commodities in any other manner than by weight or liquid measures, or commodities not liquid in any other manner than by measure of length, by weight, or by numerical count. When a commod-

ity is sold by numerical count in excess of one unit, the units which constitute said numerical count shall be uniform in size and/or weight, and be so exposed as to be readily observed by the purchaser: Provided, however, that nothing in this section shall be construed to prevent the sale of fruits, vegetables, and other dry commodities in standard containers defined by acts of the United States congress known as "Standard Container Acts," and the rules and regulations promulgated in accordance therewith; or of fruits and vegetables sold by the head, or bunch, or of any other commodity which is especially provided for by some other section of this chapter. (1945, c. 280, s. 1; 1949, c. 973.)

Editor's Note.—The 1949 amendment rewrote the first sentence and changed the former words "consumption on the premises" to read "consumption by the purchaser, on the premises of the seller."

§ 81-14.3. Unlawful for package to mislead purchaser.—It shall be unlawful to keep for the purpose of sale, offer or expose for sale, or sell, any commodity in package form when said package is so made, or formed, or filled, or wrapped, or exposed, or marked, or labeled as to mislead, or deceive the purchaser as to the quantity of its contents. (1945, c. 280, s. 1.)

§ 81-14.4. Standard weight packages of flour, meal, grits and hominy.—All flour and meal packed for sale, offered or exposed for sale, or sold in this state shall be in one of the following standard weight packages and no other, namely: five pounds, ten pounds, twenty-five pounds, fifty pounds, one hundred pounds, and multiples of one hundred pounds. However, nonstandard weight packages may be packed for sale, offered or exposed for sale, or sold in this state, weighing three pounds or less, if said nonstandard weight packages shall be plainly and conspicuously marked showing net contents in avoirdupois weight: Provided, that nothing in this section shall be construed to prevent the retail sale of any amount of flour or meal direct to the consumer from bulk, upon order and weight at time of delivery to the consumer.

The term "flour" as used herein shall be construed to mean any finely ground product of wheat, or other grain, corn, peas, beans, seeds or other substance, with or without added ingredients, intended for use as food for man.

The term "meal" as used herein shall be construed to mean any product of grain, corn, peas, beans, seed or other substance coarsely ground, with or without added ingredients, either bolted, or unbolted, including grits and hominy, intended for use as food for man. (1945, c. 280, s. 1; 1949, c. 984.)

Editor's Note.—The 1949 amendment substituted the word "used" for "said" in line one of the second paragraph.

§ 81-14.5. Weight and measure terms defined.—(a) Whenever the term "pound" is used in connection with weight, it shall be understood to be the avoirdupois pound as declared by act of the United States congress, except in those cases where it is common practice to use the "troy" pound or "apothecaries" pound, and the "ounce" is one-sixteenth part of an avoirdupois pound.

(b) The term "ton" shall be understood to mean a unit of two thousand (2000) pounds, avoirdupois weight.

(c) Whenever the term "gallon" is used in connection with liquid measure, it shall be understood to mean a unit of two hundred and thirty-one (231) cubic inches of which the liquid quart, liquid pint, and gill are respectively, the quarter, the one eighth and the one-thirty-second parts.

(d) The term "bushel" when used in connection with dry measure and standard containers shall be understood to mean a unit of two thousand one hundred and fifty and forty-two one hundredths (2150.42) cubic inches, of which the dry quart and dry pint, respectively, are the one-thirty-second and one-sixty-fourth parts.

(e) The term "barrel" when used in connection with beer, ale, porter, and other similar fermented liquor, shall be understood to mean a unit of thirty-one liquid gallons, and fractional parts of a barrel shall be understood to mean like fractional parts of thirty-one gallons.

(f) Whenever wood is solicited, bought or sold in this state on the basis of ricked or stacked measurement, as is customarily the case in transactions involving such forest products as, for example, pulp wood and fuel wood, the unit of said measurement shall be the cord and no other; except that until June first, one thousand nine hundred and forty-six, same may be purchased on the basis of a unit of one hundred and sixty cubic feet or of the cord of one hundred and twenty-eight cubic feet. The term "cord" when used in connection with such purchases of wood, shall be understood to mean a quantity of wood consisting of any number of sticks, bolts or pieces laid parallel and together so as to form a rick or stack occupying a space four feet wide, four feet high and eight feet long, or such other dimensions that will, when multiplied together, equal one hundred and twenty-eight cubic feet by volume, construed as being seventy per cent solid and thirty per cent air space or ninety solid cubic feet. (1945, c. 280, s. 1.)

§ 81-14.6. Sale of cement blocks, cinder blocks and other concrete masonry units.—In order to protect the purchasers of concrete block, cinder block, and other concrete masonry units and to provide for a minimum load bearing strength, on and after July 1st, 1947, all concrete block, cinder block, and other concrete masonry units offered for sale or sold in this state shall have a load bearing strength of not less than 700 pounds per square inch of gross bearing area, or the minimum load bearing strength approved by the National Underwriters Laboratory or by the American Society of Testing Materials, whichever is less. The manufacturer shall furnish proof, acceptable to the board of agriculture, that the concrete block, cinder block, or other concrete masonry units being offered for sale or sold complies with the minimum load bearing strength required by this section; and each and every sale shall be accompanied with a bill of sale or invoice on which shall be printed or stamped in ink or other indelible substance, a statement guaranteeing that the products covered by said bill of sale or invoice meet the minimum load bearing strength as required by this section signed by a duly authorized official or agent of the manufacturer; provided, however, that the provisions of this section shall not prohibit the sale or offer for sale of cement block, cinder block, or other concrete masonry units, known as "seconds"

or "rejects," due to size, shape, or less than minimum load bearing requirement, if and when said sale is accompanied with a bill of sale or invoice on which is printed or stamped in ink or other indelible substance in bold letters a statement that the cement block, cinder block, or other concrete masonry units so billed or invoiced are inferior in quality and do not comply with minimum load bearing requirement signed by a duly authorized official or agent of the manufacturer. (1947, c. 788.)

§ 81-14.7. Approval of heating units, etc., for curing tobacco.—All heating units and/or curing assemblies offered for sale or sold in this state, intended for use in curing the so-called flue cured tobacco, shall bear a label or seal of approval, authorized by the board of agriculture, and be accompanied with a statement, including drawings and instructions, signed by the manufacturer thereof, specifying how said heating unit shall be installed, operated, and/or used, so as to reduce to a minimum the fire hazard involved. Such expense as incurred in obtaining the label or seal of approval referred to in this section shall be borne by the manufacturer or distributor of the heating unit involved. (1947, c. 787.)

§ 81-14.8. Sale of coal, coke and charcoal by weight.—(a) All coal, coke or charcoal sold in this state shall be sold by weight only. The standard unit of weight shall be the avoirdupois pound, and a ton shall be two thousand (2000) pounds.

(b) All coal, coke or charcoal sold or offered for sale in this state, or which is being transported on any public street or highway in North Carolina, shall be weighed on scales suitable for such weighing, which have been tested and sealed by a state inspector of weights and measures. It shall not be unlawful to transport such coal, coke or charcoal to the nearest such scale for the purpose of having same weighed, but no sale or delivery of same shall take place until the load shall have been weighed.

(c) Each and every sale or delivery of coal, coke or charcoal to the consumer shall be accompanied by a weight certificate on which shall be expressed in ink or other indelible substance the name and address of the seller or dealer, name and address of purchaser or receiver, the kind and size of coal being delivered and the gross tare and net weights, the date of weighing, the signature of the weighmaster, a place for signature of receiver, the name of delivery man, and the number or license number of delivery vehicle. The weight certificate shall be made with an original and two (2) carbon copies, one (1) going to the purchaser or receiver, one to be held by the delivery man, and the third (3rd) to be held by the weighmaster: Provided, however, that when coal, coke or charcoal is delivered in this state in railway carload lots, the railway bill of lading may be used in lieu of the weight certificate required by this section. (1949, c. 860.)

§ 81-14.9. Establishment of standard loaves of bread; "loaf" defined.—When loaves of bread are offered for sale or sold in this state, each loaf shall be of one of the following weights and lengths and no other, to-wit: 1 pound, 11½ inches maximum length, 5 inches maximum width at bottom; 1½ pounds, 15 inches maximum length, 5 inches maximum width at bottom; 2 pounds, 15 inches maximum length, 5 inches maximum width at bottom; 2½ pounds, 15 inches maximum length, 5 inches maximum width at bottom. The term "loaf" as used in this section shall be construed to mean a loaf which is baked in a pan of rectangular shape, either with straight up or flared side, either with or without cover, and shall be known hereafter as the standard loaf. (1949, c. 1005.)

§ 81-15. Weights of goods sold in packages to be stated on package.—It shall be unlawful to keep for the purpose of sale, or expose for sale, or sell any commodity in package form unless the net quantity of the contents are plainly or conspicuously marked on the outside of the package in terms of weight, measure, or numerical count: Provided, however, that reasonable variations or tolerances shall be permitted and that these reasonable variations or tolerances, and also exemptions as to small packages shall be established by rules and regulations made by and published with other rules and regulations approved by the department of agriculture.

The words "in package form," as used in this section, shall be construed to include a commodity in a package, carton, case, can, box, bundle, barrel, bottle, phial, or other receptacle, on a spool or similar holder, in a container or band, or in a bolt or roll or in a ball, coil or skein or in coverings or wrappings of any kind, put up by the manufacturer, or when put up prior to the order of the commodity, by the vendor for either or both wholesale or retail, whether sealed or unsealed, closed or open. The words "plainly and conspicuously marked" as used in this section shall be construed to mean that the principal label shall indicate the net weight contents by legend as plain and conspicuous as any other legend thereon and as likely to be read as any other legend, and shall not be obscured by crowding or by color or by other legend. (1927, c. 261, s. 16; 1945, c. 280, s. 1.)

Editor's Note.—The 1945 amendment added the second paragraph.

§ 81-15.1. Statement to be furnished seller of pulp wood by purchaser.—Upon delivery of pulp wood to a purchaser, from a seller in this state, the purchaser shall furnish the seller with a statement, showing the kind and amount of wood, the price paid, and the amount of wood refused, if any. (1945, c. 280, s. 3.)

§ 81-16: Repealed by Session Laws 1945, c. 280, s. 2.

§ 81-17. Net weight basis of sales by weight.

Cited in State v. Presnell, 226 N. C. 160, 36 S. E. (2d) 927.

§ 81-18. Acts and omissions declared misdemeanor.—Any person who, by himself, or his servant or agent, or as the servant or agent of any other person, shall offer, or expose for sale, sell, use in the buying or selling of any commodity or thing or for hire or award, or in the computation of any charge for services rendered on the basis of weight or measure, or in the determination of weight or measure, when a charge is made for such determination, or retain in his pos-

session a false weight or measure or weighing or measuring device or any weight or measure or weighing or measuring device which has not been sealed by the State Superintendent, or his deputy, or inspectors, or by a sealer or deputy sealer of weights and measures within one year, or shall dispose of any condemned weight, measure, or weighing or measuring device contrary to law, or remove the tag placed thereon by the State Superintendent, or his deputy, or inspectors, or who shall sell or offer or expose for sale less than the quantity he represents on any commodity, thing or service, or shall take or attempt to take more than the quantity he represents, when as the buyer, he furnishes the weight, measure, or weighing or measuring device by means of which the amount of any commodity, thing, or service is determined; or who shall keep for the purpose of sale, offer or expose for sale, or sell any commodity in a manner contrary to law; or who shall use in retail trade, except in the preparation of packages put up in advance of sale, a weighing or measuring device which is not so positioned that its indications may be accurately read and the weighing or measuring operation observed from some position which may reasonably be assumed by a customer; or who shall violate any provision, rule, regulation, code or order made and/or adopted as provided for by this article for which a specific penalty has not been provided; or who shall sell or offer for sale, or use or have in his possession for the purpose of selling or using any device or instrument to be used to, or calculated to, falsify any weight or measure, shall be guilty of a misdemeanor, and shall be punished by fine of not less than ten dollars or more than two hundred dollars, or by imprisonment for not more than three months, or by both such fine and imprisonment, upon a first conviction in any court of competent jurisdiction; and upon a second or subsequent conviction in any court of competent jurisdiction he shall be punished by a fine of not less than fifty dollars or more than five hundred dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment. (1927, c. 261, s. 19; 1945, c. 280, s. 1; 1949, c. 984.)

Editor's Note.—The 1945 amendment inserted, beginning in line twenty-nine, the provision relating to use of weighing or measuring device not so positioned that its indications and operation may be observed by a customer.

The 1949 amendment struck out the words "any provisions of this article" formerly appearing in lines thirty-six and thirty-seven and inserted in lieu thereof the words "any provision, rule, regulation, code or order made and/or adopted as provided for by this article."

§ 81-21: Repealed by Session Laws 1945, c. 280, s. 2.

§ 81-22. Certain measures regulated.—Whenever any commodity now named in § 81-23 shall be quoted or sold by the bushel, the bushel shall consist of the number of pounds stated in said section; and whenever quoted or sold in subdivisions of the bushel, the number of pounds shall consist of the fractional part of the number of pounds as set forth therein for the bushel; and when sold by the barrel shall consist of the number of pounds constituting 3.281 bushels. (1933, c. 523, s. 3; 1949, c. 984.)

Editor's Note.—The 1949 amendment substituted "§ 81-23" for "§ 81-24" in line two.

Art. 2. Establishment and Use of Standards.

§ 81-23.1. Standard rule for measurement of logs.—The standard rule for determining the number of board feet in a tree or log shall be the so-called "International ¼ inch Log Rule." None of the provisions of this section shall apply to contracts entered into prior to the ratification of this section, nor to the measure of damages in any action in tort. This section shall not prevent the buyer and the seller from agreeing that some other log rule shall be used to determine the number of board feet in trees or logs covered by the contract between them. (1947, c. 400, s. 1.)

Editor's Note.—The act inserting this section was ratified on March 20, 1947, and provided that it shall be effective January 1, 1948.

For a brief discussion of this section, see 25 N. C. Law Rev. 428.

§ 81-24: Repealed by Session Laws 1945, c. 280, s. 2.

Art. 4. Public Weigh Masters.

§ 81-36. Definitions. — Any person, either for himself or as a servant or agent of any other person, firm, or corporation, or who is elected by popular vote, who shall weigh, or measure, or count, or who shall ascertain from, or record the indications or readings of, a weighing, or measuring, or recording, device or apparatus for any other person, firm, or corporation, and declare the weight, or measure, or count, or reading or recording to be the true weight, or measure, or count, or reading, or recording of any commodity, thing, article, or product upon which the purchase, or sale, or exchange, is based, and make a charge for, or collect pay, a fee, or any other compensation for such act, shall issue a certificate of weight, or measure, or count, in accordance with the provisions of this article, shall be licensed and shall be known as a public weigh master in the state of North Carolina, (1939, c. 285, s. 1; 1945, c. 1067.)

Editor's Note.—The 1945 amendment struck out the word "and" formerly appearing after the word "act" in line fifteen and substituted a comma therefor.

§ 81-36.1. Administration of article.—The provisions of this article shall be administered by the state department of agriculture through the state superintendent of weights and measures. (1945, c. 1067.)

§ 81-37. Application for license permit.—Any person desiring to be a public weigh master in this state shall apply for and obtain license permit from the state of North Carolina through the state superintendent of weights and measures by filing formal application under oath as follows:

"I, ..., a citizen of the United States, residing at ....., county of ....., have familiarized myself with the law and with full knowledge of the provisions contained therein relative to licensing of public weigh master, do hereby file application for license permit to be issued accordingly.

I certify that I am of sound mind and am physically fit to perform the duties imposed upon a public weigh master and that I will, if licensed, abide by and enforce all laws, rules and regulations relating to the public weigh master Act to

the best of my knowledge and ability. (1939, c. 285, s. 2; 1949, c. 983, s. 1.)

Editor's Note.—The 1949 amendment inserted the words "under oath" in line six and struck out the original latter part of the form of application.

§ 81-43.1. Weighing tobacco in sales warehouses.—All leaf tobacco offered for sale in a leaf tobacco warehouse in this state shall be weighed by a public weigh master, shall be accompanied by a public weigh master certificate, and shall be and remain in custody of the warehouse operator from and after the time it is weighed by the public weigh master until it is sold or the bid is rejected by the owner thereof. (1945, c. 1067.)

Art. 5. Scale Mechanics.

§ 81-52. Purpose.—The purpose and intent of this article shall be:

(a) To protect the owners and/or users of scales and weighing devices in their needs or requirements for scale repair and service.

(b) To define the name "scale mechanic," provide for scale mechanic registration, and to provide for financial underwriting of services rendered. (1941, c. 237, s. 1; 1947, c. 380.)

Editor's Note.—

Session Laws 1947, c. 380, rewrote former sections 81-52 through 81-58 to appear as set forth herein. The title of the act purports to amend "sections 52-58 inclusive of the General Statutes" which is an obvious misnumbering and was clearly intended to refer to sections 81-52 through 81-58. It will be noted that there is no section numbered 81-56. Section 81-50 and repealed section 81-51 appearing under this article in the original volume belong under article 4.

§ 81-53. Definitions.—The definition of certain terms used in this article shall be as follows:

(a) The term "scale mechanic" is defined as meaning any person who, for hire or award, renders service involving adjustment, installation, repair, or maintenance of a scale or weighing device, either used or intended to be used in determining weight value, or values, by either physical act, instruction, or supervision.

(b) The term "adjustment" is defined as meaning an act involving the tightening or loosening, or lengthening or shortening, or movement, of any part of a scale or weighing device, or the coordination of mechanical action of parts with or upon each other, so as to make the scale or weighing device give correct indications of applied weight values within legal tolerance, and the correctness of indications shall be determined by test provided for under definition of the term "service" as defined in this article.

(c) The term "installation" is defined as meaning an act involving the erection, or building, or assembling of parts, or the placing or setting up of a scale or weighing device so as to give correct indications of applied weight values within legal tolerance when used for the purpose intended, and the correctness of indications shall be determined by test provided for under definition of the term "service" as defined in this article.

(d) The term "repair" is defined as meaning an act involving the replacement or mending of a broken or nonadjustable part or parts and the restoration of a scale or weighing device to such working condition as to give correct indications of applied weight values within legal tolerance when used for the purpose intended, and the correctness of indications shall be determined by test provided for under the term "service" as defined in this article.

(e) The term "maintenance" is defined as meaning an act pursuant to the retention of a scale or weighing device in such working condition as to give correct applied weight value indications within legal tolerance when used as intended, which may involve either or both adjustment or repair before or after inaccuracy develops in fact, and the correctness of indications shall be determined by test provided for under the term "service" as defined in this article.

(f) The term "service" is defined as meaning activity involving adjustment, installation, repair, or maintenance or a combination of two or more of these activities with respect to a scale or weighing device, and, in addition thereto, a test for determination of the accuracy of weight value indication. Said determination is to be accomplished by applying a series of loads of standard weight on a platter or platform up to capacity on a scale of 30 pounds capacity, and up to ¼ scale capacity, applied to the respective corners, on a scale having a capacity in excess of 30 pounds. (1941, c. 237, s. 2; 1947, c. 380.)

§ 81-54. Prerequisites for scale mechanic.—It shall be unlawful for any scale mechanic to render service as a scale mechanic until after he or she has complied with the following requirements:

(a) Obtain from the office of state superintendent of weights and measures a copy of Scale Mechanic Act, a copy of regulations pertinent to said act, and an application form for registration.

(b) Obtain a bond in the sum of one thousand dollars ($1,000.00) issued by a corporate surety company licensed to do business in North Carolina.

(c) File bond with clerk of superior court of the county in which such applicant resides, unless he or she be a resident of some other state, in which event such bond shall be filed with clerk of superior court in Wake county, North Carolina.

(d) Obtain receipt in duplicate for such bond filed with clerk of superior court and mail or deliver one copy of such receipt together with the application form for registration, completely filled out, to office of state superintendent of weights and measures, Raleigh, North Carolina.

(e) Obtain a registration card or certificate from state superintendent of weights and measures and a model form of service certificate.

The provisions of this section shall not apply to a full time employee who renders service only on a scale or weighing device, or on scales or weighing devices, owned solely by his or her employer unless additional pay or compensation is received for such service. (1941, c. 237, s. 3; 1947, c. 380.)

§ 81-55. Registration.—The state superintendent of weights and measures shall register any person who has complied with the requirements stipulated under this article by making a record of receipt of application and of bond, and the issuing of a certificate or card of registration to applicant, whereupon the applicant becomes a registered scale mechanic and shall be known thereafter as such. Such registration shall be in effect from date of registration until July 1st next and shall be renewed on the 1st day of July of each year

thereafter. (1941, c. 237, ss. 4, 5; 1943, c. 543; 1947, c. 380.)

§ 81-56.1. Service Certificate.—Whenever any service is rendered on any scale or weighing device used or intended to be used in this state by a scale mechanic, a certificate shall be issued by such scale mechanic who rendered said service, which shall be known as a "service certificate." The size and form of said service certificate will be determined by the state superintendent of weights and measures. Inclusive of other pertinent information or statements, the said certificate shall bear a statement expressed in ink or other indelible substance naming the kind of service rendered, whether adjustment, installation, repair, or maintenance, and stating that a service test as defined under the term "service" has been made, and that the service rendered is guaranteed to be as represented. The service certificate shall be made out in triplicate, with original going to the owner of such scale or weighing device or his agent, and a duplicate shall be sent to office of state superintendent of weights and measures if service is upon a scale or weighing device which has been condemned by a weights and measures inspector, and the triplicate copy shall be retained by the scale mechanic issuing such certificate. (1947, c. 380.)

§ 81-56.2. Bond.—The bond required by this article shall underwrite the guarantee of a refund or compensation, covering any claim by owner of scale or weighing device for damage or injury, which claim is sustained by the court, resulting in misrepresentation of service rendered, or failure to comply with all the provisions of this article, by the scale mechanic, regardless of his or her intent; provided, however, that the aggregate liability of the surety to all claimants sustained by the court shall in no event exceed the amount of said bond. (1947, c. 380.)

§ 81-56.3. Scale removal. — When a scale or weighing device is removed from the premises where located by a scale mechanic, the scale mechanic or his servant or agent shall issue a receipt for said scale or weighing device, on which shall be written in ink or other indelible substance the name and address of the owner, the name and address of receiving agent, date of receipt, anticipated date of return, name or make of scale, and such other information pertinent to its identification. The form of receipt shall be approved by the state superintendent of weights and measures. (1947, c. 380.)

§ 81-56.4. Condemned scale.—It shall be unlawful for any owner of a scale or weighing device which has been condemned by a weights and measures inspector to either use or dispose of same in any manner but shall hold same at the disposal of the state superintendent of weights and measures, his deputy, or inspector; provided, however, said scale or weighing device may be removed from the premises for scale service only. (1947, c. 380.)

§ 81-56.5. Secondhand scale.—It shall be unlawful for any person to sell, or offer for sale, or put into use, a secondhand or rebuilt or reconditioned scale or weighing device unless said scale shall have been tested and approved by the superintendent of weights and measures, or his deputy, or inspector, or shall be accompanied by a service certificate as provided for in this article. Said service certificate shall be retained by the purchaser or user of said scale until an inspector of weights and measures has tested and approved such secondhand scale. The said certificate shall serve as proof of the accuracy of scale at the time scale was purchased or put into service. A secondhand or rebuilt or reconditioned scale or weighing device as referred to in this section shall be considered as being a scale or weighing device in the channels of trade which does not belong to the previous user. (1947, c. 380.)

§ 81-56.6. Scale location.—It shall be unlawful for any scale or weighing device to be installed, set up, put into service, or used on a foundation or support that aids in giving false indication of weight values applied to platter, platform, or other load receiving element. (1947, c. 380.)

§ 81-57. Exemption.—The provisions of this article shall not prohibit the user of a scale or weighing device from employing some person other than a scale mechanic to render service as defined by this article upon his or her scale or weighing device, nor apply to the person so employed, who does not solicit such employment, provided that said user shall not be relieved of his or her responsibility or liability concerning the accuracy of the scale or weighing device after service has been rendered. (1947, c. 380.)

§ 81-57.1. Rules and regulations.—Such rules and regulations as are necessary to carry out the purpose and intent of this article shall be made and published by the state superintendent of weights and measures, by and with the advice of his advisory board. (1941, c. 237, s. 6; 1947, c. 380.)

§ 81-58. Penalty.—Any person who violates any of the provisions of this article, or who for hire or award renders service as a scale mechanic on a scale or weighing device without registering as a scale mechanic or who shall fail to issue a service certificate or who shall issue a service certificate bearing false statements regarding service rendered, shall be guilty of a misdemeanor, and upon conviction, shall be fined not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00) or by imprisonment for not more than three months or by both fine and imprisonment upon conviction in any court of competent jurisdiction; and in addition, if the defendant be a scale mechanic, he or she shall forfeit any charges or remuneration for service rendered, if service be involved, and he or she and/or the bonding company shall, at the discretion of the court, reimburse or compensate the owner of the scale or weighing device in question for such damage, or injury, sustained; and upon a subsequent conviction in any court of competent jurisdiction, the penalty shall be the same as for first conviction and in addition, at the discretion of the court, if defendant be a scale mechanic, his or her privilege to act as or in the capacity of a scale mechanic may be revoked for a specified length of time, his or her registration card or certificate seized and turned over to the state superintendent of weights and measures with instructions con-

cerning reinstatement or renewal. (1941, c. 237, s. 7; 1947, c. 380; 1949, c. 983, s. 2.)

Editor's Note.—The 1949 amendment inserted, beginning in line five, the following: "or who shall fail to issue a service certificate or who shall issue a service certificate bearing false statements regarding service rendered."

Art. 7. Standard Weight Packages of Grits, Meal and Flour.

§§ 81-67 to 81-70: Repealed by Session Laws 1945, c. 280, s. 2.

Chapter 84. Attorneys at Law.

Art. 4. North Carolina State Bar.

Sec.

84-38. Solicitation of retainer or contract for legal services prohibited; division of fees.

Art. 1. Qualifications of Attorney; Unauthorized Practice of Law.

§ 84-2.1. "Practice law" defined.—The phrase "practice law" as used in this chapter is defined to be performing any legal service for any other person, firm or corporation, with or without compensation, specifically including the preparation or aiding in the preparation of deeds, mortgages, wills, trust instruments, inventories, accounts or reports of guardians, trustees, administrators or executors, or preparing or aiding in the preparation of any petitions or orders in any probate or court proceeding; abstracting or passing upon titles, the preparation and filing of petitions for use in any court, or assisting by advice, counsel, or otherwise in any such legal work; and to advise or give opinion upon the legal rights of any person, firm or corporation: Provided, that the above reference to particular acts which are specifically included within the definition of the phrase "practice law" shall not be construed to limit the foregoing general definition of such term, but shall be construed to include the foregoing particular acts, as well as all other acts within said general definition. (Rev., ss. 210, 3641; Code, ss. 27, 28, 110; 1870-1, c. 90; 1883, c. 406; 1871-2, c. 120; 1880, c. 43; C. C. P., s. 424; 1919, c. 205; 1933, c. 15; 1941, c. 177; 1943, c. 543; 1945, c. 468; C. S. 198.)

Editor's Note.—The 1945 amendment extended the definition of "practice law" to include "aiding in the preparation" of certain instruments and writings listed, added inventories and accounts to the list and inserted the provision as to petitions or orders in any probate or court proceeding.

Art. 3. Arguments.

§ 84-14. Court's control of argument.

Wide latitude is given counsel in the exercise of the right to argue to the jury the whole case, as well of law as of fact, but counsel is not entitled to travel outside of the record and argue facts not included in the evidence, and when counsel attempts to do so it is the right and duty of the court to correct the argument, either at the time or in the charge to the jury. State v. Little, 228 N. C. 417, 45 S. E. (2d) 542.

Art. 4. North Carolina State Bar.

§ 84-24. Admission to practice.

The examination shall be held in such manner and at such times as the board of law examiners may determine, but no change in the time or place shall become effective within one year from the date upon which the change is determined, except that during the years 1947, 1948, 1949, 1950 and 1951 the board of law examiners may provide for an additional regular examination to be held in Raleigh to commence on the first Tuesday in March of each of said years or upon such other date as the board may determine after consideration of the needs of qualified applicants and issue license if otherwise qualified.

(1947, c. 77.)

Cross References.—
Reference to § 28-32 in original should be to § 84-32.
Editor's Note.—
The 1947 amendment added the exception clause to the fourth paragraph. As the rest of the section was not affected by the amendment it is not set out.

§ 84-27: Repealed by Session Laws 1945, c. 782.

§ 84-38. Solicitation of retainer or contract for legal services prohibited; division of fees.—It shall be unlawful for any person, firm, corporation, or association or his or their agent, agents, or employees, acting on his or their behalf, to solicit or procure through solicitation either directly or indirectly, any legal business, whether to be performed in this state or elsewhere, or to solicit or procure through solicitation either directly or indirectly, a retainer or contract, written or oral, or any agreement authorizing an attorney or any other person, firm, corporation, or association to perform or render any legal services, whether to be performed in this state or elsewhere.

It shall be unlawful for any person, firm, corporation, or association to divide with or receive from any attorney at law, or group of attorneys at law, whether practicing in this state or elsewhere, either before or after action is brought, any portion of any fee or compensation charged or received by such attorney at law, or any valuable consideration or reward, as an inducement for placing or in consideration of being placed in the hands of such attorney or attorneys at law, or in the hands of another person, firm, corporation or association, a claim or demand of any kind, for the purpose of collecting such claim or instituting an action thereon or of representing claimant in the pursuit of any civil remedy for the recovery thereof, or for the settlement or compromise thereof, whether such compromise, settlement, recovery, suit, claim, collection or demand shall be in this state or elsewhere. This paragraph shall not apply to agreements between attorneys to divide compensation received in cases or matters legitimately, lawfully and properly received by them.

Any person, firm, corporation or association of persons violating the provisions of this section shall be guilty of a misdemeanor and punished by fine or imprisonment or both in the discretion of the court.

The council of the North Carolina state bar is hereby authorized and empowered to investigate and bring action against persons charged with violations of this section and the provisions as set forth in § 84-37 shall apply. Nothing contained herein shall be construed to supersede the author-

ity of solicitors to seek injunctive relief or institute criminal proceedings in the same manner as provided for in § 84-7. Nothing herein shall be construed as abridging the inherent powers of the courts to deal with such matters. (1947, c. 573.)

Editor's Note.—For a discussion of the purposes of this section, see 25 N. C. Law Rev. 379.

Chapter 86. Barbers.

Sec.

§ 86-1. Necessity for certificate of registration and shop or school permit.—No person or combination of persons shall, either directly or indirectly, practice or attempt to practice barbering as hereinafter defined in the State of North Carolina without a Certificate of Registration either as a Registered Apprentice or as a Registered Barber issued pursuant to the provisions of this chapter by the State Board of Barber Examiners hereinafter established. No person, or combination of persons, or corporation, shall operate, manage, or attempt to manage or operate a barber school, barber shop, or any other place where barber service is rendered, after July first, one thousand nine hundred and forty-five, without a shop permit, or school permit, issued by the state board of barber examiners, pursuant to the provisions of this chapter. (1929, c. 119, s. 1; 1941, c. 375, s. 1; 1945, c. 830, s. 1.)

Editor's Note.—
The 1945 amendment added the second sentence.

Validity of Chapter Is No Longer Open to Attack.—The validity of this chapter, providing for the licensing of barbers and the control and regulation of the trade, having been judicially determined, it may not be attacked in a subsequent suit. Motley v. State Board of Barber Examiners, 228 N. C. 337, 45 S. E. (2d) 550, 175 A. L. R. 253.

§ 86-7. Office; seal; officers and secretary; bond.

Said Board shall elect its own officers, and in addition thereto, shall elect a full time Secretary, which Secretary shall receive an annual salary not to exceed thirty-six hundred dollars ($3600.00), such salary as well as all other expenses of said Board, to be paid only out of the revenue derived from fees collected under the provisions of this chapter.

(1945, c. 830, s. 2.)

Editor's Note.—
The 1945 amendment increased the annual salary of the secretary from three thousand to thirty-six hundred dollars. As only the second sentence was affected by the amendment the rest of the section is not set out.

§ 86-8. Salary and expenses; employees; audit; annual report to Governor.—Each member of the Board of Barber Examiners shall receive for his services an annual salary of thirty-six hundred dollars ($3600.00) payable in equal monthly installments, and shall be reimbursed for his actual expenses, and shall receive not less than five cents (5c) per mile for the distance traveled in performance of his duties, which said salary and expense and all other salaries and expenses in connection with the administration of this chapter, shall be paid upon warrant drawn on the State Treasurer, solely from the funds derived from the fees collected and received under this chapter.

(1945, c. 830, s. 3.)

Editor's Note.—
The 1945 amendment increased the annual salary from three thousand to thirty-six hundred dollars. As only the first sentence was affected by the amendment the rest of the section is not set out.

§ 86-11.1. Issuance of certificates of registration, without examination, to certain war veterans.—The board shall issue to honorably discharged veterans of World War I or II, who are bona fide residents of North Carolina for at least six months, upon application, certificates of registration to practice barbering by any such veteran without requiring him to take the examination provided for in this chapter. The application shall be accompanied by a certified or photostatic copy of the honorable discharge of such applicant from the armed forces, an affidavit by such veteran that he or she has practiced barbering for a period of three or more years, either in or out of the service, and that he or she was a resident of North Carolina immediately prior to entering the United States armed forces, accompanied by supporting affidavits of two or more unrelated individuals, and a certificate from a physician licensed to practice medicine in this state to the effect that applicant is of good health and is free from any communicable or contagious disease.

The application, honorable discharge, affidavit and health certificate accompanied by the fees prescribed in this chapter shall be the sole requirement for the issuance to such veterans of a certificate of registration as a registered barber provided for in this chapter. (1947, c. 941.)

Cross Reference.—See Const., Art. I, §§ 1, 7, 17, and notes.

Section Is Constitutional.—The provisions of this section, that veterans of World War I or World War II, who have practiced barbering for three or more years prior to application, are eligible for license without standing the examination required by the general law, prescribe a reasonable classification and are valid. Motley v. State Board of Barber Examiners, 228 N. C. 337, 45 S. E. (2d) 550, 175 A. L. R. 253.

Licensed barbers in their individual capacity may not challenge the constitutionality of this section, by a suit for an injunction upon the ground that the granting of licenses to returned veterans under the provisions of the statute would tend to lower the standards or destroy the security of the trade, since there is no allegation of specific injury to personal or property right sufficient to invoke equitable jurisdiction. Motley v. State Board of Barber Examiners, 228 N. C. 337, 45 S. E. (2d) 550, 175 A. L. R. 253.

Licensed barbers may not attack the constitutionality of this section by suit for injunction on the ground that the granting of licenses to returned veterans under the provisions of this section would result in unlawful competition which would diminish their income from the trade, or even amount to its confiscation, since if the section is unconstitutional there is adequate remedy by prosecution of interlopers. Id.

Suit Determined on Its Merits.—A suit by an experienced barber who had applied for and was refused a license for failure to pass the examination of the Board of Barber

Examiners, to enjoin the Board from issuing licenses to returned veterans without an examination under the provisions of this section, was determined upon its merits. Motley v. State Board of Barber Examiners, 228 N. C. 337, 45 S. E. (2d) 550, 175 A. L. R. 253.

§ 86-12. Barbers from other states; temporary permits; graduates of out-of-state barber schools.—Persons who have practiced barbering in another state or county for a period of not less than two years, and who move into this state, shall prove and demonstrate their fitness to the board of barber examiners, as herein created, before they will be issued a certificate of registration to practice barbering, but said board may issue such temporary permits as are necessary.

Any person who has graduated from a barber school in any other state having substantially the same standards as are required of barber schools in this state and who is otherwise qualified as required by this chapter, shall be allowed, upon making the application and paying the fee required by this chapter, to take the examination for a certificate of registration as a registered barber or as a registered apprentice, as the case may be. And the state board of barber examiners shall issue a proper certificate to each such person who passes such examination. When any such person makes application for permission to take an examination, it shall be the duty of the state board of barber examiners to ascertain and determine whether the barber school from which such person has graduated has substantially the same standards as are required of barber schools in this state. (1929, c. 119, s. 12; 1941, c. 375, s. 5; 1947, c. 1024.)

Editor's Note.—
The 1947 amendment added the second paragraph.

§ 86-15. Fees.—The fee to be paid by applicant for examination to determine his fitness to receive a certificate of registration, as a registered apprentice, shall be five ($5.00) dollars, and such fee must accompany his application. The annual license fee of an apprentice shall be three ($3.00) dollars. The fee to be paid by an applicant for an examination to determine his fitness to receive a certificate of registration as a registered barber shall be fifteen ($15.00) dollars, and such fee must accompany his application. The annual license fee of a registered barber shall be five ($5.00) dollars. All licenses, both for apprentices and for registered barbers, shall be renewed as of the thirtieth day of June of each and every year, and such renewals for apprentices shall be three ($3.00) dollars, and for registered barbers five ($5.00) dollars. The fee for restoration of an expired certificate for registered barbers shall be seven ($7.00) dollars, and restoration of expired certificate of an apprentice shall be four ($4.00) dollars. The fee to be paid for all barber shop permits, established, and under the inspection of the state board of barber examiners as of July first, one thousand nine hundred and forty-five, shall be two dollars ($2.00), and the initial fee to be paid by barber shops thereafter established, shall be five dollars ($5.00) for the first year, or portion thereof, and the annual renewal fee for each barber shop permit shall be two dollars ($2.00). The fee to be paid for barber school permits operating on, or before July first, one thousand nine hundred and forty-five, shall be twenty-five dollars ($25.00). The initial fee to be paid by each barber school thereafter established, shall be fifty dollars ($50.00), and the annual renewal fee for each barber school permit shall be twenty-five dollars ($25.00). Each barber shop permit and each barber school permit shall be renewed as of the thirtieth day of June, each and every year, and shall not be transferable from one person to another, and such barber shop and barber school permit shall be conspicuously posted within each shop or school, or any place or establishment: Provided, further, that all fees received under this chapter shall be used exclusively for the enforcement of this chapter as provided by law. (1929, c. 119, s. 14; 1937, c. 138, s. 4; 1945, c. 830, s. 4.)

Editor's Note.—
The 1945 amendment rewrote the latter half of this section.

§ 86-19. Renewal or restoration of certificates. All persons serving in the United States armed forces or any persons whose certificates of registration as a registered barber, or registered apprentice, were in force one year prior to entering service, or one year prior to the beginning of war, may, without taking the required examination, renew said certificate within three years after receiving an honorable discharge, any other persons three years after the end of war, by paying the current annual license fee and furnishing the state board of barber examiners with a satisfactory health certificate. (1929, c. 119, s. 18; 1937, c. 138, s. 5; 1945, c. 830, s. 5.)

Editor's Note.—
The 1945 amendment added the above sentence at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

§ 86-20. Disqualifications for certificate.—The Board may either refuse to issue or renew, or may suspend or revoke, any Certificate of Registration, or barber shop permit, or barber school permit for any one or combination of the following causes:

1. Conviction of a felony shown by certified copy of the record of the court of conviction.
2. Gross malpractice or gross incompetency.
3. Continued practice by a person knowingly having an infectious or contagious disease.
4. Advertising by means of knowingly false or deceptive statements.
5. Habitual drunkenness or habitual addiction to the use of morphine, cocaine or other habit-forming drugs.
6. The commission of any of the offences described in § 86-22, sub-divisions three, four and six.
7. The violation of any one or a combination of the sanitary rules and regulations.
8. The violation of any of the provisions of §§ 86-4 and 86-15. (1929, c. 119, s. 19; 1941, c. 375, s. 8; 1945, c. 830, s. 6.)

Editor's Note.—
The 1945 amendment inserted in lines four and five the words "or barber shop permit or barber school permit." The amendment also added the reference to § 86-15 at the end of the section.

§ 86-21. Notice; public hearing; appeal.—The Board may neither refuse to issue nor refuse to renew, nor suspend, or revoke any Certificate of Registration, barber shop permits, or barber school permits, however, for any of these causes, unless the person accused has been given at least

thirty days' notice in writing of the charge against him and a public hearing by the Board.

Upon the hearing of any such proceeding, the Board may administer oaths and may procure by its subpoena, the attendance of witnesses and the production of relevant books and papers.

Any barber in the State whose case has been passed upon by the Board of Barber Examiners shall have the right and is hereby given the right to appeal to the Superior Court of the State, which Court may in its discretion reverse or modify any order made by the said Board of Barber Examiners if it appears to the court that the law was not followed in said action. (1929, c. 119, s. 20; 1939, c. 218, s. 1; 1945, c. 830, s. 7.)

Editor's Note.—The 1945 amendment inserted in lines four and five the words "barber shop permits, or barber school permits." It also added at the end of the section the words "if it appears to the court that the law was not followed in said action."

§ 86-25. Licensing and regulating barber schools and colleges.—The North Carolina state board of barber examiners shall have the right to approve barber schools or colleges in the state, and to prescribe rules and regulations for their operation. However, no barber school or college shall be approved by the board unless it meets all of the following provisions:

(a) Provide a course of instruction of six months, or one thousand two hundred and forty-eight hours (1,248) for each student; attendance on each working day to consist of not less than eight hours.

(b) Each instructor or teacher in any barber school or college must be the holder of an up to date certificate of registration as a registered barber in the state of North Carolina, and before being permitted to instruct or teach, shall pass an examination prescribed by the board to determine his or her qualifications to instruct or teach. Such examination shall be based, among other things, on the provisions of subsection (c) of this section.

(c) Each student enrolled shall be given a complete course of instruction on the following subjects: haircutting; shaving; shampooing, and the application of creams and lotions; care and preparation of tools and implements; scientific massaging and manipulating of muscles of the scalp, face, and neck; sanitation and hygiene; shedding and regrowth of hair; elementary chemistry relating to sterilization and antiseptics; instruction in common skin and scalp diseases to the extent that they may be recognized; pharmacology as it relates to preparations commonly used in barber shops; instruction in the use of ultra-violet, infra-red lamps and other electrical appliances and the effects of the use of each on the human skin; structure of the skin and hair; structure of the head and cranium; muscles of the head, neck and face; glands of the skin and their various functions; cells, digestion; blood circulation; nerve points of the face.

(d) An application for student's permit and doctor's certification must be filed with the state board of barber examiners for each student before entering school or college. Such application to be worded as prescribed by the state board of barber examiners. No student shall be entitled to enroll without student's permit.

(e) A monthly report of each student enrolled shall be furnished the state board of barber examiners on the first of each month. This report to be prescribed by the state board of barber examiners.

(f) All services rendered in schools or colleges on patrons must be done by students only. Instructors may be allowed to teach and aid the students in performing the various barber services, but they shall not be permitted to finish up the patrons after the student has completed work.

(g) After the student has completed six months, or one thousand two hundred and forty-eight (1,248) hours in school or college, he shall not be allowed to remain in the pay department to work on patrons.

(h) A sign must be displayed on front of the place of business designating that it is a school or college.

(i) The board of barber examiners shall have the right to withdraw the approval of any barber school or college for the violation of any of the provisions of this section. (1945, c. 830, s. 8.)

Chapter 87. Contractors.

Art. 1. General Contractors.

Sec.
87-1. "General contractor" defined; exemptions.

Art. 1. General Contractors.

§ 87-1. "General contractor" defined; exemptions.—For the purpose of this article, a "general contractor" is defined as one who for a fixed price, commission, fee or wage, undertakes to bid upon or to construct any building, highway, sewer main, grading or any improvement or structure where the cost of the undertaking is fifteen thousand dollars ($15,000.00) or more and anyone who shall bid upon or engage in constructing any undertakings or improvements above mentioned in the state of North Carolina costing fifteen thousand dollars ($15,000.00) or more shall be deemed and held to have engaged in the business of general contracting in the state of North Carolina.

This section shall not apply to persons or firms or corporations furnishing or erecting industrial equipment, power plant equipment, radial brick chimneys, and monuments. (1925, c. 318, s. 1; 1931, c. 62, s. 1; 1937, c. 429, s. 1; 1949, c. 936.)

Editor's Note.—The 1949 amendment rewrote this section, increasing the minimum cost mentioned from ten thousand to fifteen thousand dollars and adding the second paragraph.

§ 87-4. First meeting of board; officers; secretary-treasurer and assistants.

The secretary-treasurer need not be a member of the board, and the board is hereby authorized to employ a full time secretary-treasurer, whose salary shall not exceed forty-eight hundred dollars ($4800.00) per annum, and such other assistants and make such other expenditures as may be necessary to the proper carrying out of the provisions of this article. (1925, c. 318, s. 4; 1941, c. 257, s. 4; 1947, c. 611.)

Editor's Note.—
The 1947 amendment increased the annual salary from $3600 to $4800. As only the last sentence was affected by the amendment the rest of the section is not set out.

§ 87-14. Regulations as to issue of building permits.—Any person, firm or corporation, upon making application to the building inspector or such other authority of any incorporated city, town or village in North Carolina charged with the duty of issuing building or other permits for the construction of any building, highway, sewer, grading or any improvement or structure where the cost thereof is to be fifteen thousand dollars ($15,000.00) or more, shall, before he be entitled to the issuance of such permit, furnish satisfactory proof to such inspector or authority that he is duly licensed under the terms of this article to carry out or superintend the same, and that he has paid the license tax required by the Revenue Act of the state of North Carolina then in force so as to be qualified to bid upon or contract for the work for which the permit has been applied; and shall be unlawful for such building inspector or other authority to issue or allow the issuance of such building permit unless and until the applicant has furnished evidence that he is either exempt from the provisions of this article or is duly licensed under this article to carry out or superintend the work for which permit has been applied; and further, that the applicant has paid the license tax required by the State Revenue Act then in force so as to be qualified to bid upon or contract for the work covered by the permit; and such building inspector, or other such authority, violating the terms of this section shall be guilty of a misdemeanor and subject to a fine of not more than fifty dollars ($50.00). (1925, c. 318, s. 13; 1931, c. 62, s. 4; 1937, c. 429, s. 7; 1949, c. 934.)

Editor's Note.—The 1949 amendment increased the minimum cost mentioned from ten thousand to fifteen thousand dollars.

Chapter 88. Cosmetic Art.

Sec.
88-28.1. Restraining orders against persons engaging in illegal practices.

§ 88-28. Acts made misdemeanors.

(g) The willful violation of the reasonable rules and regulations adopted by the state board of cosmetic art examiners and approved by the state board of health. (1933, c. 179, s. 28; 1949, c. 505, s. 2.)

Editor's Note.—As only subsection (g) was changed by the amendment the rest of the section is not set out.

§ 88-28.1. Restraining orders against persons engaging in illegal practices.—The state board of health and/or any county, city or district health officer and/or the state board of cosmetic art examiners, if it shall be found that any licensed cosmetologist or other person, who is subject to the provisions of this chapter, is violating any of the rules and regulations adopted by the state board of cosmetic art examiners, as approved by the state board of health, or any provisions of chapter 88, section 28, of the General Statutes of North Carolina, may, after notice to such person of such violation, apply to the superior court for a temporary or permanent restraining order to restrain such person from continuing such illegal practices. If, upon such application, it shall appear to the court that such person has violated and/or is violating any of the said rules and regulations or any provisions of chapter 88, section 28, of the General Statutes of North Carolina, the court may issue an order restraining any further violations thereof. All such actions for injunctive relief shall be governed by the provisions of article 37 of chapter 1 of the General Statutes: Provided, such injunctive relief may be granted regardless of whether criminal prosecution has been or may be instituted under any of the provisions of this chapter. (1949, c. 505, s. 1.)

Editor's Note.—For a brief comment on this section, see 27 N. C. Law Rev. 407.

Chapter 90. Medicine and Allied Occupations.

Art. 3. The Licensing of Mouth Hygienists, to Teach and Practice Mouth Hygiene in Public Institutions.

Sec.
90-49 to 90-52. [Repealed.]

Art. 4. Pharmacy.

Part 2. Dealing in Specific Drugs Regulated.
90-85.1. Enjoining illegal practices.

Art. 8. Chiropractic.

90-144. Meetings of association and board of examiners.

Art. 9. Trained Nurses.

90-168. Renewal of license; lapsation and reinstatement; temporary retirement from practice.
90-169. Revocation or suspension of license and procedure therefor.

Art. 9A. Practical Nurses.

Sec.
90-171.1. Board of examiners.
90-171.2. Committee on standardization.
90-171.3. Applicants; qualifications; procedure.
90-171.4. Examination; procedure.
90-171.5. License without examination.
90-171.6. Licensed practical nurses formally recognized.
90-171.7. Renewal of licenses annually; procedure and fees.
90-171.8. Revocation and suspension of licenses; procedure for reinstatement.
90-171.9. Accredited institutions and courses for training practical nurses; powers of standardization committee.
90-171.10. Article does not prohibit other persons from performing nursing service.

Art. 16. Dental Hygiene Act.

Art. 1. Practice of Medicine.

§ 90-18. Practicing without license; practicing defined; penalties.

The distinction between the practice of osteopathy and the practice of medicine and surgery is recognized by articles 1 and 7 of this chapter. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61.

The legislature has denied to a licensed osteopath the privilege of using drugs in his practice. It necessarily follows that he exceeds the limits of his certificate and is guilty of practicing medicine without being licensed so to do within the purview of this section if he administers or prescribes drugs in treating the ailments of his patients. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61. See § 90-129 and note.

But he is not guilty of practicing medicine without a license in administering violet ray treatments to his patients suffering with skin diseases. Subsection 13 specifically confers upon him the privilege of practicing radiology. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61.

A person administers drugs when he gives or applies drugs to a patient. Thus, the giving of a hypodermic injection of a drug is administering a drug. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61.

Or Gives Oral Directions for Their Use or Application.—The giving of oral directions by an osteopath to his patient directly, or indirectly by telephone directions to the druggist, for the use or application by the patient of recommended remedies, is prescribing drugs. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61.

Meaning of "Drugs." — In so far as the practice of osteopathy is concerned, a "drug" is any substance used as a medicine or in the composition of medicines for internal or external use, and a "medicine" is any substance or preparation used in treating disease. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61.

The Narcotic Drug Act does not furnish the criterion for determining the meaning of "drugs" in relation to the practice of medicine without a license. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61.

Laxatives and tonics are "drugs" in so far as the practice of osteopathy is concerned. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61.

Also Patent or Proprietary Remedies.—A person who holds himself out as an expert in medical affairs and prescribes drugs for his patients and charges fees for so doing practices medicine notwithstanding the drugs are patent or proprietary remedies purchasable without a prescription, and notwithstanding the fact that the recommendation of such remedies to acquaintances without the charge of a fee would not be unlawful. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61.

Canned Milk Is Not a Drug.—An osteopath does not practice medicine in advising a client to feed her baby a designated brand of canned milk, since milk is a food and not a drug. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61.

Whether a vitamin preparation is a drug or a food is ordinarily a question of fact. The same substance may be a drug under one set of circumstances, and not a drug under another. The test is whether it is administered or employed as a medicine. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61, wherein for the purpose of the particular case it was assumed that vitamin preparations were used solely for nourishment, and that the defendant did not transgress the scope of his osteopathic certificate in urging their use by his patients.

§ 90-19. Practicing without registration; penalties.

Practice of Medicine by Licensed Osteopath.—A licensed osteopathic physician exceeds the limits of his certificate and is guilty of practicing medicine without being registered within the purview of this section, if he administers or prescribes drugs in treating the ailments of his patents. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61. See notes to §§ 90-18, 90-129.

Art. 3. The Licensing of Mouth Hygienists, to Teach and Practice Mouth Hygiene in Public Institutions.

§§ 90-49 to 90-52: Repealed by Session Laws 1945, c. 639, s. 14.

Art. 4. Pharmacy.

Part 1. Practice of Pharmacy.

§ 90-57. Powers of board; reports; quorum; records.—The board of pharmacy shall have a common seal, and shall have the power and authority to define and designate nonpoisonous domestic remedies, to adopt such rules, regulations, and by-laws, not inconsistent with this article, as may be necessary for the regulation of its proceedings and for the discharge of the duties imposed under this article, and shall have power and authority to employ inspectors, chemists, and an attorney to conduct prosecutions and to assist in the conduct of prosecutions under this article, and for any other purposes which said board may deem necessary. The said board of pharmacy shall keep a record of its proceedings and a register of all persons to whom certificates of license as pharmacists and permits have been issued, and of all renewals thereof; and the books and register of the said board, or a copy of any part thereof, certified by the secretary, attested by the seal of said board, shall be taken and accepted as competent evidence in all the courts of the state. The said board of pharmacy shall make annually to the governor and to the North Carolina pharmaceutical association written reports of its proceedings and of its receipts and disbursements under this article, and of all persons licensed to practice as pharmacists in this state. A majority of the board shall constitute a quorum for the transaction of all business. (Rev., s. 4475; 1905, c. 108, s. 9; 1907, c. 113, s. 1; 1945, c. 572, s. 1; C. S. 6654.)

Editor's Note.—The 1945 amendment authorized the employment of inspectors and chemists.

§ 90-60. Fees collectible by board.—The board of pharmacy shall be entitled to charge and collect the following fees: For the examination of an applicant for license as a pharmacist, ten dollars; for renewing the license as a pharmacist or an assistant pharmacist, five dollars; for licenses without examination as provided in § 90-64, original, twenty-five dollars ($25.00) and renewal thereof, five dollars ($5.00); for original registration of a drug store, twenty-five dollars ($25.00) and renewal thereof, ten dollars ($10.00); for issuing a permit to a physician to conduct a drug store in a village of not more than five hundred inhabitants, ten dollars; for the renewal of permit to a physician to conduct a drug store in a village of not more than five hundred inhabit-

ants, five dollars. All fees shall be paid before any applicant may be admitted to examination or his name placed upon the register of pharmacists or before any license or permit, or any renewal thereof, may be issued by the board. (Rev., s. 4478; 1905, c. 108, s. 12; 1921, c. 57, s. 3; 1945, c. 572, s. 3; C. S. 6657.)

Editor's Note.—The 1945 amendment inserted the provision as to fees for licenses without examination.

§ 90-64. When license without examination issued.—The board of pharmacy may issue licenses to practice as pharmacists in this state, without examination, to such persons as have been legally registered or licensed as pharmacists by other boards of pharmacy, if the applicant for such license shall present satisfactory evidence of the same qualifications as are required from licentiates in this state, and that he was registered or licensed by examination by such other board of pharmacy, and that the standard of competence required by such board of pharmacy is not lower than that required in this state. All applicants for license under this section shall, with their application, forward to the secretary of the board of pharmacy a fee of twenty-five dollars ($25.00). (Rev., s. 4482; 1905, c. 108, s. 16; 1945, c. 572, s. 2; C. S. 6660.)

Editor's Note.—The 1945 amendment substituted the words "a fee of twenty-five dollars ($25.00)" at the end of the section for the words "the same fees as are required of other candidates for license."

§ 90-66. Expiration and renewal of license; failure to renew misdemeanor.

And if any pharmacist or assistant pharmacist shall fail, for a period of sixty days after the expiration of his license, to make application to the board for its renewal, his name shall be erased from the register of licensed pharmacists and assistant pharmacists and such person, in order to again become registered as a licensed pharmacist or assistant pharmacist shall be required to pay the same fee as in the case of original registration. (1947, c. 781.)

Editor's Note.—The 1947 amendment substituted "sixty" for "six" in line two of the third sentence. As the rest of the section was not affected by the amendment it is not set out.

Part 2. Dealing in Specific Drugs Regulated.

§ 90-85.1. Enjoining illegal practices. — The board of pharmacy may, if it shall find that any person is violating any of the provisions of this article, and after notice to such person of such violation, apply to the superior court for a temporary or permanent restraining order or injunction to restrain such person from continuing such illegal practices. If upon such application, it shall appear to the court that such person has violated, or is violating, the provisions of this article, the court may issue an order restraining any further violations thereof. All such actions by the board for injunctive relief shall be governed by the provisions of article 37 of the chapter on "Civil Procedure": Provided, such injunctive relief may be granted regardless of whether criminal prosecution has been or may be instituted under any of the provisions of this article. (1947, c. 229.)

Editor's Note.—For a brief comment on this section, see 25 N. C. Law Rev. 429.

Art. 5. Narcotic Drug Act.

§ 90-103. Places unlawfully possessing drugs declared nuisances.

Suit to Abate Will Not Lie.—A suit cannot be maintained to abate a public nuisance as defined by this section, since §§ 19-2 to 19-8, are not applicable, and the Narcotic Drug Act does not provide the remedy of abatement. State v. Townsend, 227 N. C. 642, 44 S. E. (2d) 36.

Art. 6. Optometry.

§ 90-114. Optometry defined.

This article was intended to regulate the practice of optometry, and not the optical trade. Palmer v. Smith, 229 N. C. 612, 51 S. E. (2d) 8.

This section is in substantial accord with the definitions given in other jurisdictions. Palmer v. Smith, 229 N. C. 612, 51 S. E. (2d) 8.

The duplication of an ophthalmic lens, or the duplication or replacement of a frame or mounting for such lenses, does not constitute the practice of optometry as defined in this section. Palmer v. Smith, 229 N. S. 612, 51 S. E. (2d) 8. See note to § 90-115.

§ 90-115. Practice without registration unlawful.

Section Is Invalid in Part.—This section is invalid in so far as it declares that a person is practicing optometry when he replaces or duplicates an ophthalmic lens, or replaces or duplicates the frame or mounting for such lens, for these acts do not constitute the practice of optometry as defined by § 90-114, and the proscription has no reasonable relation to the public health, safety or welfare. Palmer v. Smith, 229 N. C. 612, 51 S. E. (2d) 8. See Const., Art. I, §§ 1, 17, 31.

Effect of Definition in § 90-114.—The mere fact that this section provides that a person shall be deemed to be practicing optometry if he duplicates a lens or replaces or duplicates a frame or mounting, without a prescription, does not make it so, unless such duplication or replacement constitutes the practice of optometry within the definition thereof in § 90-114. Palmer v. Smith, 229 N. C. 612, 51 S. E. (2d) 8.

What Optician May Do.—So long as an optician confines his work to the mere mechanical process of duplicating lenses, replacing or duplicating frames and mountings, "making mechanical repairs to frames for spectacles," and filling prescriptions issued by a duly licensed optometrist or oculist, and does not in any manner undertake "the measurement of the powers of vision and the adaptation of lenses for the aid thereof," he is not practicing optometry. Palmer v. Smith, 229 N. C. 612, 51 S. E. (2d) 8.

§ 90-118. Examination for practice; prerequisites; registration.

1. He must be twenty-one years of age: Provided, that the examination may be given to any applicant who will be twenty-one years of age before the next regular period for giving examinations: Provided, further, that no license shall be issued until the applicant reaches twenty-one years of age.

(1949, c. 357.)

Editor's Note.—The 1949 amendment added the provisos to subsection 1. As the rest of the section was not affected by the amendment it is not set out.

§ 90-126.1. Board may enjoin illegal practices.

For comment on this section, see 21 N. C. Law Rev. 324.

Art. 7. Osteopathy.

§ 90-129. Osteopathy defined.

Cro. Reference.—As to what constitutes illegal practice of medicine by licensed osteopath, see also §§ 90-18, 90-19 and notes.

Purpose of Article.—In all probability, the general assembly enacted the statutes relating to the practice of osteopathy now embodied in this article because of the decision in State v. McKnight, 131 N. C. 717, 42 S. E. 580, 59 L. R. A. 187, which recognized that osteopathy is a "mode of treatment which absolutely excludes medicines and surgery from its pathology" and held that for this reason the statutes requiring examination and license "before beginning the

practice of medicine or surgery" did not apply to osteopaths. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61.

The distinction between the practice of osteopathy and the practice of medicine and surgery is recognized by articles 1 and 7 of this chapter. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61.

"Osteopathy" Does Not Involve Use of Drugs. — "Osteopathy" is the very antithesis of any science of medicine involving the use of drugs. It is a system of treating diseases of the human body without drugs or surgery. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61.

The words "as taught by the various colleges of osteopathy" do not set at large the signification of "osteopathy," permitting the colleges to give it any meaning they choose. The legislature merely authorizes the colleges to determine, select, and teach the most desirable methods of doing what is comprehended within the term "osteopathy." The colleges cannot widen the scope of the osteopath's certificate so as to permit him to practice other systems of healing by the simple expedient of varying their curricula. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61.

In a prosecution of an osteopath for practicing medicine without a license, the state does not have the burden of showing that the administration or prescription of medicines with which defendant is charged was not taught in the recognized colleges of osteopathy. Id.

Art. 8. Chiropractic.

§ 90-139. Creation and membership of board of examiners.

Editor's Note.—For a brief comment on the 1949 amendments to this article, see 27 N. C. Law Rev. 406.

§ 90-144. Meetings of association and board of examiners.—The North Carolina chiropractic association shall meet at least once a year at such time and place as said association shall determine. The North Carolina board of chiropractic examiners shall meet at least once a year at such time and place as said board shall determine at which meetings applicants for license shall be examined. (1917, c. 73, s. 6; 1933, c. 442, s. 1; 1949, c. 785, s. 1; C. S. 6716.)

Editor's Note.—The 1949 amendment rewrote this section. Prior to the amendment the annual meetings of the association and the board of examiners were required to be held at the same time and place.

§ 90-145. Grant of license; temporary license.—The board of chiropractic examiners shall grant to each applicant who is found to be competent, upon examination, a license authorizing him or her to practice chiropractic in North Carolina. Said board may grant a temporary license to any applicant who shall comply with the requirements of this article as to proof of good character and of graduation from a chiropractic school or college as prescribed in this article; but such temporary license shall not continue in force longer than until the next meeting of said board, and in no case shall a temporary license be granted to an applicant who has already been refused a license by said board. (1917, c. 73, s. 7; 1949, c. 785, s. 2; C. S. 6717.)

Editor's Note.—The 1949 amendment rewrote this section.

§ 90-154. Grounds for refusal or revocation of license. — The board of chiropractic examiners may refuse to grant or may revoke a license to practice chiropractic in this state, upon the following grounds: Immoral conduct, bad character, the conviction of a crime involving moral turpitude, habitual intemperance in the use of ardent spirits, narcotics, or stimulants to such an extent as to incapacitate him or her for the performance of such professional duties, unethical advertising, unprofessional or dishonorable conduct unworthy of and affecting the practice of his profession. (1917, c. 73, s. 14; 1949, c. 785, s. 3; C. S. 6725.)

Editor's Note.—The 1949 amendment added at the end of the section the following: "unethical advertising, unprofessional or dishonorable conduct unworthy of and affecting the practice of his profession."

§ 90-156. Pay of board and authorized expenditures.—The members of the board of chiropractic examiners shall receive their actual expenses, including railroad fare and hotel bills, when meeting for the purpose of holding examinations, and performing any other duties placed upon them by this article, such expenses to be paid by the treasurer of the board out of the moneys received by him as license fees, or from renewal fees. The board shall also expend out of such fund so much as may be necessary for preparing licenses, securing seal, providing for programs for licensed doctors of chiropractic in North Carolina, and all other necessary expenses in connection with the duties of the board. (1917, c. 73, s. 16; 1949, c. 785, s. 4; C. S. 6727.)

Editor's Note.—The 1949 amendment inserted in the second sentence the following: "providing for programs for licensed doctors of chiropractic in North Carolina."

Art. 9. Trained Nurses.

§ 90-163. Scope of examination; fees; licensing. Before an applicant shall be permitted to take such an examination he or she shall pay to the secretary of the examining board an examination fee of fifteen dollars. In the event of the failure of the applicant to pass examination, one-half of the above named fee shall be returned to the applicant. (1917, c. 17, s. 4; 1925, c. 87, s. 7; 1947, c. 116, s. 1; C. S. 6732.)

Editor's Note.—
The 1947 amendment substituted "fifteen" for "ten" in line four of the second paragraph. As the first paragraph was not affected by the amendment it is not set out.

§ 90-164. Licenses and certificates without examination; fee.

The fee for license without examination shall be fifteen dollars ($15.00). (1917, c. 17, s. 5; 1925, c. 87, s. 8; 1947, c. 116, s. 2; C. S. 6733.)

Editor's Note.—
The 1947 amendment decreased the fee in the last sentence from $25.00 to $15.00. As the rest of the section was not affected by the amendment it is not set out.

§ 90-165. Only licensed nurses to practice.—On and after February 28, 1925, all "trained," "graduate," "licensed," or "registered" nurses must obtain licenses from the board of nurse examiners before practicing their profession in this state, and before using the abbreviation "R. N." But nothing in this section shall be construed to apply to any nurse who is qualified and practicing her profession on February 28, 1925. (1917, c. 17, s. 6; 1917, c. 288; 1925, c. 87, s. 9; 1947, c. 116, s. 3; C. S. 6734.)

Editor's Note.—
The 1947 amendment struck out the words "must obtain certificates of registration from the clerk of the superior court of any county as hereinafter provided," formerly appearing after the abbreviation R. N.

§ 90-168. Renewal of license; lapsation and reinstatement; temporary retirement from practice.—The license of every person licensed or deemed to be licensed under the provisions of this article shall be annually renewed, except as hereinafter provided. On or before Novembe 1st, 1947, and annually thereafter, the board shall mail to the

last known address an application for renewal of license to every person who has received from the board license or who has a right to renewal of license because of having received license under the provisions of chapter 87 of the Public Laws of North Carolina, 1925, as amended, or under laws existing prior thereto. The applicant shall fill in the application blank and return it to the board with a renewal fee of one dollar ($1.00) before January 1st, 1948, and on or before January 1st of each year thereafter. Upon receipt of the application and fee the board shall verify the accuracy of the application and issue to the applicant a certificate of renewal for the current year beginning January 1st and expiring December 31st. Such certificate of renewal shall render the holder thereof a legal practitioner for the period stated on the certificate of renewal.

Any licensee who allows his or her license to lapse by failing to renew the license as provided above may be reinstated by the board on satisfactory explanation for such failure to renew his or her license and on payment of a fee of five dollars ($5.00). A lapse shall not be deemed to have accrued during a period of service in the armed services of the United States and for six months thereafter.

Any person practicing nursing during the time his or her license has lapsed shall be considered an illegal practitioner and shall be subject to the penalties provided for violations of this article. A person licensed under the provisions of this article desiring to retire from practice temporarily, shall send a written notice to the board. Upon receipt of such notice the board shall place the name of such person upon the non-practicing list. While remaining on this list the person shall not be subject to the payment of any renewal fees and shall not practice in the state. When the person desires to resume practice, application for renewal of license and payment of renewal fee for the current year shall be made to the board. (1917, c. 17, s. 8; 1925, c. 87, s. 11; 1947, c. 116, s. 4; C. S. 6736.)

Editor's Note.—
The 1947 amendment rewrote this section. Formerly the section related to registration of nurses.

§ 90-169. Revocation or suspension of license and procedure therefor.—The board shall have the power to suspend or revoke the license of any registered nurse upon any one or more of the following grounds, after notice, hearing, and determination by the board as hereinafter provided for: gross incompetency, dishonesty, intemperance, or any act derogatory to the morals or standing of the profession of nursing. The procedure for the revocation or suspension of a license shall be in accordance with the provisions of chapter 150, General Statutes of North Carolina, 1943, entitled "Uniform Revocation of Licenses." Upon the revocation or suspension of a license the name of the holder thereof shall be stricken from the roll of registered nurses in the hands of the secretary of the board. (1917, c. 17, s. 9; 1925, c. 87, s. 12; 1947, c. 116, s. 5; C. S. 6737.)

Editor's Note.—
The 1947 amendment rewrote this section.

Art. 9A. Practical Nurses.

§ 90-171.1. Board of examiners.—Solely and exclusively for the purpose of examining, licensing, and regulating practical nurses in accordance with and under the provisions of this article and for the purpose of administering the provisions of this article as it relates to practical nurses, the North Carolina board of nurse examiners is hereby enlarged by adding to the board three members who shall be practical nurses, who shall be appointed by the Undergraduate and Practical Nurses Organization, Incorporated, and the Practical Nurses Association of Durham. These practical nurse members added to the board for the purposes stated shall be originally appointed for terms commencing on June 1, 1947, one for a term of one year, one for a term of two years, and one for a term of three years, and until their successors shall be appointed and shall qualify. Thereafter, appointments shall be for a term of three years. Following the formation of a licensed practical nurses association in North Carolina, all appointments of the practical nurse members of the board, as enlarged, shall be made by such licensed practical nurse association.

For all other purposes, except as herein specifically provided, the membership of the North Carolina board of nurse examiners shall be and remain constituted as provided by General Statutes, chapter 90, article 9, and except as herein specifically provided, the powers, duties, and functions of the board as constituted by chapter 90, article 9, of the General Statutes, shall not be affected by the provisions of this article.

The practical nurse members of the board, as enlarged by this article, shall participate only in such action and functions of the board as shall concern and affect matters relating to the examination, licensing and the regulation of undergraduate and practical nurses and relating to the administration of the provisions of this article. No business shall be transacted or other action taken concerning undergraduate and practical nurses at any meeting of the board, as enlarged by this article, unless at least two of the practical nurse members shall be present.

The officers of the board, as enlarged by this article, shall be the officers of the North Carolina board of nurse examiners, who shall continue to be registered professional nurses.

The secretary-treasurer of the board shall keep and maintain separate records and accounts of the funds arising from fees received under the provisions of General Statutes, chapter 90, article 9, as amended, from registered professional nurses and applicants for licensure as registered professional nurses, and of the funds arising from fees received under the provisions of this article from licensed practical nurses and applicants for licensure as licensed practical nurses.

The practical nurse members of the board, as enlarged by this article, shall receive a per diem for attendance at meetings of the board not exceeding ten dollars ($10.00) per day, and in addition thereto they shall be entitled to their actual traveling and hotel expenses, to be approved by the enlarged board, which shall be paid from the practical nurse funds arising from fees authorized by this article.

The board, as enlarged by this article, is hereby empowered to authorize and direct the use of the funds arising from fees received under the provisions of this article from licensed practical nurses and applicants for licensure as licensed

practical nurses for the purpose of contributing towards the payment of joint office expenses and joint operating expenses, including salaries of the secretary-treasurer and other employees who serve both the North Carolina board of nurse examiners and the board, as enlarged by this article, and including the salary of the educational director, in the event the same individual is serving and performs the duties of educational director with respect to both the schools and training of professional nurses and the schools and training of practical nurses; provided, however, that the amount of funds arising from fees received under the authority and provisions of this article which may be so authorized and used for such joint purposes shall not exceed one-half of the total annual amount of such joint salaries and expenses during any fiscal year.

The board, as enlarged by this article, is authorized and empowered to appoint and employ an educational director, together with such assistants as the board may deem necessary, for the purpose of performing such duties and functions as may be prescribed by the joint committee on standardization, as enlarged by this article, in carrying out the provisions of this article. Such educational director may be the same individual acting and serving as educational director as provided for by the General Statutes, § 90-160, in which event the salary and expenses of such educational director shall be fixed in accordance with the provisions of General Statutes § 90-160. In the event an additional educational director shall be named by the board, as enlarged by this article, the board is authorized to fix and to pay the salary of such director and assistants out of funds arising from fees authorized by this article received from licensed practical nurses and applicants for licensure as licensed practical nurses.

All moneys received from fees authorized by this article from licensed practical nurses and from applicants for licensure as licensed practical nurses, in excess of the expenditures authorized and directed by the board to be used for salaries and expenses as hereinbefore provided for, shall be held by the secretary-treasurer for future expenses and for extending practical nursing education in North Carolina. No moneys used in carrying out this article shall be paid out of the state treasury.

The board, as enlarged by this article, shall provide for the examination, licensing, and regulation of licensed practical nurses, and shall provide for the licensing of those now practicing as undergraduate and practical nurses, or attendants, in the manner hereinafter provided. (1947, c. 1091, s. 1.)

§ 90-171.2. Committee on standardization. — Solely and exclusively for the purpose of carrying out the educational and standardization provisions of this article, there are added to the joint committee on standardization, as provided for by the General Statutes § 90-159, three practical nurse members, who shall be originally appointed by the Undergraduate and Practical Nurses Organization, Incorporated, and the Practical Nurses Association of Durham, who shall serve for a period of three years from the date of appointment or until their successors are appointed and qualified. After the formation of a licensed practical nurses association, future appointments shall be made by such association. The practical nurse members shall participate only in those meetings or activities of the standardization committee as concern or pertain to practical nursing. This joint committee on standardization, as enlarged by this article, shall have the power to establish standards and provide minimum requirements for the conducting of schools of practical nursing, of which applicants for examination for the practical nurses' license under this article must be graduates before taking such examination. Nothing in this article shall be construed to limit or otherwise affect the constitution, powers, duties, and functions of the joint committee on standardization created by General Statutes § 90-159, as provided for by chapter 90, article 9, of the General Statutes. (1947, c. 1091, s. 1.)

§ 90-171.3. Applicants; qualifications; procedure.—Any applicant who desires to obtain a license to practice as a licensed practical nurse shall submit to the board, on forms furnished by the board, satisfactory written evidence under oath that the applicant is at least eighteen years of age, is a citizen of the United States, or has legally declared intention of becoming a citizen, is of good moral character, is in good physical and mental health, has completed an education through the first-year high school, or its equivalent, and has successfully completed a course of training for practical nursing approved and accredited by the standardization committee. The application shall be accompanied by a fee of ten dollars ($10.00) for examination and certification. (1947, c. 1091, s. 1.)

§ 90-171.4. Examination; procedure.—An examination for licenses to practice practical nursing shall be given by the board at least once in each year, after notice of the time and place of holding the examination has been published at least once a week for four weeks immediately preceding such examination in such newspapers, having statewide circulation as may be selected by the board. The examination shall be of such character as to determine the fitness of the applicant to practice practical nursing of the sick. In the discretion of the board written examinations may be supplemented by oral or practical examinations. If the result of the examination of any applicant shall be satisfactory to a majority of the board, the secretary shall, upon an order of the board, issue the applicant a certificate to that effect; whereupon the person named in the certificate shall be declared duly licensed to practice practical nursing in North Carolina. (1947, c. 1091, s. 1.)

§ 90-171.5. License without examination.—Persons twenty years of age or over now practicing as undergraduate nurses, practical nurses, or performing similar services under any other title may make application to the board for licensure as a licensed practical nurse under this provision on or before July 1st, 1949. The above application shall be made on forms furnished by the board, in the manner prescribed by the board and verified by oath. The board, without requiring an examination, shall issue a license to practice as a licensed practical nurse to any person found to be a citizen of the United States and a resident of North Carolina, twenty years of age or more, of

good moral character, in good physical and mental health, and to have lived in and cared for the sick as a vocation in this state for two years immediately preceding the date of such application.

Before such license is issued such applicant must be favorably endorsed by two physicians licensed to practice in North Carolina who have personal knowledge of the applicant's qualifications as a practical nurse, must be endorsed by two persons who have employed the applicant in the capacity of a practical nurse.

The fee for each such license shall be seven dollars and fifty cents ($7.50) and shall accompany each application filed under this section.

The board upon written application and such references and proof of identity as it may by rule prescribe may issue a license to practice as a licensed practical nurse without examination to any applicant who has been duly licensed or registered as a practical nurse, licensed or trained attendant, or as a person entitled to perform similar services under any other title under the laws of any other state, if in the opinion of the board the applicant meets the preliminary requirements for licensed practical nurses under the provisions of this article upon application in the prescribed manner accompanied by a fee of ten dollars ($10.00). (1947, c. 1091, s. 1.)

§ 90-171.6. Licensed practical nurses formally recognized.—A person holding a license to practice as a licensed practical nurse in this state shall have the right to hold and use the title "Licensed Practical Nurse" and the abbreviation "L. P. N." No other person shall assume such title or abbreviation, or any other word, symbols or letters to indicate that the person is a licensed or registered practical nurse unless licensed as such under the provisions of this article. (1947, c. 1091, s. 1.)

§ 90-171.7. Renewal of licenses annually; procedure and fees.—The license of every person practicing under the provisions of this article shall be renewed annually upon application to the board. On or before November one of each year, the secretary of the board shall mail to the last known address an application for renewal of license to every licensed practical nurse in the state, but the failure to receive such application shall not excuse any practitioner from the requirements for renewal herein contained. The person receiving such application shall furnish the information indicated thereon and return the form to the board with a renewal fee of one dollar ($1.00) prior to January one of the following year. Upon receipt of the application duly filled in and signed and the required fee, the secretary of the board shall verify the accuracy of the application and issue to the applicant a certificate of renewal for the period beginning January 1st and ending December 31st of the following year. Such certificate of renewal shall constitute the holder thereof a duly licensed practical nurse for the period indicated on such certificate. Failure to renew the license thus annually shall automatically result in forfeiture of the right to practice nursing in North Carolina as a licensed practical nurse until application shall have been made and the fee therefor paid for the current year. (1947, c. 1091, s. 1.)

§ 90-171.8. Revocation and suspension of licenses; procedure for reinstatement.—The board, as enlarged by this article, shall have power to deny, revoke or suspend any license to practice as a licensed practical nurse applied for or issued by the board in accordance with the provisions of this article for gross incompetency, negligence while on duty, the commission of a felony or a crime involving moral turpitude, habitual drunkenness, addiction to the use of drugs, or for any habit rendering her unfit to care for the sick, or for violation of any provision of this article. The procedure for revocation or suspension of a license shall be in accordance with the provisions of chapter 150 General Statutes of North Carolina, 1943, entitled, "Uniform Revocation of Licenses." Upon revocation or suspension of a license the name of the holder thereof shall be stricken from the roll of licensed practical nurses in the hands of the secretary of the board.

When the license of any person has been revoked as herein provided, the board may, after the expiration of three months, and upon payment of a fee of five dollars ($5.00), entertain an application for and grant a new license without further examination. No such new license shall be granted except upon the affirmative vote of at least five members of the board. (1947, c. 1091, s. 1.)

§ 90-171.9. Accredited institutions and courses for training practical nurses; powers of standardization committee.—Any institution desiring to conduct a course for the training of licensed practical nurses shall apply to the standardization committee, and submit evidence that it is prepared to give a course of not less than twelve months of theoretical instruction and practical training and experience in practical nursing prescribed in a curriculum adopted by the standardization committee and specified by law and that it is prepared to meet other standards and regulations adopted by the standardization committee. Such instruction and experience may be secured in one or more institutions approved for the purpose by the standardization committee. The length of such course shall not be less than twelve months. Upon receipt of such application, a survey of the institution or institutions with which the course is to be affiliated shall be made by an educational director designated by the enlarged board, and a written report of such survey shall be submitted to the standardization committee. If in the opinion of the standardization committee the requirements for accredited courses for licensed practical nurses are met, the standardization committee shall declare the course to be an accredited course for licensed practical nurses.

The standardization committee shall, annually or more often, as it may deem necessary, survey all courses for the training of licensed practical nurses in the state. Written reports of such surveys shall be submitted to the standardization committee. If the standardization committee determines that any accredited course for the training of practical nurses is not attaining the standard required by the statutes and the standardization committee, notice thereof in writing specifying the deficiencies shall be given immediately to the institution giving such course. If the deficiencies are not corrected to the satisfaction of the standardization committee within a reasonable time, the course of training shall be removed from the list

of courses accredited for training licensed practical nurses. (1947, c. 1091, s. 1.)

§ 90-171.10. Article does not prohibit other persons from performing nursing service.—No provision of this article shall be construed to prohibit the performance of general nursing service by any person for compensation or gratuitously, or to prohibit the gratuitous nursing of the sick, the furnishing of services, by domestic servants, friends or relatives, or any midwife or other person who does not assume to be or hold herself out to be a licensed practical nurse. (1947, c. 1091, s. 1.)

§ 90-171.11. Violation of article; penalties. — After the effective date of this article it shall be unlawful for any person to:

a. Represent herself to be a licensed practical nurse or use the designation "Licensed Practical Nurse" or the abbreviation "L. P. N.", unless she is licensed under the provisions of this article.

b. Make a material false statement or representation to the board in applying for a license under this article.

c. Refuse to surrender a license which has been revoked in the manner prescribed herein.

d. Represent that any school or course is approved or accredited as a course or school for the training of licensed practical nurses unless such course or school has been approved and accredited by the standardization committee hereinabove referred to.

Any person violating any of the provisions of this article shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than fifty dollars ($50.00) or imprisoned not more than thirty (30) days. (1947, c. 1091, s. 1.)

§ 90-171.12. Undergraduate nurse.—The words "practical nurse" or "licensed practical nurse," shall mean and include "undergraduate nurse." (1947, c. 1091, s. 2.)

Art. 12. Chiropodists.

§ 90-188. Chiropody defined.—Chiropody (podiatry) as defined by this article is the surgical or medical or mechanical treatment of all ailments of the human foot, except the correction of deformities requiring the use of the knife, amputation of the foot or toes, or the use of an anesthetic other than local. (1919, c. 78, s. 2; 1945, c. 126; C. S. 6763.)

Editor's Note.—The 1945 amendment inserted "or" before "medical" in line three and after "medical" substituted "or" for "and."

Art. 13. Embalmers and Funeral Directors.

§ 90-203. State board; election; qualifications; term; vacancies.—The state board of embalmers and funeral directors shall consist of seven members, elected by the North Carolina funeral directors and burial association, inc., at least five of whom shall be licensed and practicing embalmers, having experience in the care and disposition of dead human bodies. Of the five members of the board required to be licensed and practicing embalmers, one such member of the board shall be elected in June, one thousand nine hundred and five, and one annually thereafter in the month of June. The term of office shall begin on the first day of July, next after the election and continue for five years. The two members of the board not required to be licensed and practical embalmers shall be elected during the month of June, one thousand nine hundred and forty-nine, one for a term of two years, beginning on the first day of July, one thousand nine hundred and forty-nine, and one for a term of three years, beginning July 1, one thousand nine hundred and forty-nine; the successor of these members of the board shall be elected thereafter during the month of June in the year in which the term of the board member expires. The North Carolina funeral directors and burial association, inc., shall fill all vacancies in such board. (Rev., s. 4384; 1901, c. 338, ss. 1, 2, 3; 1931, c. 174; 1945, c. 98, s. 1; 1949, c. 951, s. 1; C. S. 6777.)

Editor's Note.—

The 1945 amendment substituted the words "North Carolina funeral directors and burial association, incorporated" for the words "state board of health."

The 1949 amendment rewrote this section and increased the number of members from five to seven.

For a brief comment on the 1949 amendments to this article, see 27 N. C. Law Rev. 407.

§ 90-204. Members; removal; oath.—The North Carolina funeral directors and burial association, incorporated, shall have power to remove from office any member of said board for neglect of duty, incompetency, or improper conduct. The North Carolina funeral directors and burial association, incorporated, shall furnish each person appointed to serve on the state board of embalmers and funeral directors a certificate of appointment. The appointees shall qualify by taking and subscribing to the usual oath of office before some person authorized to administer oaths, within ten days after said appointment has been made, which oath shall be filed with the board of embalmers and funeral directors. (Rev., s. 4385; 1901, c. 338, ss. 3, 4; 1945, c. 98, s. 2; 1949, c. 951, s. 2; C. S. 6778.)

Editor's Note.—The 1945 amendment substituted the words "North Carolina funeral directors and burial association, incorporated" for the words "state board of health."

The 1949 amendment inserted the words "and funeral directors" after the word "embalmers."

§ 90-206. Meetings; quorum; bylaws; officers; president to administer oaths.—The board shall meet at least once every year, during the month of July, at such place as it may determine. Four members shall constitute a quorum. At each annual meeting the board from its members shall select a president and a secretary, who shall hold their offices for one year, and until their successors are elected. The board shall, from time to time, adopt rules, regulations, and bylaws not inconsistent with the laws of this state or of the United States, whereby the performance of the duties of such board and the practice of embalming of dead human bodies and conducting funerals shall be regulated. Provided, however, that any regulations concerning funerals, shall pertain to sanitation only. The board shall also enforce such rules and regulations relative to sanitation, health and the protection of the public from contagious and infectious diseases as are promulgated by the state board of health with respect to the handling of dead human bodies. The president of the board (and in his absence a president pro tempore elected by the members present) is authorized to administer oaths to wit-

nesses testifying before the board. (Rev., s. 4387; 1901, c. 338, ss. 5, 6, 7, 8; 1949, c. 951, s. 3; C. S. 6780.)

Editor's Note.—The 1949 amendment rewrote this section.

§ 90-207. Grant and renewal of licenses; fees; licenses displayed.—Every person not licensed as an embalmer, now engaged or desiring to engage in the practice of embalming dead human bodies, shall make written application to the state board of embalmers and funeral directors for a license, accompanying the same with a license fee of ten dollars ($10.00), whereupon the applicant shall present himself before the board at a time and place to be fixed by the board, and if the board shall find upon due examination, that the applicant is of good moral character, possessed of skill and knowledge of said science of embalming and the care and disposition of the dead, and has a responsible knowledge of sanitation and the disinfection of bodies of deceased persons and the apartment, clothing, and bedding, in case of death from infectious or contagious disease, and has had a special course in embalming in an approved school, or two years practical experience with a licensed and practicing embalmer, who shall make affidavit upon the application that said applicant has had such experience under him, the board shall issue to such applicant a license to practice the art of embalming and the care and disposition of the dead, and shall register such applicant as a duly licensed embalmer. Such license shall be signed by a majority of the board and attested by its seal. All persons receiving a license under the provisions of this article shall also register the fact at the office of the board of health of the city, and where there is no board of health, with the clerk of the superior court in the county or counties in which it is proposed to carry on said practice, and shall display said license in a conspicuous place in the office of such licentiate. Every registered embalmer and funeral director who desires to continue the practice of his profession shall annually, during the time he shall continue in such practice, on such day as the board may determine, pay to the secretary of the board a fee of ten dollars ($10.00) for the renewal registration. (Rev., s. 4388; 1901, c. 338, ss. 9, 10; 1917, c. 36; 1919, c. 88; 1949, c. 951, s. 4; C. S. 6781.)

Editor's Note.—The 1949 amendment rewrote this section. It increased the amount of the fees and made other changes.

Art. 16. Dental Hygiene Act.

§ 90-221. Definitions.—(a) "Dental Hygiene" as used in this article shall mean the treatment of human teeth by removing therefrom calcareous deposits and by removing accumulated accretion from directly beneath the free margin of the gums and polishing the exposed surface of the teeth, provided that nothing in this article shall be construed as affecting the practice of medicine or the practice of dentistry as provided by law, nor so construed as to prevent the performance of the acts herein referred to in colleges or universities under the supervision of instructors; (b) "dental hygienist" as used in this article shall mean any person who practices dental hygiene; (c) "license" shall mean a certificate issued to any applicant upon completion of requirements for admission to practice dental hygiene; (d) "renewal certificate" shall mean the annual certificate of renewal of license to continue practice of dental hygiene in the state of North Carolina; (e) "board" shall mean "The North Carolina State Board of Dental Examiners" created by chapter one hundred thirty-nine, Public Laws of one thousand eight hundred and seventy-nine, and chapter one hundred and seventy-eight, Public Laws of one thousand nine hundred and fifteen as continued in existence by § 90-22. (1945, c. 639, s. 1.)

§ 90-222. Administration of article.—The board is hereby vested with the authority and is charged with the duty of administering the provisions of this article. (1945, c. 639, s. 2.)

§ 90-223. Powers and duties of board.—The board shall have authority, in the administration of this article, to fix the time of examinations for the granting of licenses to dental hygienists; form of application to be filed; the type of examination to be given, whether written or oral or a combination of both, and to make such rules and regulations as may be necessary and reasonable to carry out the provisions of this article.

The board shall keep on file in its office at all times a complete record of the names, addresses, license numbers and renewal certificate numbers of all persons entitled to practice dental hygiene in this state. (1945, c. 639, s. 3.)

§ 90-224. Eligibility for examination.—Any person of good moral character over nineteen (19) years of age who is a citizen of any state of the United States or of the United States of America, a graduate of an accredited high school who has successfully completed training in a school of dental hygiene approved by the board, shall be eligible to take an examination for a license to practice dental hygiene in the state of North Carolina. (1945, c. 639, s. 4.)

§ 90-225. Examination of applicants; issuance of license.—Any person desiring to obtain a license to practice dental hygiene after having complied with the rules and regulations of the board under its authority to determine eligibility, shall be entitled to an examination by the board upon such subjects as the board may deem necessary, which examination may be written or oral or a combination of both, as in the opinion of the board will be practical or necessary to test the qualifications of the applicant.

As soon as possible after the examination has been given, the board, under rules and regulations adopted by it, shall determine the qualifications of the applicant and shall issue to each person successfully meeting the qualifications a license which shall entitle the person to practice dental hygiene in the state of North Carolina, subject to the requirements hereinafter provided for annual renewal certificate. (1945, c. 639, s. 5.)

§ 90-226. Renewal certificates.—On or before the first of January next following the obtaining of a license to practice dental hygiene, the holder of such license shall obtain from the board a renewal certificate, which renewal certificate shall authorize the holder of a license certificate to continue the practice of dental hygiene in the state of North Carolina for the current calendar year and

on or before each January first thereafter, such holder of a license certificate shall obtain from the board a renewal certificate, which renewal certificate shall authorize the practice by such person of dental hygiene for the year for which the renewal certificate is issued. (1945, c. 639, s. 6.)

§ 90-227. Renewal of license.—Any person who has obtained from the board a license certificate to practice dental hygiene in the state of North Carolina and who shall fail to obtain a renewal certificate for any year, shall before resuming the practice of dental hygiene make application to the board under such rules as it may prescribe for the renewal of the license to practice dental hygiene and upon such application being made the board shall determine that such applicant possesses the qualifications prescribed for the granting of a license to practice dental hygiene and that the applicant continues to possess a good moral character and is not otherwise disqualified to practice dental hygiene in the state of North Carolina, and thereupon issue a renewal certificate for the practice of dental hygiene for the calendar year in which the renewal certificate is issued, and thereafter such person shall have the right to make application annually for the renewal certificate as if there had been no failure to obtain for one year a renewal certificate. (1945, c. 639, s. 7.)

§ 90-228. Revocation or suspension of license or renewal certificate.—The board may revoke or suspend the license or renewal certificate of any person upon proof satisfactory to said board:

(a) That license or registration was procured through fraud or misrepresentation.

(b) That the holder thereof has been convicted of an offense involving moral turpitude.

(c) That the holder thereof is guilty of chronic or periodic inebriety or addiction to habit forming drugs.

(d) That the holder thereof is guilty of advertising professional superiority or the performance of professional service in a superior manner; advertising prices for professional services; advertising by means of large display, glaring light signs or containing as a part thereof representation of a tooth, teeth or any other portion of the human head; employing or making use of solicitors or free publicity agents directly or indirectly; advertising any free dental work or free examination; advertising to guarantee any service.

(e) That such holder is guilty of hiring, supervising, permitting or aiding unlicensed persons to practice dental hygiene.

(f) That such holder is guilty of conduct which disqualifies him to practice dental hygiene with safety to the public.

(g) That such person practices dental hygiene in any place or establishment not authorized by this article.

(h) That such person is guilty of unprofessional conduct.

The following acts on the part of a licensed dental hygienist are hereby declared to constitute unprofessional conduct: (1) Practicing while his or her license is suspended, (2) practicing without a renewal certificate, (3) wilfully deceiving or attempting to deceive the board or its agents with reference to any matter under investigation by the board, (4) practicing dental hygiene under a false or assumed name or any name except the full name which was used in making application and in the license granted by the board or under her married name, established to the satisfaction of the board, (5) violating this article or the provisions of article 2 of this chapter, or violating or aiding any person to knowingly violate the Dental Practice Act or Dental Hygiene Act of any state or territory, and (6) practicing in the employment of or in association with any person who is practicing in an unlawful or unprofessional manner.

The foregoing specifications of acts constituting unprofessional conduct shall not be construed as a complete definition of unprofessional conduct nor as authorizing or permitting the performance of other or similar acts not denounced or as limiting or restricting the said board from holding that other or similar acts also constitute unprofessional conduct. (1945, c. 639, s. 8.)

§ 90-229. Procedure for renewal of certificate.—The procedure for the renewal of a certificate by the board shall be the same in form and manner as prescribed in § 90-31. (1945, c. 639, s. 9.)

§ 90-230. Discipline of dental hygienist.—The procedure for the revocation of a license or for other discipline of a holder of a certificate under this article shall be the same in form and manner as prescribed in § 90-41. (1945, c. 639, s. 10.)

§ 90-231. Fees and disposition thereof.—The fees which shall be charged by the board for the performance of the duties imposed upon it by this article shall be as follows: (1) Examination fee, twenty dollars ($20.00). (2) Issuance of annual renewal certificate, two dollars ($2.00). (3) Restoration of license, twenty dollars ($20.00).

All fees shall be payable in advance to the board and shall be disposed of by the board in the discharge of its duties under this article, with any surplus to be disposed of as provided in article 2 of this chapter. (1945, c. 639, s. 11.)

§ 90-232. Practice of dental hygiene.—The holder of a license certificate for the year in which the same is issued, or of a renewal certificate for the current year, shall have the right to practice dental hygiene in this state in the office of any duly licensed dentist; in a clinic or in clinics in the public schools of the state of North Carolina, as an employee of the state board of health; in a clinic or in clinics in a state institution as an employee of the institution; in a clinic in any industrial establishment as an employee of such establishment where services are rendered only to bona fide employees of the industrial establishment; or in a clinic established by a hospital, as an employee of the hospital, where service is rendered only to patients of such hospital. No dentist in private practice shall employ more than one dental hygienist at one and same time. In a clinic the necessary number of dental hygienists may be employed, but no clinic shall be operated or maintained except under the supervision and direction of a licensed dentist. (1945, c. 639, s. 12.)

§ 90-233. Violation a misdemeanor.—Any person who shall violate, or aid or abet another in violating any of the provisions of this article shall be guilty of a misdemeanor and upon conviction shall be punished in the discretion of the court. (1945, c. 639, s. 13.)

Chapter 92. Photographers.

§ 92-1. Definitions.

Chapter Is Unconstitutional.— This chapter relating to the licensing and supervision of photographers tends to create a monopoly in violation of Art. I, § 31 of the State Constitution, and it is also unconstitutional as violative of Art. I, §§ 1 and 17 of the State Constitution. State v. Ballance, 229 N. C. 764, 51 S. E. (2d) 731.

Chapter 94. Apprenticeship.

§ 94-7. Contents of agreement.

(8) A provision that all controversies or differences concerning the apprentice agreement which cannot be adjusted locally in accordance with § 94-5 shall be submitted to the director for determination.

(1945, c. 729, s. 1.)

Editor's Note.—The 1945 amendment struck out the phrase "as provided for in § 94-10" formerly appearing at the end of subsection (8). As only this subsection was affected by the amendment the rest of the section is not set out.

§ 94-10: Repealed by Session Laws 1945, c. 729, s. 2.

Editor's Note.—The repealed section related to the settlement of controversies or complaints.

§ 94-11. Limitation.—Nothing in this chapter or in any apprentice agreement approved under this chapter shall operate to invalidate any apprenticeship provision in any collective agreement between employers and employees, setting up higher apprenticeship standards; provided, that none of the terms or provisions of this chapter shall apply to any person, firm, corporation or crafts unless, until, and only so long as such person, firm, corporation or crafts voluntarily elects that the terms and provisions of this chapter shall apply. Any person, firm, corporation or crafts terminating an apprenticeship agreement, shall notify the director of apprenticeship. (1939, c. 229, s. 11; 1945, c. 729, s. 3.)

Editor's Note.—The 1945 amendment added the proviso and the second sentence.

Chapter 95. Department of Labor and Labor Regulations.

Art. 4A. Arbitration Service for Voluntary Arbitration of Labor Disputes.

Sec.
95-36.1. Declaration of policy.
95-36.2. Scope of article.
95-36.3. Administration of article.
95-36.4. Arbitration service established; personnel; removal; compensation.
95-36.5. Arbitration.
95-36.6. Disqualification.
95-36.7. Rules.

Art. 10. Declaration of Policy as to Labor Organizations.

95-78. Declaration of public policy.
95-79. Certain agreements declared illegal.
95-80. Membership in labor organization as condition of employment prohibited.
95-81. Non-membership as condition of employment prohibited.
95-82. Payment of dues as condition of employment prohibited.
95-83. Recovery of damages by persons denied employment.
95-84. Application of article.

Art. 1. Department of Labor.

§ 95-2. Election of commissioner; term; salary; vacancy.

Editor's Note. — Session Laws 1947, c. 1041, increased the salary of the commissioner of labor to $7,500.00 per year. And Session Laws 1949, c. 1278, effective April 23, 1949, provides that the salary, from and after the expiration of the present term of office of said officer, shall be $9,000.00 per year, payable in equal monthly installments.

§ 95-4. Authority, powers and duties of commissioner.

(f) To enforce the provisions of this section and to prosecute all violations of laws relating to the inspection of factories, mercantile establishments, mills, workshops, public eating-houses, and commercial institutions in this state before any justice of the peace or court of competent jurisdiction. It shall be the duty of the solicitor of the proper district or the prosecuting attorney of any city or county court, upon the request of the commissioner of labor, or any of his assistants or deputies, to prosecute any violation of a law, which it is made the duty of the said commissioner of labor to enforce. (1925, c. 288; 1931, cc. 277, 312, ss. 5, 6; 1933, cc. 46, 244; 1945, c. 723, s. 2.)

Editor's Note.—

The 1945 amendment struck out former subsection (f) authorizing the commissioner "to aid veterans of the World War in securing adjustment of claims against the federal government," and relettered former subsection (g) as subsection (f). As the introductory paragraph and subsections (a) through (e) were not affected by the amendment they are not set out.

Section 4 of the amendatory act provided that it should become effective as of the date upon which the governor effects the transfer of veterans activities in compliance with § 165-11.

Art. 2. Maximum Working Hours.

§ 95-17. Limitations of hours of employment; exceptions.

No employer shall employ a male person for more than fifty-six hours in any one week, or more than twelve days in any period of fourteen consecutive days or more than ten hours in any one day, except that in case where two or more shifts of eight hours each or less per day are employed, any shift employee may be employed not to exceed double his regular shift hours in any one day whenever a fellow employee in like work is prevented from working because of illness or other cause: Provided, that any male person employed working in excess of fifty-five hours in any one week shall be paid time and a half at his regular rate of pay for such excess hours: Provided, in case of emergencies, repair crews, engineers, electricians, firemen, watchmen, office and

supervisory employees and employees engaged in hereinafter defined continuous process operations and in work, the nature of which prevents second shift operations, may be employed for not more than sixty hours in any one week: Provided, also, that the ten hours per day maximum shall not apply to any employee when his employment is required for a longer period on account of an emergency due to breakdown, installation or alteration of equipment: Provided, also that the ten hours per day maximum shall not apply to any employee who is employed as a motor vehicle mechanic on a commission, or who is employed partly on commission and partly on wage or salary basis: Provided, that boys over fourteen years of age delivering newspapers on fixed routes and working not more than twenty-four hours per week, and watchmen may be employed seven days per week: Provided, further, that from the eighteenth of December to and including the following twenty-fourth of December and for two periods of one week's duration each during the year for purpose of taking inventory, female persons over sixteen years of age in mercantile establishments may be employed not to exceed ten hours in any one day: Provided further, that female persons engaged in the operation of seasonal industries in the process of conditioning and preserving perishable or semi-perishable commodities may be employed for not more than ten hours in any one day and not more than fifty-five hours in any one week.

Nothing in this section or any other provisions of this article shall apply to the employment of persons in agricultural occupations, ice plants, cotton gins and cottonseed oil mills or in domestic service in private homes and boarding houses, or to the work of persons over eighteen years of age in bona fide office, foremanship, clerical or supervisory capacity, executive positions, learned professions, commercial travelers, motion picture theatres, seasonal hotels and club houses, commercial fishing or tobacco redrying plants, tobacco warehouses, employers employing a total of not more than eight persons in each place of business, charitable institutions and hospitals: Provided further, that nothing in this section or in any other provision of this article shall apply to railroads, common carriers and public utilities subject to the jurisdiction of the interstate commerce commission or the North Carolina utilities commission, and utilities operated by municipalities or any transportation agencies now regulated by the federal government: Provided, further, that the limitation on daily and weekly hours provided for in this section shall not apply to any male employee eighteen years of age and over whose employment is covered by or in compliance with the Fair Labor Standards Act of 1938 (Public No. 718; 75th Congress; Chapter 676-3rd Session), as amended or as same may be amended: Provided, nothing in this article shall apply to the state or to municipal corporations or their employees, or to employees in hotels.

(1947, c. 825; 1949, c. 1057.)

The 1947 amendment inserted the proviso beginning in line twenty-two of the sixth paragraph. The 1949 amendment inserted the proviso beginning in line twenty-six of the second paragraph. As the other paragraphs were not changed they are not set out.

For discussion of the 1947 amendment, see 25 N. C. Law Rev. 449.

Art. 4. Conciliation Service and Mediation of Labor Disputes.

§ 95-32. Declaration of policy.

For subsequent statute affecting this article, see §§ 95-36.1 to 95-36.7.

§ 95-36. Powers and duties of commissioner and conciliator.—Upon his own motion in an existent or imminent labor dispute, the commissioner of labor may, and, upon the direction of the governor, must order a conciliator to take such steps as seem expedient to effect a voluntary, amicable and expeditious adjustment and settlement of the differences and issues between employer and employees which have precipitated or culminated in or threaten to precipitate or culminate in such labor dispute.

The conciliator shall promptly put himself in communication with the parties to such controversy, and shall use his best efforts, by mediation, to bring them to agreement.

The commissioner of labor, any conciliator or conciliators and all other employees of the commissioner of labor engaged in the enforcement and duties prescribed by this article, shall not be compelled to disclose to any administrative or judicial tribunal any information relating to, or acquired in the course of their official activities under the provisions of this article, nor shall any reports, minutes, written communications, or other documents or copies of documents of the commissioner of labor and the above employees pertaining to such information be subject to subpoena: Provided, that the commissioner of labor, any conciliator or conciliators and all other employees of the commissioner of labor engaged in the enforcement of this article, may be required to testify fully in any examination, trial, or other proceeding in which the commission of a crime is the subject of inquiry. (1941, c. 362, s. 5; 1949, c. 673.)

Editor's Note.—The 1949 amendment added the last paragraph. For brief comment on the amendment, see 27 N. C. Law Rev. 465.

Art. 4A. Arbitration Service for Voluntary Arbitration of Labor Disputes.

§ 95-36.1. Declaration of policy.—It is hereby declared as the public policy of this state that the best interests of the people of the state are served by the prompt settlement of labor disputes; that strikes and lockouts and other forms of industrial strife, regardless of where the merits of the controversy lie, are forces productive ultimately of economic waste; that the interests and rights of the consumers and the people of the state, while not direct parties thereto, should always be considered, respected and protected; and where amicable settlement by conciliation and/or mediation have been unsuccessful that the voluntary arbitration of such disputes under the guidance and supervision of a governmental agency will tend to promote permanent industrial peace and the health, welfare, comfort and safety of the people of the state. To carry out such policy, the necessity for the enactment of the provisions of this article is hereby declared as a matter of legislative determination. (1945, c. 1045, s. 1.)

§ 95-36.2. Scope of article.—The provisions of this article shall apply to labor disputes pertain-

ing to wages, hours and working conditions in North Carolina when parties wish to avail themselves of arbitration under this article. (1945, c. 1045, s. 2.)

§ 95-36.3. Administration of article.—The administration of this article shall be under the general supervision of the commissioner of labor of North Carolina. (1945, c. 1045, s. 3.)

§ 95-36.4. Arbitration service established; personnel; removal; compensation.—There is hereby established in the department of labor an arbitration service. The commissioner of labor may appoint such employees as may be required for the consummation of the work under this article, prescribe their duties and fix their compensation, subject to existing laws applicable to the appointment and compensation of employees of the state of North Carolina. Any member of or employee in the arbitration service may be removed from office by the commissioner of labor, acting in his discretion. (1945, c. 1045, s. 4.)

§ 95-36.5. Arbitration.—(a) Submission of Controversy to Arbitration Panel.—Whenever a controversy pertaining to wages, hours and working conditions shall arise between employees and employer and where amicable settlement by conciliation and/or mediation have been unsuccessful such controversy may by agreement of the parties thereto, be submitted to an arbitration panel of three persons, or should the parties so desire a single arbitrator appointed by the commissioner of labor as provided for in subsection (b); provided, however, that the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this article or otherwise.

(b) Manner of Selecting Arbitration Panel or Arbitrator.—Such panel or arbitrator shall be chosen in the following manner: In case a panel is desired, the employer shall designate one arbitrator, the union or other representative of the employees shall designate one arbitrator, and they by agreement shall select the third arbitrator, who shall serve as chairman of the panel. If they are unable, within a reasonable time, to agree upon such third arbitrator, he may, upon the request of the parties to the dispute, be appointed by the commissioner of labor. Should the parties prefer to submit the dispute to a single arbitrator, and be unable within a reasonable time, to agree upon such an arbitrator, he may, upon the request of the parties to the dispute, be appointed by the commissioner of labor. All appointments of third and single arbitrators by the commissioner of labor shall be made from the list of qualified arbitrators maintained by him. It shall be the duty of the commissioner of labor to maintain a list of qualified and public spirited citizens who will serve as arbitrators. The third arbitrator, when appointed by the commissioner, may be paid, within the discretion of the commissioner, per diem compensation, at the rate established by the commissioner of labor, and actual travel and necessary expenses incurred while performing duties arising under this article. Necessary stenographic, clerical and technical service and assistance to the panel or arbitrator, in those cases wherein an arbitrator has been named by the commissioner of labor, shall be furnished by the department of labor. Expenditures provided for under this section shall be paid from funds appropriated for the administration of this article.

(c) Arbitration Procedure; Witnesses; and Award.—The submission of the dispute to the arbitration panel or arbitrator shall be in writing, signed by the parties or their authorized agents, and shall contain a statement of the issues or questions in dispute and an agreement to continue in business or at work without a lockout or strike during the arbitration and to abide by the arbitration award. Upon such submission, the panel or arbitrator shall examine the matter in controversy, and, after reasonable notice, afford the parties an opportunity to be heard and to examine and cross-examine witnesses. The arbitrator or panel, or a majority of them, may require any person to attend before him or them as a witness and to bring with him any book or writing or other evidence. Subpoenas shall issue in the name of the arbitrator or panel, or a majority of them, and shall be directed to the person and shall be served in the same manner as subpoenas to testify before a court of record in this state; if any persons so summoned to testify shall refuse or neglect to obey such subpoenas, upon petition the superior court may compel the attendance of such person before the arbitrator or panel, or punish such persons for contempt in the same manner now provided for the attendance of witnesses or the punishment of them in the courts of this state. A written report of the panel's or arbitrator's findings of fact and recommendations shall be made to each party to the controversy; where the commissioner of labor has appointed an arbitrator, such reports shall be made within thirty (30) days after the selection of the arbitrator, unless this period of time shall be extended by agreement of the parties or by the commissioner of labor for good and sufficient reasons. If any panel is unable to reach a unanimous decision on the merits of any issue, the finding and decision of a majority of the members of the panel shall constitute the award of the panel on that issue; if a majority vote cannot be obtained on any issue, the finding and decision of the chairman shall constitute the award of the panel on that issue. Arbitration proceedings under this article shall be filed with the commissioner of labor, who may make a public report. (1945, c. 1045, s. 5; 1947, c. 379, ss. 1-3.)

The 1947 amendment substituted "three" for "five" in line eight of subsection (a) and substituted "a single" for "an" in the next line. It also rewrote subsection (b) and inserted the next to last sentence of subsection (c). For discussion of the amendment, see 25 N. C. Law Rev. 446.

§ 95-36.6. Disqualification.—No person named by the commissioner of labor to act as an arbitrator in a dispute which has been submitted to arbitration shall be qualified to serve as such arbitrator if such person has any financial or other interest in the company or union involved in the dispute. (1945, c. 1045, s. 6; 1947, c. 379, s. 4.)

Editor's Note.—The 1947 amendment rewrote the latter part of this section. For discussion of the amendment, see 25 N. C. Law Rev. 446.

§ 95-36.7. Rules.—The commissioner of labor with the written approval of the attorney general shall have power to adopt, alter, amend or

repeal such rules in connection with the voluntary arbitration of labor disputes as may be necessary for the proper administration and enforcement of the provisions of this article. (1945, c. 1045, s. 7.)

Art. 9. Earnings of Employees in Interstate Commerce.

§ 95-73. Collections out of state to avoid exemptions forbidden.

The resident creditor is not forbidden to send his claim out of the state for collection by suit or otherwise, provided no effort is made, in the foreign state by attachment or garnishment, to deprive the resident debtor of his personal earnings and property exempt from application to the payment of his debts under the laws of this state. Padgett v. Long, 225 N. C. 392, 35 S. E. (2d) 234.

§ 95-75. Remedies for violation of section 95-73 or 95-74; damages; indictment.

Necessary Allegation.—In a suit to recover damages for violation of the provisions of § 95-73, an allegation that the forbidden purpose of the statute was accomplished by instituting in the foreign state an action, suit or proceeding for the attachment or garnishment of the debtor's earnings in the hands of his employer, would seem to be an essential element of the cause of action. An allegation, that the debtor was threatened with attachment or garnishment of his wages and was forced to pay the foreign judgment in order to avoid same, is not sufficient. Padgett v. Long, 225 N. C. 392, 35 S. E. (2d) 234.

Art. 10. Declaration of Policy as to Labor Organizations.

§ 95-78. Declaration of public policy.—The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion. It is hereby declared to be the public policy of North Carolina that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization or association. (1947, c. 328, s. 1.)

Editor's Note.—For discussion of this article, see 25 N. C. Law Rev. 447.

Article Is Constitutional.—This article does not abridge the freedom of speech and the opportunities of unions and their members "peaceably to assemble and to petition the Government for a redress of grievances," which are guaranteed by the First Amendment and made applicable to the states by the Fourteenth Amendment. Nor does it conflict with Art. I, § 10, of the Constitution, insofar as it impairs the obligation of contracts made prior to its enactment. Nor does it deny unions and their members equal protection of the laws contrary to the Fourteenth Amendment. Nor does it deprive employers, unions or members of unions of their liberty without due process of law in violation of the Fourteenth Amendment. Lincoln Federal Labor Union v. Northwestern Iron, etc., Co., 335 U. S. 525, 69 S. Ct. 251, 93 L. Ed. 201, affirming State v. Whitaker, 228 N. C. 352, 45 S. E. (2d) 860.

It is a valid exercise of the police power of the state, and does not violate § 17, Art. I, of the State Constitution. State v. Whitaker, 228 N. C. 352, 45 S. E. (2d) 860, affirmed in Lincoln Federal Labor Union v. Northwestern Iron, etc., Co., 335 U. S. 525, 69 S. Ct. 251, 93 L. Ed. 201.

And Is Not Discriminatory.—This article is applicable to all employers and employees within the state, and therefore the fact that persons or groups coming within its scope must perforce be affected in different degrees because of the difference of their economic, social or political positions, does not render the act unconstitutional as discriminatory. State v. Whitaker, 228 N. C. 352, 45 S. E. (2d) 860, affirmed in Lincoln Federal Labor Union v. Northwestern Iron, etc., Co., 335 U. S. 525, 69 S. Ct. 251, 93 L. Ed. 201.

The violation of this article is a criminal offense. State v. Whitaker, 228 N. C. 352, 45 S. E. (2d) 860, affirmed in Lincoln Federal Labor Union v. Northwestern Iron, etc., Co., 335 U. S. 525, 69 S. Ct. 251, 93 L. Ed. 201.

Punishable as for Misdemeanor.—This article is declaratory of public policy and was enacted in the interest of the public welfare, and therefore the violation of its provisions is a criminal offense punishable as for a misdemeanor, notwithstanding the failure of the statute to prescribe a penalty for its breach. The fact that the act incidentally provides for the redress of private injuries does not alter this result. State v. Bishop, 228 N. C. 371, 45 S. E. (2d) 858.

§ 95-79. Certain agreements declared illegal.—Any agreement or combination between any employer and any labor union or labor organization whereby persons not members of such union or organization shall be denied the right to work for said employer, or whereby such membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be against the public policy and an illegal combination or conspiracy in restraint of trade or commerce in the state of North Carolina. (1947, c. 328, s. 2.)

§ 95-80. Membership in labor organization as condition of employment prohibited.—No person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such employer. (1947, c. 328, s. 3.)

§ 95-81. Non-membership as condition of employment prohibited.—No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment. (1947, c. 328, s. 4.)

§ 95-82. Payment of dues as condition of employment prohibited.—No employer shall require any person, as a condition of employment or continuation of employment, to pay any dues, fees, or other charges of any kind to any labor union or labor organization. (1947, c. 328, s. 5.)

§ 95-83. Recovery of damages by persons denied employment.—Any person who may be denied employment or be deprived of continuation of his employment in violation of sections 95-80, 95-81 and 95-82 or of one or more of such sections, shall be entitled to recover from such employer and from any other person, firm, corporation, or association acting in concert with him by appropriate action in the courts of this State such damages as he may have sustained by reason of such denial or deprivation of employment. (1947, c. 328, s. 6.)

§ 95-84. Application of article.—The provisions of this article shall not apply to any lawful contract in force on the effective date hereof but they shall apply in all respects to contracts entered into thereafter and to any renewal or extension of any existing contract. (1947, c. 328, s. 7.)

Editor's Note.—The act inserting this article became effective on March 18, 1947.

Chapter 96. Unemployment Compensation.

Art. 1. Employment Security Commission.

Art. 2. Unemployment Compensation Division.

Art. 1. Employment Security Commission.

§ 96-1. Title.—This chapter shall be known and may be cited as the "Employment Security Law." (Ex. Sess., 1936, c. 1, s. 1; 1947, c. 598, s. 1.)

Editor's Note.—For provision not applicable to activities of commission in respect to veterans, see § 165-11.

The 1947 amendment, effective April 1, 1947, substituted "Employment Security Law" for "Unemployment Compensation Law".

For a discussion of the 1947 amendments to this chapter, see 25 N. C. Law Rev. 415.

Cited in B-C Remedy Co. v. Unemployment Compensation Comm., 226 N. C. 52, 36 S. E. (2d) 733, 163 A. L. R. 773.

§ 96-1.1. Change in title of law and names of commission and funds. — Wherever the words "Unemployment Compensation Law" are used or appear in any statute of this state, heretofore or hereafter enacted, the same shall be stricken out and the words "Employment Security Law" shall be inserted in lieu thereof; wherever the words "Unemployment Compensation Commission" are used or appear in any statute of this state, heretofore or hereafter enacted, the same shall be stricken out and the words "Employment Security Commission" shall be inserted in lieu thereof; wherever the words "Unemployment Compensation Administration Fund" are used or appear in any statute of this state, heretofore or hereafter enacted, the same shall be stricken out and the words "Employment Security Administration Fund" shall be inserted in lieu thereof; wherever the words "Special Unemployment Compensation Administration Fund" are used or appear in any statute of this state, heretofore or hereafter enacted, the same shall be stricken out and the words "Special Employment Security Administration Fund" shall be inserted in lieu thereof; wherever the words "State Unemployment Commission" are used or appear in any statute of this state, heretofore or hereafter enacted, the same shall be stricken out and the words "Employment Security Commission" shall be inserted in lieu thereof; wherever the words "North Carolina Unemployment Commission" are used or appear in any statute of this state, heretofore or hereafter enacted, the same shall be stricken out and the words "Employment Security Commission" shall be inserted in lieu thereof.

The sole purpose of this section is to effectuate a change in the name of the "Unemployment Compensation Commission of North Carolina" to the "Employment Security Commission of North Carolina"; to change the name of the "Unemployment Compensation Law" to "Employment Security Law"; to change the name of the "Unemployment Compensation Administration Fund" to "Employment Security Administration Fund"; to change the name of the "Special Unemployment Compensation Administration Fund" to "Special Employment Security Administration Fund"; to change the words "State Unemployment Commission" to "Employment Security Commission"; to change the words "North Carolina Unemployment Commission" to "Employment Security Commission" wherever such names are used or appear in any statute of this state, heretofore or hereafter enacted. (1947, c. 598, s. 1.)

§ 96-1.2. Members of Unemployment Compensation Commission; tenure of office and rights and duties.—The present members of the Unemployment Compensation Commission of North Carolina shall continue their tenure of office as commissioned by the governor; and all rights, powers, duties and obligations of every nature heretofore exercised by such individuals as members of the Unemployment Compensation Commission of North Carolina shall continue in such individuals as members of the Employment Security Commission of North Carolina. (1947, c. 598, s. 2.)

§ 96-1.3. Succeeding to rights, powers and duties of Unemployment Compensation Commission.— The Employment Security Commission of North Carolina shall automatically succeed to all the rights, powers, duties and obligations of whatever nature of the present Unemployment Compensation Commission of North Carolina; and the duties and powers imposed upon and vested in the Unemployment Compensation Commission of North Carolina by law shall devolve and be imposed upon, vested in and merged with the duties and powers of the Employment Security Commission of North Carolina; and all obligations, liens and judgments in favor of the Unemployment Compensation Commission of North Carolina shall inure to and be vested in the Employment Security Commission of North Carolina; and the Employment Security Commission of North Carolina is authorized and empowered to enforce and collect any and all obligations, liens and judgments due the present Unemployment Compensation Commission of North Carolina; and the Employment Security Commission is authorized to continue to use any and all printed forms bearing the name of the Unemployment Compensation Commission or the Unemployment Compensation Commission of North Carolina, including warrants or vouchers against the state treasurer, until the present supply of such printed forms and/or warrants or vouchers is exhausted; and the state treasurer and state auditor are hereby authorized, empowered and directed to honor any and all such warrants or vouchers as well as any and all warrants or vouchers bearing the name

of the Employment Security Commission of North Carolina. (1947, c. 598, s. 3.)

§ 96-1.4. Records and funds transferred to Employment Security Commission.—All records, files and property of the Unemployment Compensation Commission of North Carolina are hereby transferred and made available to the Employment Security Commission of North Carolina. All unexpended balances of any appropriation or other funds of the Unemployment Compensation Commission of North Carolina are hereby transferred to the appropriate fund of the Employment Security Commission of North Carolina and made available to the Employment Security Commission of North Carolina. (1947, c. 598, s. 4.)

§ 96-3. Employment security commission.—(a) Organization.—There is hereby created a commission to be known as the Employment Security Commission of North Carolina. The commission shall consist of seven (7) members to be appointed by the governor on or before July 1, 1941. The governor shall have the power to designate the member of said commission who shall act as the chairman thereof. The chairman of the commission shall not engage in any other business, vocation or employment, and no member of the commission shall serve as an officer or a committee member of any political party organization. Three (3) members of the commission shall be appointed by the governor to serve for a term of two (2) years. Three (3) members shall be appointed to serve for a term of four (4) years, and upon the expiration of the respective terms, the successors of said members shall be appointed for a term of four (4) years each, thereafter, and the member of said commission designated by the governor as chairman shall be appointed for a term of four (4) years from and after his appointment. Any member appointed to fill a vacancy occurring in any of the appointments made by the governor prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term. The governor may at any time after notice and hearing, remove any commissioner for gross inefficiency, neglect of duty, malfeasance, misfeasance, or nonfeasance in office.

(b) Divisions.—The commission shall establish two co-ordinate divisions: the North Carolina state employment service division, created pursuant to § 96-20, and the unemployment compensation division. Each division shall be responsible for the discharge of its distinctive functions. Each division shall be a separate administrative unit with respect to personnel and duties, except in so far as the commission may find that such separation is impracticable.

(c) Salaries.—The chairman of the Employment Security Commission of North Carolina, appointed by the governor, shall be paid from the Employment Security Administration Fund a salary payable on a monthly basis, which salary shall be fixed by the governor with the approval of the council of state; and the members of the commission, other than the chairman, shall each receive ten dollars ($10.00) per day including necessary time spent in traveling to and from their place of residence within the state to the place of meeting while engaged in the discharge of the duties of his office and his actual traveling expenses, the same to be paid from the aforesaid fund.

(d) Quorum.—The chairman and three (3) members of the commission shall constitute a quorum. (Ex. Sess., 1936, c. 1, s. 10; 1941, c. 108, s. 10, c. 279, ss. 1-3; 1943, c. 377, s. 15; 1947, c. 598, s. 1.)

Editor's Note.—The 1947 amendment substituted "Employment Security Commission" for "Unemployment Compensation Commission".

§ 96-4. Administration. — (a) Duties and Powers of Commission. — It shall be the duty of the commission to administer this chapter. The commission shall meet at least once in each sixty days and may hold special meetings at any time at the call of the chairman or any three (3) members of the commission, and the commission shall have power and authority to adopt, amend, or rescind such rules and regulations, to employ such persons, make such expenditures, require such reports, make such investigations, and take such other action as it deems necessary or suitable in the administration of this chapter. Such rules and regulations shall be effective upon publication in the manner, not inconsistent with the provisions of this chapter, which the commission shall prescribe. The commission shall determine its own organization and methods of procedure in accordance with the provisions of this chapter, and shall have an official seal which shall be judicially noticed. The chairman of said commission shall, except as otherwise provided by the commission, be vested with all authority of the commission, including the authority to conduct hearings and make decisions and determinations, when the commission is not in session and shall execute all orders, rules and regulations established by said commission. Not later than November twentieth preceding the meeting of the general assembly, the commission shall submit to the governor, a report covering the administration and operation of this chapter during the preceding biennium, and shall make such recommendation for amendments to this chapter as the commission deems proper. Such report shall include a balance sheet of the moneys in the fund in which there shall be provided, if possible, a reserve against the liability in future years to pay benefits in excess of the then current contributions, which reserve shall be set up by the commission in accordance with accepted actuarial principles on the basis of statistics of employment, business activity, and other relevant factors for the longest possible period. Whenever the commission believes that a change in contribution or benefit rates will become necessary to protect the solvency of the fund, it shall promptly so inform the governor and the legislature, and make recommendations with respect thereto.

(b) Regulations and General and Special Rules. —General and special rules may be adopted, amended, or rescinded by the commission only after public hearing or opportunity to be heard thereon, of which proper notice has been given by mail to the last known address in cases of special rules, or by publication as herein provided, and by one publication as herein provided as to general rules. General rules shall become effective ten days after filing with the secretary of state and publication in one or more newspapers of general circulation in this state. Special rules shall be-

come effective ten days after notification to or mailing to the last known address of the individuals or concerns affected thereby. Regulations may be adopted, amended, or rescinded by the commission and shall become effective in the manner and at the time prescribed by the commission.

(c) Publication.—The commission shall cause to be printed for distribution to the public the text of this chapter, the commission's regulations and general rules, its biennial reports to the governor, and any other material the commission deems relevant and suitable, and shall furnish the same to any person upon application therefor.

(d) Personnel.—Subject to other provisions of this chapter, the commission is authorized to appoint, fix the compensation, and prescribe the duties and powers of such officers, accountants, attorneys, experts, and other persons as may be necessary in the performance of its duties. It shall provide for the holding of examinations to determine the qualifications of applicants for the positions so classified, and except for temporary appointments not to exceed six months in duration, shall appoint its personnel on the basis of efficiency and fitness as determined in such examinations. All positions shall be filled by persons selected and appointed on a nonpartisan merit basis. The commission shall not employ or pay any person who is an officer or committee member of any political party organization. The commission may delegate to any such person so appointed such power and authority as it deems reasonable and proper for the effective administration of this chapter, and may, in its discretion, bond any person handling moneys or signing checks hereunder.

(e) Advisory Councils.—The governor shall appoint a state advisory council and local advisory councils, composed in each case of an equal number of employer representatives and employee representatives who may fairly be regarded as representative because of their vocation, employment, or affiliations, and have such members representing the general public as the governor may designate. Such councils shall aid the commission in formulating policies and discussing problems related to the administration of this chapter, and in assuring impartiality and freedom from political influence in the solution of such problems. Such local advisory councils shall serve without compensation, but shall be reimbursed for any necessary expenses. The state advisory council shall be paid ten dollars per day per each member attending actual sitting of such council, including necessary time spent in traveling to and from their place of residence within the state to the place of meeting, and mileage and subsistence as allowed to state officials.

(f) Employment Stabilization. — The commission, with the advice and aid of its advisory councils, and through its appropriate divisions, shall take all appropriate steps to reduce and prevent unemployment; to encourage and assist in the adoption of practical methods of vocational training, retraining and vocational guidance; to investigate, recommend, advise, and assist in the establishment and operation, by municipalities, counties, school districts, and the state, of reserves for public works to be used in times of business depression and unemployment; to promote the re-employment of unemployed workers throughout the state in every other way that may be feasible; and to these ends to carry on and publish the results of investigations and research studies.

(g) Records and Reports.—(1) Each employing unit shall keep true and accurate employment records, containing such information as the commission may prescribe. Such records shall be open to inspection and be subject to being copied by the commission or its authorized representatives at any reasonable time and as often as may be necessary. The commission may require from any employing unit any sworn or unsworn reports, with respect to persons employed by it, which the commission deems necessary for the effective administration of this chapter. Information thus obtained shall not be published or be open to public inspection (other than to public employees in the performance of their public duties) in any manner revealing the employing unit's identity, but any claimant at a hearing before an appeal tribunal or the commission shall be supplied with information from such records to the extent necessary for the proper presentation of his claims. Any individual may be supplied with information as to his potential benefit rights from such records. Any employee or member of the commission who violates any provision of this section shall be fined not less than twenty dollars ($20.00) nor more than two hundred dollars ($200.00), or imprisoned for not longer than ninety days, or both. All reports, statements, information and communications of every character so made or given to the commission, its deputies, agents, examiners and employees, whether same be written, oral or in the form of testimony at any hearing, or whether obtained by the commission from the employing unit's books and records shall be absolute privileged communications in any civil or criminal proceedings other than proceedings instituted pursuant to this chapter and proceedings involving the administration of this chapter: Provided, nothing herein contained shall operate to relieve any employing unit from disclosing any information required by this chapter or as prescribed by the commission involving the administration of this chapter.

(2) If the commission finds that any employer has failed to file any report or return required by this chapter or any regulation made pursuant hereto, or has filed a report which the commission finds incorrect or insufficient, the commission may make an estimate of the information required from such employer on the basis of the best evidence reasonably available to it at the time, and make, upon the basis of such estimate, a report or return on behalf of such employer, and the report or return so made shall be deemed to be prima facie correct, and the commission may make an assessment based upon such report and proceed to collect contributions due thereon in the manner as set forth in § 96-10 (b) of this chapter; Provided, however, that no such report or return shall be made until the employer has first been given at least ten days' notice by registered mail to the last known address of such employer: Provided further, that no such report or return shall be used as a basis in determining whether such employing unit is an employer within the meaning of this chapter.

(h) Oaths and Witnesses.—In the discharge of

the duties imposed by this chapter, the chairman of an appeal tribunal and any duly authorized representative or member of the commission shall have power to administer oaths and affirmations, take depositions, certify to official acts, and issue subpœnas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda, and other records deemed necessary as evidence in connection with a disputed claim or the administration of this chapter.

(i) Subpœnas.—In case of contumacy by, or refusal to obey a subpœna issued to any person by the commission or its authorized representative, any clerk of a superior court of this state within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the commission, or its duly authorized representatives, shall have jurisdiction to issue to such person an order requiring such person to appear before the commission, or its duly authorized representatives, there to produce evidence if so ordered, or there to give testimony touching upon the matter under investigation or in question; and any failure to obey such order of the said clerk of superior court may be punished by the said clerk of superior court as a contempt of said court. Any person who shall, without just cause, fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, or other records in obedience to a subpœna of the commission, shall be punished by a fine of not more than fifty dollars ($50.00) or by imprisonment for not longer than thirty days.

(j) Protection against Self-Incrimination. — No person shall be excused from attending and testifying or from producing books, papers, correspondence, memoranda, and other records before the commission or in obedience to the subpœna of the commission or any member thereof, or any duly authorized representative of the commission, in any cause or proceeding before the commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(k) State-Federal Co-Operation.—In the administration of this chapter, the commission shall cooperate, to the fullest extent consistent with the provisions of this chapter, with the Social Security Administration, created by the Social Security Act, approved August fourteenth, one thousand nine hundred and thirty-five, as amended; shall make such reports, in such form and containing such information as the Social Security Administration may from time to time require, and shall comply with such provisions as the Social Security Administration may from time to time find necessary to assure the correctness and verification of such reports; and shall comply with the regulations prescribed by the Social Security Administration governing the expenditures of such sums as may be allotted and paid to this state under Title III of the Social Security Act for the purpose of assisting in the administration of this chapter. The commission shall further make its records available to the railroad retirement board, created by the Railroad Retirement Act and the Railroad Unemployment Insurance Act, and shall furnish to the railroad retirement board at the expense of the railroad retirement board, such copies thereof as the board shall deem necessary for its purposes in accordance with the provisions of section three hundred three (c) of the Social Security Act as amended.

Upon request therefor, the commission shall furnish to any agency of the United States charged with the administration of public works or assistance through public employment, the name, address, ordinary occupation, and employment status of each recipient of benefits, and such recipient's rights to further benefits under this chapter.

The commission is authorized to make such investigations, secure and transmit such information, make available such services and facilities and exercise such of the other powers provided herein with respect to the administration of this chapter as it deems necessary or appropriate to facilitate the administration of any employment security or public employment service law, and in like manner, to accept and utilize information, services and facilities made available to this state by the agency charged with the administration of such other employment security or public employment service law.

The commission is also authorized and directed to apply for an advance to the unemployment compensation fund and to accept the responsibility for the repayment of such advance in accordance with the conditions specified in Title XII of the Social Security Act, as amended, in order to secure to this state and its citizens the advantages available under the provisions of such title.

The commission shall fully cooperate with the agencies of other states and shall make every proper effort within its means to oppose and prevent any further action which would, in its judgment, tend to effect complete or substantial federalization of state unemployment compensation funds or state employment security programs.

(l) Reciprocal Arrangements.—(1) The commission is hereby authorized to enter into reciprocal arrangements with appropriate and duly authorized agencies of other states or of the federal government, or both, whereby:

(A) Services performed by an individual for a single employing unit for which services are customarily performed in more than one state shall be deemed to be services performed entirely within any one of the states (i) in which any part of such individual's service is performed or (ii) in which such individual has his residence or (iii) in which the employing unit maintains a place of business, provided there is in effect, as to such services, an election by the employing unit, approved by the agency charged with the administration of such state's employment security law, pursuant to which the services performed by such individual for such employing unit are deemed to be performed entirely within such state;

(B) Potential rights to benefits accumulated under the employment security laws of one or more states or under one or more such laws of the federal government, or both, may constitute the basis for the payment of benefits through a single appropriate agency under terms which the commission finds will be fair and reasonable as to all affected interests and will not result in any substantial loss to the fund;

(C) Wages or services, upon the basis of which an individual may become entitled to benefits under an employment security law of another state or of the federal government, shall be deemed to be wages for insured work for the purpose of determining his rights to benefits under this chapter, and wages for insured work, on the basis of which an individual may become entitled to benefits under this chapter shall be deemed to be wages or services on the basis of which unemployment compensation under such law of another state or of the federal government is payable, but no such arrangement shall be entered into unless it contains provisions for reimbursements to the fund for such of the benefits paid under this chapter upon the basis of such wages or services, and provisions for reimbursements from the fund for such of the compensation paid under such other law upon the basis of wages for insured work, as the commission finds will be fair and reasonable as to all affected interests; and

(D) Contributions due under this chapter with respect to wages for insured work shall for the purposes of § 96-10 be deemed to have been paid to the fund as of the date payment was made as contributions therefor under another state or federal employment security law, but no such arrangement shall be entered into unless it contains provisions for such reimbursement to the fund of such contributions as the commission finds will be fair and reasonable as to all affected interests.

(E) The services of the commission may be made available to such other agencies to assist in the enforcement and collection of judgments of such other agencies.

(F) The services on vessels engaged in interstate or foreign commerce for a single employer, wherever performed, shall be deemed performed within this state or within such other state.

(G) Services performed by an individual for a single employing unit which customarily operates in more than one state shall be deemed to be services performed entirely within any of the states (i) in which such individual has residence or (ii) in which the employing unit maintains a place of business; provided there is in effect as to such service an election approved by the agency charged with the administration of such state's employment security law, pursuant to which all the services performed by such individual for such employing unit are deemed to be performed entirely within such state; provided, further, that no such election shall apply to more than three such individuals.

(H) Wages earned by an individual in covered employment in more than one state which is less than the eligibility requirements of either of such states may be combined and constitute the basis for the payment of benefits through a single and appropriate agency under terms which the commission finds will be fair and reasonable as to all affected interests and will not result in any substantial loss to the fund: Provided, that any benefits paid under the provisions of this subparagraph shall not be charged to the reserve account of any employer as provided in § 96-9, subsection (c) (2) of this chapter, but shall be charged to the partially pooled account: Provided further, that any such wages or services shall be deemed to be within the provisions of subparagraph (C) of this subsection.

(2) Reimbursements paid from the fund pursuant to clause (C), of paragraph (1) of this subsection shall be deemed to be benefits for the purpose of §§ 96-6, 96-9 and 96-12. The commission is authorized to make to other states or federal agencies and to receive from such other state or federal agencies, reimbursements from or to the fund, in accordance with arrangements entered into pursuant to Paragraph (1) of this subsection.

(3) To the extent permissible under the laws and constitution of the United States, the commission is authorized to enter into or cooperate in arrangements whereby facilities and services provided under this chapter and facilities and services provided under the employment security law of any foreign government, may be utilized for the taking of claims and the payment of benefits under the employment security law of this state or under a similar law of such government.

(m) The commission after due notice shall have the right and power to hold and conduct hearings for the purpose of determining the rights, status and liabilities of any "employing unit" or "employer" as said terms are defined by § 96-8(e) and § 96-8(f) and subsections thereunder of this chapter. The commission shall have the power and authority to determine any and all questions and issues of fact or questions of law that may arise under the employment security law that may affect the rights, liabilities and status of any employing unit or employer as heretofore defined by the employment security law including the right to determine the amount of contributions, if any, which may be due the commission by any employer. All hearings shall be conducted and held at the office of the commission and shall be open to the public and shall be stenographically reported and the commission shall provide for the preparation of a record of all hearings and other proceedings. The commission may provide for the taking of evidence by a deputy in which event he shall swear or cause the witnesses to be sworn and shall transmit all testimony to the commission for its determination. From all decisions or determinations made by the commission any party affected thereby shall be entitled to an appeal to the superior court. Before such party shall be allowed to appeal, he shall within ten days after notice of such decision or determination, file with the commission exceptions to the decision or the determination of the commission, which exceptions will state the grounds of objection to such decision or determination. If any one of such exceptions shall be overruled then such party may appeal from the order overruling the exceptions, and shall, within ten days after the decision overruling the exceptions, give notice of his appeal. When an exception is made to the facts as found by the commission, the appeal shall

be to the superior court in term time but the decision or determination of the commission upon such review in the superior court shall be conclusive and binding as to all questions of fact supported by any competent evidence. When an exception is made to any rulings of law, as determined by the commission, the appeal shall be to the judge of the superior court at chambers. The party appealing shall, within ten days after the notice of appeal has been served, file with the commission exceptions to the decision or determination overruling the exception which statement shall assign the errors complained of and the grounds of the appeal. Upon the filing of such statement the commission shall, within thirty days, transmit all the papers and evidence considered by it, together with the assignments of errors filed by the appellant to a judge of the superior court holding court or residing in some district in which such appellant either resides, maintains a place of business or conducts business: Provided, however, the thirty-day period specified herein may be extended by agreement of parties. If there be no exceptions to any facts as found by the commission the facts so found shall be binding upon the court and it shall be heard by the judge at chambers at some place in the district, above mentioned, of which all parties shall have ten days notice.

(n) The cause shall be entitled "State of North Carolina on Relationship of the Employment Security Commission of North Carolina against (here insert name of appellant)," and if there are exceptions to any facts found by the commission it shall be placed on the civil issue docket of such court and shall have precedence over other civil actions except those described in § 96-10(b), and such cause shall be tried under such rules and regulations as are prescribed for the trial of other civil causes. By consent of all parties the appeal may be held and determined at chambers before any judge of a district in which the appellant either resides, maintains a place of business or conducts business, or said appeal may be heard before any judge holding court therein, or in any district in which the appellant either resides, maintains a place of business or conducts business. Either party may appeal to the supreme court from the judgment of the superior court under the same rules and regulations as are prescribed by law for appeals, except that if an appeal shall be taken on behalf of the Employment Security Commission of North Carolina it shall not be required to give any undertaking or make any deposit to secure the cost of such appeal and such court may advance the cause on its docket so as to give the same a speedy hearing.

(o) The decision or determination of the commission when docketed in the office of the clerk of the superior court of any county and when properly indexed and cross indexed shall have the same force and effect as a judgment rendered by the superior court, and if it shall be adjudged in the decision or determination of the commission that any employer is indebted to the commission for contributions, penalties and interest or either of the same, then said judgment shall constitute a lien upon any realty owned by said employer in the county only from the date of docketing of such decision or determination in the office of the clerk of the superior court and upon personalty owned by said employer in said county only from the date of levy on such personalty, and upon the execution thereon no homestead or personal property exemptions shall be allowed; provided, that nothing herein shall affect any rights accruing to the commission under § 96-10. The provisions of this section, however, shall not have the effect of releasing any liens for contributions, penalties or interest, or either of the same, imposed by other law, nor shall they have the effect of postponing the payment of said contributions, penalties or interest, or depriving the said Employment Security Commission of North Carolina of any priority in order of payment provided in any other statute under which payment of the said contributions, penalties and interest or either of the same may be required. The superior court or any appellate court shall have full power and authority to issue any and all executions, orders, decrees, or writs that may be necessary to carry out the terms of said decision or determination of the commission or to collect any amount of contribution, penalty or interest adjudged to be due the commission by said decision or determination. In case of an appeal from any decision or determination of the commission to the superior court or from any judgment of the superior court to the supreme court all proceedings to enforce said judgment, decision, or determination shall be stayed until final determination of such appeal but no proceedings for the collection of any amount of contribution, penalty or interest due on same shall be suspended or stayed unless the employer or party adjudged to pay the same shall file with the clerk of the superior court a bond in such amount not exceeding double the amount of contribution, penalty, interest or amount due and with such sureties as the clerk of the superior court deems necessary conditioned upon the payment of the contribution, penalty, interest or amount due when the appeal shall be finally decided or terminated.

(p) The conduct of hearings shall be governed by suitable rules and regulations established by the commission. The manner in which appeals and hearings shall be presented and conducted before the commission shall be governed by suitable rules and regulations established by it. The commission shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure but shall conduct hearings in such manner as to ascertain the substantial rights of the parties.

(q) All subpoenas for witnesses to appear before the commission, and all notices to employing units, employers, persons, firms, or corporations shall be issued by the commission or its secretary; all such subpoenas shall be directed to any sheriff, constable, or to the marshal of any city or town, who shall execute the same and make due return thereof, as directed therein, under the penalties prescribed by law for a failure to execute and return the process of any court; all such notices to employing units, employers, persons, firms, or corporations shall be served by mailing to the last known address of such employing units, employers, persons, firms, or cor-

porations, by registered mail with a return receipt requested, a copy of such notice at least ten days prior to the date of the scheduled hearing. Such notice shall set forth the hour, date, place, and purpose of the hearing. Any such return receipt issued by the postal authorities, signed by such employing units, employers, persons, firms, or corporations, shall be prima facie evidence of the service of such notice. All bonds or undertakings required to be given for the purpose of suspending or staying execution shall be payable to the Employment Security Commission of North Carolina, and may be sued on as are other undertakings which are payable to the state.

(r) None of the provisions or sections herein set forth in this amendment shall have the force and effect nor shall the same be construed or interpreted as repealing any of the provisions of § 96-15 which provide for the procedure and determination of all claims for benefits and such claims for benefits shall be prosecuted and determined as provided by said § 96-15. (Ex. Sess., 1936, c. 1, s. 11; 1939, c. 2; c. 27, s. 8; c. 52, s. 5; cc. 207, 209; 1941, c. 279, ss. 4, 5; 1943, c. 377, ss. 16-23; 1945, c. 522, ss. 1-3; 1947, c. 326, ss. 1, 3, 4, 26; c. 598, ss. 1, 6, 7; 1949, c. 424, s. 1.)

Editor's Note.—

The 1945 amendment made changes in subsection (i), added the next to last paragraph of subsection (k), struck out the word "benefit" in the catchline of subsection (l) and added to paragraph (l) of said subsection the three subparagraphs (E), (F) and (G).

The 1947 amendments added paragraph (2) to subsection (g), the last paragraph of subsection (k) and subparagraph (H) of subsection (l) (1); changed the next to the last sentence in subsection (m) and added the proviso thereto; rewrote subsection (q); substituted "Social Security Administration" for "social security board" in the first paragraph of subsection (k) and substituted "Employment Security Commission" for "Unemployment Compensation Commission" in subsections (n) and (o).

The 1949 amendment deleted the words "and the actual earnings thereon" formerly appearing after the word "contributions" in line nine of subparagraph (D) of paragraph (1) of subsection (l).

Conclusiveness of Findings of Fact on Review.—The findings of fact of the employment security commission are conclusive upon review when there is any competent evidence or reasonable inference from such evidence to support them. State v. Champion Distributing Co., 230 N. C. 464, 53 S. E. (2d) 674.

Findings of fact by the commission as to the eligibility of a claimant to benefits under this chapter are conclusive when supported by any competent evidence. State v. Roberts, 230 N. C. 262, 52 S. E. (2d) 890.

Authority of Chairman of Commission.—By subsection (a) of this section the chairman of the employment security commission, except as otherwise provided by the commission, is vested with all authority of the commission, including authority to conduct hearings and make decisions when the commission is not in session. State v. Roberts, 230 N. C. 262, 52 S. E. (2d) 890.

§ 96-5. Employment Security Administration Fund.—(a) Special Fund.—There is hereby created in the state treasury a special fund to be known as the Employment Security Administration Fund. All moneys which are deposited or paid into this fund shall be continuously available to the commission for expenditure in accordance with the provisions of this chapter, and shall not lapse at any time or be transferred to any other fund. The Employment Security Administration Fund, except as otherwise provided in this chapter, shall be subject to the provisions of the Executive Budget Act (§ 143-1 et seq.) and the Personnel Act (§ 143-35 et seq.). All moneys in this fund which are received from the federal government or any agency thereof or which are appropriated by this state for the purpose described in § 96-20 shall be expended solely for the purposes and in the amounts found necessary by the Social Security Administration for the proper and efficient administration of this chapter. The fund shall consist of all moneys appropriated by this state, all moneys received from the United States of America, or any agency thereof, including the Social Security Administration, and all moneys received from any other source for such purpose, and shall also include any moneys received from any agency of the United States or any other state as compensation for services or facilities supplied to such agency, any amounts received pursuant to any surety bond or insurance policy or from other sources for losses sustained by the Employment Security Administration Fund or by reason of damage to equipment or supplies purchased from moneys in such fund, and any proceeds realized from the sale or disposition of any such equipment or supplies which may no longer be necessary for the proper administration of this chapter: Provided, any interest collected on contributions and/or penalties collected pursuant to this chapter subsequent to June 30th, 1947, shall be paid into the Special Employment Security Administration Fund created by subsection (c) of this section. All moneys in this fund shall be deposited, administered, and disbursed in the same manner and under the same conditions and requirements as is provided by law for other special funds in the state treasury, and shall be maintained in a separate account on the books of the state treasury. The state treasurer shall be liable on his official bond for the faithful performance of his duties in connection with the Employment Security Administration Fund provided for under this chapter. Such liability on the official bond shall be effective immediately upon the enactment of this provision, and such liability shall exist in addition to any liability upon any separate bond existent on the effective date of this provision, or which may be given in the future. All sums recovered on any surety bond for losses sustained by the Employment Security Administration Fund shall be deposited in said fund.

(b) Replacement of Funds Lost or Improperly Expended.—If any moneys received after June 30th, 1941, from the Social Security Administration under Title III of the Social Security Act, or any unencumbered balances in the Employment Security Administration Fund as of that date, or any moneys granted after that date to this state pursuant to the provisions of the Wagner-Peyser Act, or any moneys made available by this state or its political subdivisions and matched by such moneys granted to this state pursuant to the provisions of the Wagner-Peyser Act, are found by the Social Security Administration, because of any action or contingency, to have been lost or expended for purposes other than, or in amounts in excess of those found necessary by the Social Security Administration for the proper administration of this chapter, it is the policy of this state that such moneys, not available from the Special Employment Security Administration Fund established by subsection (c) of this section, shall be replaced by moneys appropriated for such purpose from the general funds

of this state to the Employment Security Administration Fund for expenditure as provided in subsection (a) of this section. Upon receipt of notice of such a finding by the Social Security Administration, the commission shall promptly pay from the Special Employment Security Administration Fund such sum if available in such fund; if not available, it shall promptly report the amount required for such replacement to the governor and the governor shall, at the earliest opportunity, submit to the legislature a request for the appropriation of such amount. This subsection shall not be construed to relieve this state of its obligation with respect to funds received prior to July 1st, 1941, pursuant to the provisions of Title III of the Social Security Act.

(c) There is hereby created in the state treasury a special fund to be known as the Special Employment Security Administration Fund. All interest and penalties, regardless of when the same became payable, collected from employers under the provisions of this act subsequent to June 30th, 1947, shall be paid into this fund. No part of said fund shall be expended or available for expenditure in lieu of federal funds made available to the commission for the administration of this act. Said fund shall be used by the commission for the payment of costs and charges of administration which are found by the Social Security Administration not to be proper and valid charges payable out of any funds in the Employment Security Administration Fund received from any source. Refunds of interest allowable under § 96-10, subsection (e) shall be made from this special fund: Provided, such interest was deposited in said fund: Provided further, that in those cases where an employer takes credit for a previous overpayment of interest on contributions due by such employer pursuant to § 96-10, subsection (e), that the amount of such credit taken for such overpayment of interest shall be reimbursed to the Unemployment Compensation Fund from the Special Employment Security Administration Fund. The Special Employment Security Administration Fund, except as otherwise provided in this chapter, shall be subject to the provisions of the Executive Budget Act (§ 143-1 et seq.) and the Personnel Act (§ 143-35 et seq.). All moneys in this fund shall be deposited, administered, and disbursed in the same manner and under the same conditions and requirements as is provided by law for other special funds in the state treasury, and shall be maintained in a separate account on the books of the state treasury. The state treasurer shall be liable on his official bond for the faithful performance of his duties in connection with the Special Employment Security Administration Fund provided for under this chapter. Such liability on the official bond shall be effective immediately upon the enactment of this provision, and such liability shall exist in addition to any liability upon any separate bond existent on the effective date of this provision, or which may be given in the future. All sums recovered on any surety bond for losses sustained by the Special Employment Security Administration Fund shall be deposited in said fund. The moneys in the Special Employment Security Administration Fund shall be continuously available to the commission for expenditure in accordance with the provisions of this section.

(d) The other provisions of this section and § 96-6, to the contrary notwithstanding, the commission is authorized to requisition and receive from its account in the Unemployment Trust Fund in the treasury of the United States of America, in the manner permitted by federal law, such moneys standing to its credit in such fund, as are permitted by federal law to be used for expense of administering this chapter and to expend such moneys for such purpose, without regard to a determination of necessity by a federal agency. The state treasurer shall be treasurer and custodian of the amounts of money so requisitioned. Such moneys shall be deposited, administered, and disbursed in the same manner and under the same conditions and requirements as are provided by law for other special funds in the state treasury. (Ex. Sess. 1936, c. 1, s. 13; 1941, c. 108, ss. 12, 13; 1947, c. 326, s. 5; c. 598, s. 1; 1949, c. 424, s. 2.)

Editor's Note.—The 1947 amendments rewrote paragraphs (a) and (b) and added paragraph (c). Paragraph (c) conflicts with the second sentence of § 96-10 (a). By reason of the conflict such sentence is repealed.

The 1949 amendment added subsection (d).

§ 96-6. Unemployment compensation fund.—(a) Establishment and Control.—There is hereby established as a special fund, separate and apart from all public moneys or funds of this state, an unemployment compensation fund, which shall be administered by the commission exclusively for the purposes of this chapter. This fund shall consist of:

(1) All contributions collected under this chapter, together with any interest earned upon any moneys in the fund;

(2) Any property or securities acquired through the use of moneys belonging to the fund;

(3) All earnings of such property or securities;

(4) Any moneys received from the federal unemployment account in the unemployment trust fund in accordance with Title XII of the Social Security Act as amended. All moneys in the fund shall be mingled and undivided, except that within the unemployment compensation fund "reserve accounts" and a "partially pooled account" shall be maintained as provided in § 96-9. To the "reserve accounts" established under § 96-9 shall be credited such portion of the contributions computed as provided in § 96-9, and the "partially pooled account" to be credited with the balance of such contributions paid as well as the remaining portions and additions thereto of the unemployment compensation fund which have not heretofore been set aside as employer "reserve accounts" within the fund under prior amendments to this chapter. Provided, however, that the "partially pooled account" established hereunder and the "reserve accounts of employer," as defined by section one (a) of the Railroad Unemployment Insurance Act, shall be subject to such withdrawals and transfers as are provided for by this section.

(b) Accounts and Deposit.—The state treasurer shall be ex officio the treasurer and custodian of the fund who shall disburse such fund in accordance with the directions of the commission and in accordance with such regulations as the commission shall prescribe. He shall maintain within the fund three separate accounts: (1) a clearing ac-

count, (2) an unemployment trust fund account, and (3) a benefit account. All moneys payable to the fund, upon receipt thereof by the commission, shall be forwarded immediately to the treasurer who shall immediately deposit them in the clearing account. Refunds payable pursuant to § 96-10 may be paid from the clearing account upon warrants issued upon the treasurer by the state auditor under the requisition of the commission. After clearance thereof, all other moneys in the clearing account shall be immediately deposited with the secretary of the treasury of the United States of America to the credit of the account of this state in the unemployment trust fund, established and maintained pursuant to section nine hundred and four of the Social Security Act, as amended, any provision of law in this state relating to the deposit, administration, release, or disbursement of moneys in the possession or custody of this state to the contrary notwithstanding. The benefit account shall consist of all moneys requisitioned from this state's account in the unemployment trust fund. Moneys in the clearing and benefit accounts may be deposited by the treasurer, under the direction of the commission, in any bank or public depository in which general funds of the state may be deposited, but no public deposit insurance charge or premium shall be paid out of the fund. The treasurer shall give a separate bond, conditioned upon the faithful performance of those duties as custodian of the fund, in an amount fixed by the commission and in a form prescribed by law or approved by the attorney-general. Premiums for said bond shall be paid from the administration fund.

(c) Withdrawals. — Moneys shall be requisitioned from this state's account in the unemployment trust fund solely for the payment of benefits and in accordance with regulations prescribed by the commission. The commission shall, from time to time, requisition from the unemployment trust fund such amounts, not exceeding the amounts standing to its account therein, as it deems necessary for the payment of benefits for a reasonable future period. Upon receipt thereof the treasurer shall deposit such moneys in the benefit account and shall pay all warrants drawn thereon by the state auditor requisitioned by the commission for the payment of benefits solely from such benefit account. Expenditures of such moneys in the benefit account and refunds from the clearing account shall not be subject to approval of the budget bureau or any provisions of law requiring specific appropriations or other formal release by state officers of money in their custody. All warrants issued upon the treasurer for the payment of benefits and refunds shall bear the signature of the state auditor, as requisitioned by a member of the commission or its duly authorized agent for that purpose. Any balance of moneys requisitioned from the unemployment trust fund which remains unclaimed or unpaid in the benefit account after the expiration of the period for which such sums were requisitioned shall either be deducted from estimates for, and may be utilized for the payment of, benefits during succeeding periods, or, in the discretion of the commission, shall be re-deposited with the secretary of the treasury of the United States of America, to the credit of this state's account in the unemployment trust fund, as provided in subsection (b) of this section.

(d) Management of Funds upon Discontinuance of Unemployment Trust Fund.—The provisions of subsections (a), (b), and (c), to the extent that they relate to the unemployment trust fund, shall be operative only so long as such unemployment trust fund continues to exist, and so long as the secretary of the treasury of the United States of America continues to maintain for this state a separate book account of all funds deposited therein by this state for benefit purposes, together with this state's proportionate share of the earnings of such unemployment trust fund, from which no other state is permitted to make withdrawals. If and when such unemployment trust fund ceases to exist, or such separate book account is no longer maintained, all moneys, properties, or securities therein belonging to the unemployment compensation fund of this state shall be transferred to the treasurer of the unemployment compensation fund, who shall hold, invest, transfer, sell, deposit, and release such moneys, properties, or securities in a manner approved by the commission, in accordance with the provisions of this chapter: Provided, that such moneys shall be invested in the following readily marketable classes of securities: Bonds or other interest-bearing obligations of the United States of America or such investments as are now permitted by law for sinking funds of the state of North Carolina; and provided further, that such investment shall at all times be so made that all the assets of the fund shall always be readily convertible into cash when needed for the payment of benefits. The treasurer shall dispose of securities or other properties belonging to the unemployment compensation fund only under the direction of the commission.

(e) Benefits shall be deemed to be due and payable under this chapter only to the extent provided in this chapter and to the extent that moneys are available therefor to the credit of the unemployment compensation fund, and neither the state nor the commission shall be liable for any amount in excess of such sums. (Ex. Sess. 1936, c. 1, ss. 9, 18; 1939, c. 27, s. 7; c. 52, s. 4; c. 208; 1941, c. 108; 1945, c. 522, s. 4; 1947, c. 326, s. 6.)

Editor's Note.—
The 1945 amendment changed the second sentence of subsection (a), and the 1947 amendment rewrote the sentence.

Art. 2. Unemployment Compensation Division.

§ 96-8. Definitions.—As used in this chapter, unless the context clearly requires otherwise:

(a) (1) The term "year" as used in § 96-9, subsection (b), paragraph (4), subparagraph (A), (except when preceded by the word "calendar" or by the word "payroll") means the twelve months' period ending on July 31st of any calendar year.

(2) The term "payroll year" as used in § 96-9, subsection (b), paragraph (4), subparagraph (A) means the twelve calendar months ending on June 30th of any calendar year.

(b) "Benefits" means the money payments payable to an individual, as provided in this chapter, with respect to his unemployment.

(c) "Commission" means the employment security commission established by this chapter.

(d) "Contributions" means the money payments

to the state unemployment compensation fund required by this chapter.

(e) "Employing unit" means any individual or type of organization, including any partnership, association, trust, estate, joint-stock company, insurance company, or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person which has, on or subsequent to January first, one thousand nine hundred and thirty-six, had in its employ one or more individuals performing services for it within this state. All individuals performing services within this state for any employing unit which maintains two or more separate establishments within this state shall be deemed to be employed by a single employing unit for all the purposes of this chapter. Each individual employed to perform or to assist in performing the work of any agent or employee of an employing unit shall be deemed to be employed by such employing unit for all the purposes of this chapter, whether such individual was hired or paid directly by such employing unit or by such agent or employee, provided the employing unit had actual or constructive knowledge of such work: Provided, however, that nothing herein, on or after July first, one thousand nine hundred thirty-nine, shall be construed to apply to that part of the business of such "employers" as may come within the meaning of that term as it is defined in section one (a) of the Railroad Unemployment Insurance Act.

(f) "Employer" means (1) Any employing unit which in each of twenty different weeks within either the current or the preceding calendar year (whether or not such weeks are or were consecutive) has, or had in employment, eight or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week): Provided, for the purpose of this subsection, when a calendar week falls partly within each of two calendar years, such week shall be deemed to be within the calendar year within which such week ends: Provided further, that for purposes of this subsection "employment" shall include services which would constitute "employment" but for the fact that such services are deemed to be performed entirely within another state pursuant to an election under an arrangement entered into by the commission pursuant to subsection (l) of § 96-4, and an agency charged with the administration of any other State or Federal Employment Security Law.

(2) Any employing unit which acquired the organization, trade or business or substantially all the assets thereof, of another which at the time of such acquisition was an employer subject to this chapter, or which acquired a part of the organization, trade, or business of another, which at the time of such acquisition was an employer subject to this chapter; provided, such other would have been an employer under paragraph (1) of this subsection, if such part had constituted its entire organization, trade, or business; provided further, that § 96-10, subsection (d), shall not be applicable to an individual or employing unit acquiring such part of the organization, trade, or business. The provisions of § 96-11 (a), to the contrary notwithstanding, any employing unit which becomes an employer solely by virtue of the provisions of this paragraph shall not be liable for contributions based on wages paid or payable to individuals with respect to employment performed by such individuals for such employing unit prior to the date of acquisition of the organization, trade, business, or a part thereof as specified herein, or substantially all the assets of another, which at the time of such acquisition was an employer subject to this chapter. This provision shall not be applicable with respect to any employing unit which is an employer by reason of any other provision of this chapter. The provisions of this paragraph shall not be applicable if the successor within sixty days from the date of the acquisition of the organization, trade, or business, or substantially all the assets of the predecessor, or a part thereof as provided herein, files a written request with the commission to be relieved from the provisions of this paragraph, and the commission finds the predecessor was an employer at the time of such acquisition only because such predecessor had failed to make application for termination of coverage as provided in § 96-11 of this chapter.

(3) Any employing unit which acquired the organization, trade, or business, or substantially all the assets thereof, of another employing unit and which, if treated as a single unit with such other employing unit, would be an employer under paragraph (1) of this subsection.

(4) Any employing unit which, having become an employer under paragraphs (1), (2), or (3), has not, under § 96-11, ceased to be an employer subject to this chapter; or

(5) For the effective period of its election pursuant to § 96-11 (c) any other employing unit which has elected to become fully subject to this chapter.

(6) Any employing unit not an employer by reason of any other paragraph of this subsection, for which, within any calendar year, services in employment are or were performed with respect to which such employing unit is or was liable for any federal tax against which credit may or could have been taken for contributions required to be paid into a state unemployment compensation fund; provided, that such employer, notwithstanding the provisions of § 96-11, shall cease to be subject to the provisions of this chapter during any calendar year if the commission finds that during such period the employer was not subject to the provisions of the Federal Unemployment Tax Act and any other provision of this chapter.

(7) Any employing unit with its principal place of business located outside of the state of North Carolina, which engages in business within the state of North Carolina, and which, during any period of twelve consecutive months, has in employment eight or more individuals in as many as twenty different weeks shall be deemed to be an employer and subject to the other provisions of this chapter. .

(8) Any employing unit which maintains an operating office within this state from which the operations of an American vessel operating on navigable waters within or within and without the United States are ordinarily and regularly supervised, managed, directed, and controlled: Provided, the employing unit would be an em-

ployer by reason of any other paragraph of this subsection.

(g) (1) "Employment" means service performed prior to January 1, 1949, which was employment as defined in this chapter prior to such date, and any service performed after December 31, 1948, including service in interstate commerce, except employment as defined in the Railroad Retirement Act and the Railroad Unemployment Insurance Act, performed for wage or under any contract of hire, written or oral, express or implied, in which the relationship of the individual performing such service and the employing unit for which such service is rendered is, as to such service, the legal relationship of employer and employee. Provided, however, the term "employee" includes an officer of a corporation, but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules.

(2) The term "employment" shall include an individual's entire service, performed within or both within and without this state if:

(A) The service is localized in this state; or

(B) The service is not localized in any state but some of the service is performed in this state, and (i) the base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled, is in this state; or (ii) the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.

(3) Services performed within this state but not covered under paragraph (2) of this subsection shall be deemed to be employment subject to this chapter, if contributions are not required and paid with respect to such services under an employment security law of any other state or of the federal government.

(4) Services not covered under paragraph (2) of this subsection, and performed entirely without this state, with respect to no part of which contributions are required and paid under an employment security law of any other state or of the federal government, shall be deemed to be employment subject to this chapter if the individual performing such service is a resident of this state and the commission approves the election of the employing unit for whom such services are performed that the entire service of such individual shall be deemed to be employment subject to this chapter, and services covered by an election duly approved by the commission in accordance with an arrangement pursuant to subsection (l) of § 96-4 shall be deemed to be employment during the effective period of such election.

(5) Service shall be deemed to be localized within a state if

(A) The service is performed entirely within such state; or

(B) The service is performed both within and without such state, but the service performed without such state is incidental to the individual's service within the state; for example, is temporary or transitory in nature or consists of isolated transactions.

(6) The term "employment" shall include:

(A) Services covered by an election pursuant to § 96-11, subsection (c), of this chapter; and

(B) Services covered by an election duly approved by the commission in accordance with an arrangement pursuant to § 96-4, subsection (l), of this chapter during the effective period of such election.

(C) Any service of whatever nature performed by an individual for an employing unit on or in connection with an American vessel under a contract of service which is entered into within the United States or during the performance of which the vessel touches at a port in the United States, if such individual is employed on and in connection with such vessel when outside the United States: Provided, such service is performed on or in connection with the operations of an American vessel operating on navigable waters within or within and without the United States and such operations are ordinarily and regularly supervised, managed, directed, and controlled from an operating office maintained by the employing unit in this state: Provided further, that this subparagraph shall not be applicable to those services excluded in subsection (g), paragraph (7), subparagraph (F) of this section.

(7) The term "employment" shall not include:

(A) Service performed in the employ of this state, or of any political subdivision thereof, or of any instrumentality of this state or its political subdivisions;

(B) Service performed in the employ of any other state or its political subdivisions, or of the United States government, or of an instrumentality of any other state or states or their political subdivisions or of the United States. From and after March 10, 1941, service performed in the employ of the United States government or an instrumentality of the United States exempt under the Constitution of the United States from the contributions imposed by this chapter, except that to the extent that the Congress of the United States shall permit states to require any instrumentalities of the United States to make payments into an unemployment fund under a State employment security law, all of the provisions of this Chapter shall be applicable to such instrumentalities, and to services performed for such instrumentalities, in the same manner, to the same extent and on the same terms as to all other employers, employing units, individuals and services: Provided, that if this state shall not be certified for any year by the Social Security Administration under section one thousand six hundred and three (c) of the Federal Internal Revenue Code, the payments required of such instrumentalities with respect to such year shall be refunded by the commission from the fund in the same manner and within the same period as is provided in § 96-10(e) with respect to contributions erroneously collected.

(C) Service with respect to which unemployment compensation is payable under an employment security system established by an act of congress: Provided, that the commission is hereby authorized and directed to enter into agreements with the proper agencies under such act of congress, which agreements shall become effective ten days after publication thereof in the

manner provided in § 96-4 (b) for general rules, to provide reciprocal treatment to individuals who have, after acquiring potential rights to benefits under this chapter, acquired rights to unemployment compensation under act of congress, or who have, after acquiring potential rights to unemployment compensation under such act of congress, acquired rights to benefits under this chapter;

(D) Agricultural labor;

(E) Domestic service in a private home;

(F) Service performed on or in connection with a vessel not an American vessel by an individual, if the individual is performing service on and in connection with such vessel when outside the United States; or, service performed by an individual in (or as an officer or member of the crew of a vessel while it is engaged in) the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life (including service performed by any such individual as an ordinary incident to any such activity), except (i) service performed in connection with the catching or taking of salmon or halibut, for commercial purposes, and (ii) service performed on or in connection with a vessel of more than ten net tons (determined in the manner provided for determining the registered tonnage of merchant vessels under the laws of the United States).

(G) Service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of twenty-one in the employ of his father or mother;

(H) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(I) Service performed on and after March 10, 1941, by an individual for an employing unit or an employer as an insurance agent or as an insurance solicitor or as a securities salesman if all such service performed by such individual for such employing unit or employer is performed for remuneration solely by way of commission;

(J) From and after March 10, 1941, service performed in any calendar quarter by any officer, individual or committeeman of any building and loan association organized under the laws of this state, or any federal savings and loan association, where the remuneration for such service does not exceed forty-five dollars in any calendar quarter;

(K) From and after March 10, 1941, service in connection with the collection of dues or premiums for a fraternal benefit society, order or association performed away from the home office, or its ritualistic service in connection with any such society, order or associations;

(L) Service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution.

(M) Except as provided in paragraph (1) of subsection (f) of this section, service covered by an election duly approved by the agency charged with the administration of any other State or Federal Employment Security Law in accordance with an arrangement pursuant to subsection (l) of § 96-4 during the effective period of such election.

(N) Notwithstanding any of the other provisions of this subsection, services shall be deemed to be in employment if with respect to such services a tax is required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment compensation fund.

(O) Casual labor not in the course of the employing unit's trade or business.

(P) The term "employment" shall not include services performed in the employ of any nationally recognized veterans' organization chartered by the Congress of the United States.

(h) "Employment office" means a free public employment office, or branch thereof, operated by this state or maintained as a part of a state-controlled system of public employment offices.

(i) "Fund" means the unemployment compensation fund established by this chapter, to which all contributions required and from which all benefits provided under this chapter shall be paid.

(j) "State" includes, in addition to the states of the United States of America, Alaska, Hawaii, and the District of Columbia.

(k) "Total and partial unemployment."

(1) An individual shall be deemed "totally unemployed" in any week with respect to which no wages are payable to him and during which he performs no services.

(2) An individual shall be deemed "partially unemployed" in any week in which, because of lack of work, he worked less than sixty per cent of the customary scheduled full time hours of the industry or plant in which he is employed, and with respect to which the wages payable to him are less than his weekly benefit amount plus two dollars ($2.00): Provided, however, that the commission may find the customary scheduled full time hours of any individual to be less or more than the customary scheduled full time hours of the industry or plant in which he is employed, if such individual customarily performs services in an occupation which requires that he customarily work a greater or smaller number of hours than the customary scheduled full time hours of the industry or plant in which he is employed.

(3) An individual's week of unemployment shall be deemed to commence only after his registration at an employment office, except as the commission may by regulation otherwise prescribe.

(l) "Employment security administration fund" means the employment security administration fund established by this chapter, from which administrative expenses under this chapter shall be paid.

(m) From and after March 10, 1941, "wages" means all remuneration for services from whatever source: Provided, that from and after March 18, 1947, wages shall not include, and no contributions shall be paid on that part of wages earned by an individual in this state, which, when added to wages previously earned by such individual in another state or states, exceeds the sum of three thousand dollars ($3,000.00), and the employer has paid contributions to such other state or states on the wages earned therein by such

individual during the calendar year applicable. This provision shall be applicable only to wages earned by such individual in the employ of one and the same employer.

(n) From and after March 10th, 1941, "wages" shall include commissions and bonuses and the cash value of all remuneration in any medium other than cash. The reasonable cash value of remuneration in any medium other than cash, and the reasonable amount of gratuities shall be estimated and determined in accordance with rules prescribed by the commission: Provided, if the remuneration of an individual is not based upon a fixed period or duration of time or if the individual's wages are paid at irregular intervals or in such manner as not to extend regularly over the period of employment, the wages for any week or for any calendar quarter for the purpose of computing an individual's right to unemployment benefits only shall be determined in such manner as may by authorized regulations be prescribed. Such regulations shall, so far as possible, secure results reasonably similar to those which would prevail if the individual were paid his wages at regular intervals: Provided, further, that the term "wages" shall not include the amount of any payment with respect to services performed from and after March 10th, 1941, to, or on behalf of, an individual in its employ under a plan or system established by an employing unit which makes provision for individuals in its employ generally or for a class or classes of such individuals (including any amount paid by an employing unit for insurance or annuities, or into a fund, to provide for any such payment), on account of (A) retirement, or (B) sickness or accident disability, or (C) medical and hospitalization expenses in connection with sickness or accident disability, or (D) death: Provided further, the individual in its employ (i) has not the option to receive, instead of provision for such death benefit, any part of such payment, or, if such death benefit is insured, any part of the premiums (or contributions to premiums) paid by his employing unit, and (ii) has not the right under the provisions of the plan or system or policy of insurance providing for such death benefit, to assign such benefit, or to receive cash consideration in lieu of such benefit either upon his withdrawal from the plan or system providing for such benefit or upon termination of such plan or system or policy of insurance or of his services with such employing unit: Provided, further, wages shall not include payment by an employer without deduction from the remuneration of the employee of the tax imposed upon an employee under the Federal Insurance Contributions Act.

(o) "Week" means such period or periods of seven consecutive calendar days ending at midnight as the commission may by regulations prescribe.

(p) "Calendar quarter" means the period of three consecutive calendar months ending on March thirty-first, June thirtieth, September thirtieth or December thirty-first, excluding, however, any calendar quarter or portion thereof which occurs prior to January first, one thousand nine hundred and thirty-seven, or the equivalent thereof as the commission may by regulation prescribe.

(q) "Weekly benefit amount." An individual's "weekly benefit amount" means the amount of benefits he would be entitled to receive for one week of total unemployment.

(r) "Benefit year" with respect to any individual means the one-year period beginning with the first day of the first week with respect to which such individual first registers for work and files a valid claim for benefits, and after the termination of such benefit year the next benefit year shall be the next one-year period beginning with the first day of the first week with respect to which such individual registers for work and files a valid claim for benefits; a valid claim shall be deemed to have been filed if such individual, at the time the claim is filed, is unemployed and has been paid wages for employment amounting to at least two hundred dollars in the applicable base period: Provided, however, that any individual whose employment under this chapter prior to July first, one thousand nine hundred and thirty-nine, shall have been for an employer subject after July first, one thousand nine hundred and thirty-nine, to the Railroad Unemployment Insurance Act and some other employer subject to this chapter, such individual's benefit year, if established before July first, one thousand nine hundred and thirty-nine, shall terminate on that date and if again unemployed after July first, one thousand nine hundred and thirty-nine, he shall establish another benefit year after such date with respect to employment subject to this chapter.

(s) For benefit years beginning on or after February fifteenth, one thousand nine hundred thirty-nine, the term "base period" shall mean the completed calendar year immediately preceding the first day of an individual's benefit year as defined in subsection (r) of this section, if the benefit year begins subsequent to July first; and if the benefit year begins prior to July first, the base period shall be the next to the last completed calendar year, notwithstanding the fact that an otherwise eligible individual may have exhausted wage credits to his account prior to February fifteenth, one thousand nine hundred thirty-nine, for any such calendar year. Except that for weeks of unemployment of any individual after July first, one thousand nine hundred thirty-nine, who has worked in employment for an employer which after July first, one thousand nine hundred thirty-nine, is subject to the Railroad Unemployment Insurance Act, then only the wages payable to such an individual earned in employment during the base period for an employer other than one subject to the Railroad Unemployment Insurance Act shall be used in determining his weekly benefit amount after July first, one thousand nine hundred thirty-nine.

(t) Wages payable to an individual with respect to covered employment performed prior to January first, one thousand nine hundred and forty-one, shall, for the purpose of § 96-12 and § 96-9, be deemed to be wages paid within the calendar quarter with respect to which such wages were payable.

(u) The term "American vessel", as used in this chapter, means any vessel documented or numbered under the laws of the United States; and includes any vessel which is neither documented or numbered under the laws of the United States

nor documented under the laws of any foreign country, if its crew is performing service solely for one or more citizens or residents of the United States or corporations organized under the laws of the United States or of any state.

(v) The words "Employment Security Law" as used in this chapter mean any law enacted by this state or any other state or territory or by the federal government providing for the payment of unemployment compensation benefits. (Ex. Sess. 1936, c. 1, s. 19; 1937, c. 448, s. 5; 1939, c. 27, ss. 11-13; c. 52, ss. 6, 7; c. 141; 1941, cc. 108, 198; 1943, c. 377, ss. 31-34; 1943, c. 552, ss. 1, 2; 1945, c. 522, ss. 5-10; c. 531, ss. 1, 2; 1947, c. 326, ss. 7-12; c. 598, ss. 1, 5, 8; 1949, c. 424, ss. 3-8½; cc. 523, 863.)

Editor's Note.—

The first 1945 amendment added that part of paragraph (2) of subsection (f) beginning with the word "or" in line five, and also added to said subsection paragraph (7). The amendment also made changes in subsections (g) and (k).

The second 1945 amendment struck out the former third sentence of subsection (e) and added paragraph (8) to subsection (f).

The 1947 amendments made substantial changes in subsection (a) and paragraph (8) of subsection (f), made changes in subsection (g), changed the name of the fund in subsection (l), added the proviso and second sentence to subsection (m), rewrote subsection (n) and added subsections (u) and (v).

The first 1949 amendment inserted the first proviso in paragraph (1) of subsection (f) and made changes in paragraph (6) thereof. It rewrote paragraph (1) of subsection (g), struck out former paragraph (6) and renumbered former paragraphs (7) and (8) as (6) and (7), respectively. The amendment also inserted in lines three and four of (m) the words "from and after March 18, 1947," added the last proviso to subsection (n), and increased the amount in line fourteen of subsection (r) from one hundred and thirty dollars to two hundred dollars. The second 1949 amendment added that part of paragraph (2) of subsection (f) beginning with the second sentence, and the third 1949 amendment added clause (P) of paragraph (7) of subsection (g).

The General Assembly, etc.—

In accord with 2nd paragraph in original. See State v. Harvey & Son Co., 227 N. C. 291, 42 S. E. (2d) 86.

Subsection (e) merely determines who shall be liable for the contributions to the unemployment compensation commission on wages paid to employees as between an employing unit and a contractor or subcontractor under certain specified circumstances. State v. Nissen, 227 N. C. 216, 219, 41 S. E. (2d) 734.

Corporation Held Contractee and Not Mere Lessor.—The corporate defendant operated a department store. Upon the discontinuance of its shoe department, it entered into a contract with the individual defendant under which he occupied space in the store at a rental of a fixed percentage of the gross and carried on the shoe business under the name of the corporation, with full authority to hire and fire employees and order stock, but under which the corporation required money from sales to be turned over to it immediately as received, controlled the extension of credit and owned all accounts, paid sales taxes and advertised in its own name with the individual defendant paying for the proportion of advertising devoted to shoes. It was held that the corporation was a contractee and not a mere landlord was a legitimate inference from the contract, and that the corporation was liable under former subsection (e), for unemployment compensation tax on wages paid by the individual to his employees for the period of operation prior to the amendment of 1945. State v. Harvey & Son Co., 227 N. C. 291, 42 S. E. (2d) 86.

Effect of Subsection (f) (2).—Subsection (f) (2) of this section is a definitive statute by which it can be determined whether or not an employing unit which is the transferee of all, substantially all, or a part of an organization, trade, or business of another, is subject to the provisions of the Employment Security Law and required to make the contributions as provided therein. State v. News Publishing Co., 228 N. C. 332, 45 S. E. (2d) 391. But see the 1949 amendment to § 96-9 (c) 4.

Employing Unit Acquiring Part of Organization, Trade or Business of Another.—In subsection (f) (2) of this section, the employing unit that acquires only a part of the organization, trade, or business of another is expressly exempted from the lien imposed by § 96-10 (d) on the assets transferred, although the former owner may not have paid all the contributions due at the time of the transfer. If it had been the intent and purpose of the legislature in enacting § 96-9 (c) (4), to authorize the transfer of such percentage of the reserve account as the transferred assets bear to the entire assets of the transferor, when only a part of the organization, trade, or business is transferred, then there would be no sound reason for exempting such assets from the provisions of § 96-10 (d). State v. News Publishing Co., 228 N. C. 332, 45 S. E. (2d) 391. But see the 1949 amendment to § 96-9 (c) (4).

Liability of Contractor.—A person who is a contractor within the meaning of paragraph (8) of subsection (f) of this section is liable for unemployment compensation taxes for wages paid to his employees for the period subsequent to the effective date of chap. 231, Session Laws 1945, until March 18, 1947, the effective date of the repeal of this section. State v. Harvey & Son Co., 227 N. C. 291, 42 S. E. (2d) 86.

Before the 1949 amendment to subsection (g), paragraphs (1) and (6), it was held that the provisions of the Employment Security Act classifying and designating those persons who are subject to the provisions of the Act, rather than the common law definition of the relationship of master and servant, were controlling, when not capricious or unreasonable. State v. Champion Distributing Co., 230 N. C. 464, 53 S. E. (2d) 674.

And the burden was upon the employer to show to the satisfaction of the employment security commission that persons performing services came within the exceptions enumerated in former paragraphs A, B and C of subsection (g) (6). Id.

Evidence Held to Support Finding That Salesmen Were "Employees."—The evidence tended to show that the services performed by defendant's salesmen were in the usual course of defendant's business, that goods were loaded on the salesmen's cars on defendant's premises, and the unsold goods returned there, that the salesmen were bonded, were allotted territory by defendant, were not permitted to sell any competitor's merchandise, paid no license or sales tax, were reported as employees in federal returns and their taxes deducted from the pay roll, were required to turn in all money for goods sold and were paid weekly on a commission basis. Held: The evidence supports the finding of the employment security commission that the salesmen were "employees" within the meaning of this section. State v. Champion Distributing Co., 230 N. C. 464, 53 S. E. (2d) 674. See the 1949 amendment to subsection (g), paragraphs (1) and (6).

§ 96-9. Contributions. — (a) Payment.—(1) On and after January first, one thousand nine hundred and thirty-six, contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this chapter, with respect to wages for employment (as defined in § 96-8 (g)). Such contributions shall become due and be paid by each employer to the commission for the fund in accordance with such regulations as the commission may prescribe, and shall not be deducted in whole or in part from the remuneration of individuals in his employ, provided that, on and after July first, one thousand nine hundred and forty-one, contributions shall be paid for each calendar quarter with respect to wages paid in such calendar quarter for employment after December thirty-first, one thousand nine hundred and forty. Contributions shall become due on and shall be paid on or before the last day of the month following the close of the calendar quarter in which such wages are paid and such contributions shall be paid by each employer to the commission for the fund in accordance with such regulations as the commission may prescribe, and shall not be deducted in whole or in part from the remuneration of individuals in his employ, provided, further, that if the commission shall be advised by its duly authorized officers or agents that the collection of any contribution under any provision of this chapter will be jeopardized by delay, the commission shall, whether or not the time otherwise prescribed by law for making returns

and paying such tax has expired, immediately assess such contributions (together with all interest and penalties, the assessment of which is provided for by law). Such contributions, penalties and interest shall thereupon become immediately due and payable, and immediate notice and demand shall be made by the commission for the payment thereof. Upon failure or refusal to pay such contributions, penalties, and interest, it shall be lawful to make collection thereof as provided by § 96-10 and subsections thereunder and such collection shall be lawful without regard to the due date of contributions herein prescribed, provided, further, that nothing in this paragraph shall be construed as permitting any refund of contributions heretofore paid under the law and regulations in effect at the time such contributions were paid.

(2) In the payment of any contributions a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to one cent. For the purposes of this section, the term "wages" shall not include that part of the remuneration which, after remuneration equal to $3,000 has become payable to an individual by an employer with respect to employment during the calendar year 1940, becomes payable to such individual by such employer with respect to employment during such calendar year, and which, after remuneration equal to $3,000 has been paid to an individual by an employer with respect to employment during the calendar year 1941, and during any calendar year thereafter, is paid to such individual by such employer with respect to employment occurring during such calendar year but after December 31, 1940: Provided, that from and after December 31st, 1946, for the purposes of this section, the term "wages" shall not include that part of remuneration in excess of three thousand dollars ($3,000.00) paid to an individual during any calendar year for employment, irrespective of the year in which such employment occurred.

(b) Rate of Contributions.—Each employer shall pay contributions equal to the following percentages of wages payable by him with respect to employment:

(1) Nine-tenths of one percentum with respect to employment during the calendar year one thousand nine hundred and thirty-six;

(2) One and eight-tenths percentum with respect to employment during the calendar year one thousand nine hundred and thirty-seven;

(3) Two and seven-tenths percentum with respect to employment during the calendar year one thousand nine hundred and thirty-eight, and each year thereafter: Provided, however, that each employer shall pay contributions equal to two and seven-tenths percentum of wages paid by him during the calendar year one thousand nine hundred and forty-one, and during each calendar year thereafter, with respect to employment occurring after December thirty-first, one thousand nine hundred and forty, which shall be deemed the standard rate of contributions payable by each employer except as provided herein.

(4) Variations from the standard rate of contributions shall be determined in accordance with the following requirements:

(A) If, as of any computation date, the commission finds that: Compensation has been payable from an employer's account throughout the year preceding the computation date; and the balance of such account amounts to not less than five times the largest amount of compensation paid from such account within any one of the three years preceding such date; and the balance of such account as of the computation date amounts to not less than two and one-half percentum of that part of the payroll or payrolls in the three payroll years preceding such date by which contributions were measured; and such contributions were payable to such account with respect to the three years preceding the computation date, contribution rates for the calendar year following such computation date shall be determined pursuant to subparagraph (B) of this paragraph.

(B) If, as of any computation date, the cumulative total of all an employer's contributions which were paid and accredited to his "reserve account" before such computation date exceeds the cumulative total benefits which were chargeable to his "reserve account" and were paid before such computation date; and if such excess of contributions over benefits paid and chargeable to such account equals that percentage of his wages by which contributions were measured during the thirty-six consecutive calendar-month period ending June thirtieth preceding such computation date, which percentage is shown in Column 1 of the table below, and is less than the percentage opposite thereto in Column 2 of the table below, his contribution rate in the ensuing calendar year beginning on or after January 1, 1949, shall be equal to that percentum of the wages paid for employment by him during such ensuing year, which is shown in Column 3 of the table below. Of the payments so made, there shall be credited to the partially pooled account the percentage of wages for employment paid by him during such calendar years which is shown opposite thereto in Column 4 of the table below, and there shall be credited to the "reserve account" of the employer that percentage of the wages for employment paid by him during such calendar year, which is shown opposite thereto in Column 5 of the table below:

Column 1 As much as but	Column 2 Less than	Column 3 Rate of Contrib.	Column 4 Cr. Pool Account	Column 5 Credit Reserve Account
	2.5%	2.70%	.10%	2.60%
2.5%	2.8	2.00	.10	1.90
2.8	3.1	1.50	.10	1.40
3.1	3.4	1.00	.10	.90
3.4	3.8	.80	.10	.70
3.8	4.2	.60	.10	.50
4.2	4.6	.40	.10	.30
4.6	5.	.20	.10	.10
5% & in excess thereof		.10	.10	0

(C) The computation date for any contribution rates shall be August first of the calendar year preceding the calendar year with respect to which such rates are effective.

(D) Should the commission be of the opinion that the balance to the credit of the "partially pooled account" is insufficient to provide adequate security in the payment of all compensation to all eligible individuals, it shall direct such fact to the attention of the council of state, and, upon finding of the council that such a situation exists and a declaration that emergency steps are advis-

able, the commission is hereby authorized and empowered to require the payment by all employers of as much as 60% of the standard rate to be credited entirely to the "partially pooled account," and if such additional credit to the "partially pooled account" as required by this section exceeds the rate for any employer as fixed under § 96-9 (b), (4), (B), his rate shall be such percentage of the standard rate with no credit to his reserve account. If the additional credit to the "partially pooled account" as required by this subsection is less than the standard rate or rate for any employer as fixed under § 96-9 (b), (4), (B), such employer shall pay the standard rate or the rate of contributions as provided in § 96-9 (b), (4), (B) and his reserve account be credited with the balance of payment after crediting the "partially pooled account" with the additional credit as provided in this subsection. Any increased contribution rate thus required by the commission shall be applicable with respect to contributions on wages paid during the quarter in which such finding of the council of state occurred, and shall continue to be applicable with respect to contributions on wages paid up to the last day of the calendar quarter preceding the quarter in which, upon recommendation by the commission, the council of state shall find that the balance to the credit of the "partially pooled account" is sufficient to provide adequate security for the payment of all compensation to all eligible individuals.

(E) Any employer may at any time make voluntary contributions, additional to the contributions required under this chapter, to the fund to be credited to his reserve account and such voluntary contributions when made shall for all intents and purposes be deemed "contributions required" as said term is used in § 96-8 (i). Any voluntary contributions so made by an employer within ten days after the date of mailing of statement of charges to the reserve account of such employer for the previous quarter ending July 31st, shall be credited to the reserve account as of July 31st of such quarter: Provided, such notice of charges shall be mailed to the employer prior to December 1st of such year. The commission in accepting a voluntary contribution shall not be bound by any condition stipulated in or made a part of such voluntary contribution by any employer.

(F) If within the calendar month next following the computation date, the commission finds that any employing unit failed to file any report required in connection therewith, or has filed a report which the commission finds incorrect or insufficient, the commission shall make an estimate of the information required from such employing unit on the basis of the best evidence reasonably available to it at the time, and shall notify the employing unit thereof by registered mail addressed to its last known address. Unless such employing unit shall file the report or a corrected or sufficient report as the case may be, within fifteen days after the mailing of such notice, the commission shall compute such employing unit's rate of contributions on the basis of such esti mates, and the rate as so determined shall be subject to increases but not to reduction, on the basis of subsequently ascertained information.

(c) (1) The commission shall maintain a separate fiscal account for each employer and shall credit his account with all the contributions which he has paid or is paid on his own behalf. On and after January 1, 1939, the commission shall establish and maintain an employer's "reserve account" for each employer subject to this chapter, to which account the commission shall credit out of the unemployment compensation fund an amount equal to fifty percent of the contributions paid by such employers pursuant to § 96-9 (b) with respect to employment during the calendar year 1938 for the purpose of paying out of such accounts compensation payable to all eligible individuals in accord with the provisions of paragraph (2) of this subsection. To these "reserve accounts" shall also be credited seventy-five per cent of all contributions paid each year pursuant to this act from and after January 1, 1939, the remaining twenty-five per cent of the contributions to be credited to the "partially pooled account" and for each calendar year, beginning January 1, 1941, to these "reserve accounts" shall be credited ninety percentum of all contributions paid each calendar year pursuant to the act, the remaining ten percentum to be credited to the "partially pooled account," except as provided in subsection (b) (4) hereof, and as hereinafter provided. Irrespective of any other provisions of this chapter, all contributions paid by an employer during a calendar year shall be credited to the reserve account of such employer if on the computation date in the preceding calendar year the funds in the partially pooled account amounted to as much as twenty-five million dollars ($25,000,000.00), this provision to be first effective as to contributions paid on and after April 1, 1949. If the amount of funds in the partially pooled account as of the computation date is less than twenty-five million dollars ($25,000,000.00), the reserve account of the employer shall be credited during the ensuing calendar year with the contributions paid during such calendar year less an amount equal to one-tenth of one per cent of the wages by which such contributions were measured, which one-tenth of one per cent shall be credited to the partially pooled account. Provided, further, that if on the computation date, beginning first with August 1, 1948, the funds in the partially pooled account amount to as much as twenty-five million dollars ($25,000,000.00), the ratio of the credit balance in each individual reserve account to the total of all the credit balances in all employer reserve accounts shall be computed as of such computation date and an amount equal to the interest credited to this state's account in the unemployment trust fund in the treasury of the United States for the four most recently completed calendar quarters shall be charged prior to the next computation date to the partially pooled account and credited on a pro rata basis to all employers' reserve accounts having a credit balance on the computation date. Such amount shall be prorated to the individual reserve accounts in the same ratio that the credit balance in each individual reserve account bears to the total of the credit balances in all such reserve accounts. No provision in this section shall in any way be subject to or affected by any provisions of the Executive Budget Act, as amended.

(2) Charging of benefit payments.—(A) All

benefits for weeks of unemployment paid during the period beginning with the last computation date and ending on July thirty-first of each year to any eligible individual shall be paid out of the reserve account of such individual's employer or employers by whom he was employed during his base period. In accordance with the regulations of the commission, such payments shall be charged against all employers of such individual during his base period in the same ratio that the wages paid to such individual by each base period employer bears to the total wages paid him by all his employers during the base period, except as provided in subparagraph (B) of this paragraph. In the event an employer's credits in his reserve account become exhausted through the payment of benefits chargeable to such account, the benefit payments which are chargeable to such account shall be paid out of the partially pooled account and at the same time the reserve account of the employer shall be debited accordingly. Whenever through inadvertence or mistake erroneous charges or credits are found to have been made to reserve accounts, the same shall be readjusted as of the date of discovery and such readjustment shall not affect any computation made under this section prior to the date of discovery.

(B) Any benefits paid to any claimant under a claim filed for a period occurring after the date of such separations as are set forth in this subparagraph and based on wages earned prior to the date of (a) the voluntary leaving of work by the claimant without good cause attributable to the employer, or (b) the discharge of claimant for misconduct in connection with his work, shall not be charged to the reserve account of the employer by whom claimant was employed at the time of such separation, but any such benefits chargeable under the provisions of subparagraph (A) of this subsection to the reserve account of such employer shall be charged to the partially pooled account; this provision to be effective as to benefits paid for periods of unemployment which establish benefit years following separations occurring after June 30, 1949. All benefits paid claimants during benefit years existing as of June 30, 1949, and for periods of unemployment which establish benefit years following separations occurring prior to July 1, 1949, shall be charged in accordance with the provisions of this chapter as in effect immediately prior to March 21, 1949, notwithstanding the repeal of the provisos formerly contained in § 96-14, subsections (a) and (b) of the General Statutes: Provided, however, said employer promptly furnishes the commission with such notices regarding the separation of the individual from work as are or may be required by the regulations of the commission.

(3) As of July 31st of each year, and prior to the effective date of any variation from standard rate of contribution, the commission shall determine the balance of each employer in his reserve account and shall furnish him with a statement of all charges and credits thereto. At the same time the commission shall notify each employer of his rate of contributions as determined for the succeeding calendar year pursuant to this section. Such determination shall become final unless the employer files an application for review or redetermination within thirty days after the effective date of such rates.

(4) Transfer of reserve account.—(A) Whenever any individual, group of individuals, or employing unit, who or which, in any manner, succeeds to or acquires substantially all or a distinct or severable portion of the organization, trade, or business of another employing unit as provided in § 96-8, subsection (f), paragraph (2), the reserve account or that part of the reserve account of the predecessor which relates to the acquired portion of the business shall, upon the mutual consent of the parties concerned and approval of the commission in conformity with the regulations as prescribed therefor, be transferred as of the date of acquisition to the successor employer for use in the determination of his rate of contributions, provided that after the transfer the successor employing unit continues to operate the transferred portion of such organization, trade, or business. This provision shall not be retroactive with respect to the transfer of a part of a reserve account of the predecessor in those cases in which an employing unit succeeds to or acquires a distinct and severable portion of the organization, trade, or business of another employing unit as provided in § 96-8, subsection (f), paragraph (2), and shall apply only when the transfer of such distinct and severable portion of the organization, trade or business of another occurs after March 21, 1949.

(B) Notwithstanding any other provisions of this section, if the successor employer was an employer subject to this chapter prior to the date of acquisition, his rate of contributions for the period from such date to the end of the then current contribution year shall be the same as his rate with respect to the period immediately preceding the date of acquisition. If the successor was not an employer prior to the date of the acquisition, his rate shall be the rate applicable to the predecessor employer or employers with respect to the period immediately preceeding the date of acquisition, provided there was only one predecessor, or if more than one and the predecessors had identical rates. In the event the rates of the predecessors were not identical, the rate of the successor shall be the highest rate applicable to any of the predecessor employers with respect to the period immediately preceding the date of acquisition.

(5) In the event any employer subject to this chapter ceases to be such an employer, his reserve account shall be maintained for a period of five years from the termination date, and shall be charged with benefits paid to any individual based on wages paid by such employer during the individual's base period as hereinabove provided. If within such five-year period he again becomes an employer subject to this chapter, he shall be entitled to a variation from the standard rate of contributions only if thereafter the conditions specified in § 96-9 (b) (4) are met. If within such five-year period he fails to become an employer subject to this chapter the reserve account standing to the credit of such employer shall immediately revert to the partially pooled account established herein and the reserve account shall be closed.

(d) In order that the commission shall be kept

informed at all times on the circumstances and conditions of unemployment within the state and as to whether the stability of the fund is being impaired under the operation and effect of the system provided in subsection (c) of this section, the actuarial study now in progress shall be continued and such other investigations and studies of a similar nature as the commission may deem necessary shall be made. (Ex. Sess. 1936, c. 1, s. 7; 1939, c. 27, s. 6; 1941, c. 108, ss. 6, 8; c. 320; 1943, c. 377, ss. 11-14; 1945, c. 522, ss. 11-16; 1947, c. 326, ss. 13-15, 17; c. 881, s. 3; 1949, c. 424, ss. 9-13; c. 969.)

Editor's Note.—The 1945 amendment made changes in subparagraphs (A), (B) and (C) of paragraph (4) of subsection (b), and in paragraphs (2), (3) and (4) of subsection (c). The 1947 amendments made changes in paragraph (2) of subsection (a), in subparagraphs (A) and (E) of paragraph (4) of subsection (b) and in paragraphs (2) and (3) of subsection (c). The 1949 amendments rewrote subparagraph (B) of paragraph (4) of subsection (b), made changes in paragraphs (1), (2) and (4) of subsection (c), and added paragraph (5) to subsection (c).

Prior to the 1949 amendment, subsection (c) (4) of this section, by its own limitation, restricted the transfer of reserve accounts to those cases where the account was to be transferred in toto; and even then, such reserve account could be transferred only to such employing unit defined in § 96-8(f) (2), as might acquire the organization, trade, or business of another for whom a reserve account had been theretofore established and maintained. State v. News Publishing Co., 228 N. C. 332, 45 S. E. (2d) 391.

An employer under the Employment Security Act was engaged in the business of printing and publishing a newspaper and also the business of operating a job printing business as separate businesses with separate books. Thereafter an independent corporation was organized which took over all the assets of the job printing business and retained all the employees of that department. It was held, under subsection (c) (4) of this section as it stood before the 1949 amendment, that the new corporation was not entitled to a pro rata transfer to it of the reserve fund. Id.

Transfer of Reserve Credited to Particular Employer through Misapprehension.—Paragraph 4 of subsection (c) authorizes the commission to transfer a reserve fund only upon the mutual consent of the parties. However, the law does not apply where such reserve was credited to a particular person, firm or corporation under a misapprehension of the facts or the status of the person, firm or corporation making the contribution. State v. Nissen, 227 N. C. 216, 220, 41 S. E. (2d) 734.

§ 96-10. Collection of contributions.—(a) Interest on Past-Due Contributions.—Contributions unpaid on the date on which they are due and payable, as prescribed by the commission, shall bear interest at the rate of one-half of one per centum per month from and after such date until payment plus accrued interest is received by the commission. Interest collected pursuant to this subsection shall be paid into the special employment security administration fund. If any employer, in good faith, pays contributions to another state or to the United States under the Federal Unemployment Tax Act, prior to a determination of liability by this commission, which contributions were legally payable to this state, such contributions, when paid to this state, shall be deemed to have been paid by the due date under the law of this state if paid by the due date of such other state or the United States.

(b) Collection.— (1) If, after due notice, any employer defaults in any payment of contributions or interest thereon, the amount due shall be collected by civil action in the name of the commission, and the employer adjudged in default shall pay the costs of such action. Civil actions brought under this section to collect contributions or interest thereon from an employer shall be heard by the court at the earliest possible date, and shall be entitled to preference upon the calendar of the court over all other civil actions except petitions for judicial review under this chapter and cases arising under the Workmen's Compensation Law of this state; or, if any contribution imposed by this chapter, or any portion thereof, and/or penalties duly provided for the nonpayment thereof shall not be paid within thirty days after the same become due and payable, and after due notice and reasonable opportunity for hearing, the commission under the hand of its chairman, may certify the same in duplicate and forward one copy thereof to the clerk of the superior court of the county in which the delinquent resides or has property, and additional copies for each county in which the commission has reason to believe such delinquent has property located, which copy so forwarded to the clerk of the superior court shall be immediately docketed by said clerk and indexed on the cross index of judgment, and from the date of such docketing shall constitute a preferred lien upon any property which said delinquent may own in said county, with the same force and effect as a judgment rendered by the superior court; for docketing said certificate and indexing same as above set forth, the clerks of superior courts shall charge a fee of one dollar ($1.00), which shall be in lieu of any other fee chargeable under the General Statutes of North Carolina or any Public-Local or Private Act. The duplicate of said certificate shall be forwarded by the commission to the sheriff or sheriffs of such county or counties, or to a duly authorized agent of the commission, and in the hands of such sheriff or agent of the commission shall have all the force and effect of an execution issued to such sheriff or agent of the commission by the clerk of the superior court upon the judgment of the superior court duly docketed in said county. Provided, however, that notwithstanding any provision of this subsection, upon filing one written notice with the commission the sheriff of any county shall have the sole and exclusive right to serve all executions and make all collections mentioned in this subsection and in such case no agent of the commission shall have the authority to serve any executions or make any collections therein in such county. A return of such execution shall be made to the commission, together with all moneys collected thereunder, and when such order or execution is referred to the agent of the commission for service the said agent of the commission shall be vested with all the powers of the sheriff to the extent of serving such order or execution and levying or collecting thereunder. The agent of the commission to whom such order or execution is referred shall give a bond not to exceed three thousand dollars ($3,000.00) approved by the commission for the faithful performance of such duties. The liability of said agent shall be in the same manner and to the same extent as is now imposed on sheriffs in the service of executions. If any sheriff of this state or any agent of the commission who is charged with the duty of serving executions shall wilfully fail, refuse, or neglect to execute any order directed to him by the said commission and within the time provided by law, the official bond of such sheriff or of such agent of the

commission shall be liable for the contributions, penalty, interest, and costs due by the employer.

(2) When the commission furnishes the clerk of superior court of any county in this state a written statement or certificate to the effect that any judgment docketed by the commission against any firm or individual has been satisfied and paid in full, and said statement or certificate is signed by the chairman of the commission and attested by its secretary, with the seal of the commission affixed, it shall be the duty of the clerk of superior court to file said certificate and enter a notation thereof on the margin of the judgment docket to the effect that said judgment has been paid and satisfied in full, and is in consequence cancelled of record. Such cancellation shall have the full force and effect of a cancellation entered by an attorney of record for the commission. This paragraph shall apply to judgments already docketed, as well as to the future judgments docketed by the commission. For the filing of said statement or certificate and making new notations on the record, the clerk of superior court shall be paid a fee of fifty cents (50c.) by the commission.

(c) Priorities under Legal Dissolution or Distributions.—In the event of any distribution of an employer's assets pursuant to an order of any court under the laws of this state, including any receivership, assignment for benefit of creditors, adjudicated insolvency, composition, or similar proceeding, contributions then or thereafter due shall be paid in full prior to all other claims except taxes, and claims for remuneration of not more than two hundred and fifty dollars to each claimant, earned within six months of the commencement of the proceeding. In the event of an employer's adjudication in bankruptcy, judicially confirmed extension proposal, or composition, under the Federal Bankruptcy Act of one thousand eight hundred and ninety-eight, as amended, contributions then or thereafter due shall be entitled to such priority as is provided in section sixty-four (b) of that act (U. S. C., Title II, sec. 104 (b), as amended.

(d) Collections of Contributions upon Transfer or Cessation of Business.—The contribution or tax imposed by § 96-9, and subsections thereunder, of this chapter shall be a lien upon the assets of the business of any employer subject to the provisions hereof who shall lease, transfer or sell out his business, or shall cease to do business and such employer shall be required, by the next reporting date as prescribed by the commission, to file with the commission all reports and pay all contributions due with respect to wages payable for employment up to the date of such lease, transfer, sale or cessation of the business and such employer's successor in business shall be required to withhold sufficient of the purchase money to cover the amount of said contributions due and unpaid until such time as the former owner or employer shall produce a receipt from the commission showing that the contributions have been paid, or a certificate that no contributions are due. If the purchaser of a business or a successor of such employer shall fail to withhold purchase money or any money due to such employer in consideration of a lease or other transfer and the contributions shall be due and unpaid after the next reporting date, as above set forth, such successor shall be personally liable to the extent of the assets of the business so acquired for the payment of the contributions accrued and unpaid on account of the operation of the business by the former owner or employer.

(e) Refunds.—If not later than three years from the last day of the period with respect to which a payment of any contributions or interest thereon was made, or one year from the date on which such payment was made, whichever shall be the later, an employer who has paid such contributions or interest thereon shall make application for an adjustment thereof in connection with subsequent contribution payments, or for a refund, and the commission shall determine that such contributions or any portion thereof was erroneously collected, the commission shall allow such employer to make an adjustment thereof, without interest, in connection with subsequent contribution payments by him, or if such an adjustment cannot be made in the next succeeding calendar quarter after such application for such refund is received, or if said money which constitutes the overpayment has been in the possession of the commission for six months or more, a cash refund may be made, without interest, from the fund: Provided, that any interest refunded under this subsection, which has been paid into the Special Employment Security Administration Fund established pursuant to § 96-5 (c), shall be paid out of such fund. For like cause and within the same period, adjustment or refund may be so made on the commission's own initiative. Provided further, that nothing in this section or in any other section of this chapter shall be construed as permitting the refund of moneys due and payable under the law and regulations in effect at the time such moneys were paid. In any case where the commission finds that any employing unit has erroneously paid to this state contributions or interest upon wages earned by individuals in employment in another state, refund or adjustment thereof shall be made, without interest, irrespective of any other provisions of this subsection, upon satisfactory proof to the commission that the payment of such contributions or interest has been made to such other state.

(f) No injunction shall be granted by any court or judge to restrain the collection of any tax or contribution or any part thereof levied under the provisions of this chapter nor to restrain the sale of any property under writ of execution, judgment, decree or order of court for the non-payment thereof. Whenever any employer, person, firm or corporation against whom taxes or contributions provided for in this chapter have been assessed, shall claim to have a valid defense to the enforcement of the tax or contribution so assessed or charged, such employer, person, firm or corporation shall pay the tax or contribution so assessed to the commission; but if at the time of such payment he shall notify the commission in writing that the same is paid under protest, such payment shall be without prejudice to any defenses or rights he may have in the premises, and he may, at any time within thirty days after such payment, demand the same in writing from the commission; and if the same shall not be refunded within ninety

days thereafter, he may sue the commission for the amount so demanded; such suit against the Employment Security Commission of North Carolina must be brought in the superior court of Wake county, or in the county in which the taxpayer resides, or in the county where the taxpayer conducts his principal place of business; and if, upon the trial it shall be determined that such tax or contribution or any part thereof was for any reason invalid, excessive or contrary to the provisions of this chapter, the amount paid shall be refunded by the commission accordingly. The remedy provided by this subsection shall be deemed to be cumulative and in addition to such other remedies as are provided by other subsections of this chapter. No suit, action or proceeding for refund or to recover contributions or payroll taxes paid under protest according to the provisions of this subsection shall be maintained unless such suit, action or proceeding is commenced within one year after the expiration of the ninety days mentioned in this subsection, or within one year from the date of the refusal of said commission to make refund should such refusal be made before the expiration of said ninety days above mentioned. The one-year limitation here imposed shall not be retroactive in its effect, shall not apply to pending litigation nor shall the same be construed as repealing, abridging or extending any other limitation or condition imposed by this chapter.

(g) Any employer refusing to make reports required under this chapter, after ten days written notice sent by the commission to the employer's last known address by registered mail, may be enjoined from operating in violation of the provisions of this chapter upon the complaint of the commission, in any court of competent jurisdiction, until such reports shall have been made. When an execution has been returned to the commission unsatisfied, and the employer, after ten days written notice sent by the commission to the employer's last known address by registered mail, refuses to pay contributions covered by the execution, such employer may be enjoined from operating in violation of the provisions of this chapter upon the complaint of the commission, in any court of competent jurisdiction, until such contributions have been paid.

(h) When any uncertified check is tendered in payment of any contributions to the commission and such check shall have been returned unpaid on account of insufficient funds of the drawer of said check in the bank upon which same is drawn, a penalty shall be payable to the commission, equal to ten per cent (10%) of the amount of said check, and in no case shall such penalty be less than one dollar ($1.00) nor more than two hundred dollars ($200.00).

(i) No suit or proceedings for the collection of unpaid contributions may be begun under this chapter after five years from the date on which such contributions become due, and no suit or proceeding for the purpose of establishing liability and/or status may be begun with respect to any period occurring more than five years prior to the first day of January of the year within which such suit or proceeding is instituted; provided, that this subsection shall not apply in any case of willful attempt in any manner to defeat or evade the payment of any contributions becoming due under this chapter: Provided, further, that a proceeding shall be deemed to have been instituted or begun upon the date of issuance of an order by the chairman of the commission directing a hearing to be held to determine liability or nonliability, and/or status under this act of an employing unit, or upon the date notice and demand for payment is mailed by registered mail to the last known address of the employing unit: Provided, further, that the order mentioned herein shall be deemed to have been issued on the date such order is mailed by registered mail to the last known address of the employing unit. (Ex. Sess. 1936, c. 1, s. 14; 1939, c. 27, ss. 9, 10; 1941, c. 108, ss. 14-16; 1943, c. 377, ss. 24-28; 1945, c. 221, s. 1; c. 288, s. 1; c. 522, ss. 17-20; 1947, c. 326, ss. 18-20; c. 598, s. 9; 1949, c. 424, ss. 14-16.)

Editor's Note.—

The first 1945 amendment inserted the provision as to venue beginning in line twenty-four of subsection (f).

The second 1945 amendment inserted at the end of the second sentence of subsection (b) the provision as to fee for docketing and indexing certificate.

The third 1945 amendment inserted the references to the United States in subsection (a), added subparagraph (2) to subsection (b), made changes in subsection (e), and added subsection (h) and (i).

The 1947 amendments changed the amount of the bond in paragraph (1) of subsection (b) from two to three thousand dollars, added the proviso at the end of the first sentence of subsection (e), substituted "commission" for "commissioner" in the next to last sentence of subsection (f) and added the provisos at the end of subsection (i).

The 1949 amendment substituted in the second sentence of subsection (a) the words "special employment security administration fund" for the words "unemployment compensation fund," added the last sentence of subsection (e) and made changes in subsection (i).

Subsection (e) relating to refund is procedural, and limitation it imposes is addressed to the power of the commission to make a refund and the conditions upon which it may be made rather than to any limitation upon an action for the recovery of money. B-C Remedy Co. v. Unemployment Compensation Comm., 226 N. C. 52, 36 S. E. (2d) 733, 163 A. L. R. 773.

It is broad enough in its phraseology to cover refund of money paid through mistake, without raising technical distinctions between voluntary and involuntary payments. B-C Remedy Co. v. Unemployment Compensation Comm., 226 N. C. 52, 36 S. E. (2d) 733, 736, 163 A. L. R. 773.

Retroactive Extension of Time for Applying for Refunds.—While the limitation on the authority of commission to make refunds is fatal to a claim, so long as the limitation lasts, a change of law, enlarging time in which refunds may be applied for or made, does not involve any constitutional inhibitions such as apply to ordinary statutes of limitation, and legislature has the power to apply the extended time retroactively. B-C Remedy Co. v. Unemployment Compensation Comm., 226 N. C. 52, 36 S. E. (2d) 733, 163 A. L. R. 773, so holding as to the 1943 amendment of subsection (e).

Cited, as to subsection (d), in Employment Security Comm. v. News Publishing Co., 228 N. C. 332, 45 S. E. (2d) 391.

§ 96-11. Period, election, and termination of employer's coverage.—(a) Any employing unit which is or becomes an employer subject to this chapter within any calendar year shall be subject to this chapter during the whole of such calendar year except as otherwise provided in § 96-8 (f) (2); provided, however, that on and after July first, one thousand nine hundred thirty-nine, this section shall not be construed to apply to any part of the business of an employer as may come within the terms of section one (a) of the Federal Railroad Unemployment Insurance Act.

(b) Except as otherwise provided in subsections (a), (c) and (d) of this section, an employing unit shall cease to be an employer subject to this act only as of the first day of January of any

calendar year, if it files with the commission prior to the first day of March of such year a written application for termination of coverage and the commission finds that there were no twenty different weeks within the preceding calendar year (whether or not such weeks are or were consecutive) within which said employing unit employed eight or more individuals in employment (not necessarily simultaneously and irrespective of whether the same individuals were employed in each such week). For the purpose of this subsection, the two or more employing units mentioned in paragraphs two or three of § 96-8, subsection (f), of this chapter shall be treated as a single employing unit.

(c) (1) An employing unit, not otherwise subject to this chapter, which files with the commission its written election to become an employer subject hereto for not less than two calendar years shall, with the written approval of such election by the commission, become an employer subject hereto to the same extent as all other employers, as of the date stated in such approval, and shall cease to be subject hereto as of January one of any calendar year subsequent to such two calendar years only if, prior to the first day of March following such first day of January, it has filed with the commission a written notice to that effect.

(2) Any employing unit for which services that do not constitute employment as defined in this chapter are performed may file with the commission a written election that all such services performed by individuals in its employ, in one or more distinct establishments or places of business, shall be deemed to constitute employment for all the purposes of this chapter for not less than two calendar years. Upon the written approval of such election by the commission such services shall be deemed to constitute employment subject to this chapter from and after the date stated in such approval. Such services shall cease to be deemed employment, subject hereto as of January one of any calendar year subsequent to such two calendar years only if, prior to the first day of March following such first day of January, such employing unit has filed with the commission a written notice to that effect.

(d) An employer who has not had any individuals in employment for a period of five consecutive calendar years shall cease to be subject to this chapter. (Ex. Sess. 1936, c. 1, s. 8; 1939, c. 52, ss. 2, 3; 1941, c. 108, s. 9; 1945, c. 522, ss. 21-23; 1949, c. 424, ss. 17, 18; c. 522.)

Editor's Note.—
The 1945 amendment substituted in line six of subsection (b) the words "first day of March" for "thirty-first day of January." The amendment also substituted near the ends of paragraphs (1) and (2) of subsection (c) the words "prior to the first day of March following" for the words "at least thirty days prior to."

The 1949 amendment inserted the exception clause in subsection (a), inserted the reference to (d) in line two of subsection (b) and added subsection (d).

§ 96-12. Benefits. — (a) Payment of Benefits. —Twenty-four months after the date when contributions first accrue under this chapter benefits shall become payable from the fund. All benefits shall be paid through employment offices, in accordance with such regulations as the commission may prescribe.

(b) (1) Each eligible individual whose benefit year begins on and after March 13, 1945, and prior to the effective date of this act, and who is totally unemployed in any week as defined by § 96-8 (k) (1), shall be paid benefits with respect to such week or weeks at the rate per week appearing in the following table in Column II opposite which in Column I appear the wages paid to such individual during his base period with respect to employment.

Column I Wages Paid During Base Period		Column II Weekly Benefit Amount
Less than $130.00		Ineligible
$ 130.00 to	$ 152.99	$ 4.00
153.00	178.99	4.50
179.00	207.99	5.00
208.00	239.99	5.50
240.00	275.99	6.00
276.00	316.99	6.50
317.00	362.99	7.00
363.00	415.99	7.50
416.00	464.99	8.00
465.00	519.99	8.50
520.00	580.99	9.00
581.00	649.99	9.50
650.00	727.99	10.00
728.00	788.99	10.50
789.00	853.99	11.00
854.00	923.99	11.50
924.00	999.99	12.00
1,000.00	1,081.99	12.50
1,082.00	1,169.99	13.00
1,170.00	1,265.99	13.50
1,266.00	1,370.99	14.00
1,371.00	1,485.99	14.50
1,486.00	1,611.99	15.00
1,612.00	1,663.99	15.50
1,664.00	1,715.99	16.00
1,716.00	1,767.99	16.50
1,768.00	1,819.99	17.00
1,820.00	1,871.99	17.50
1,872.00	1,923.99	18.00
1,924.00	1,975.99	18.50
1,976.00	2,027.99	19.00
2,028.00	2,079.99	19.50
2,080.00	and over	20.00

(2) Each eligible individual whose benefit year begins on and after the effective date of this act, and who is totally unemployed in any week as defined by § 96-8 (k) (1), shall be paid benefits with respect to such week or weeks at the rate per week appearing in the following table in Column II opposite which in Column I appear the wages paid to such individual during his base period with respect to employment.

Column I Wages Paid During Base Period		Column II Weekly Benefit Amount
Less than $200.00		Ineligible
$ 200.00 to	$ 232.99	$ 6.00
233.00	261.99	6.50
262.00	293.99	7.00
294.00	327.99	7.50
328.00	363.99	8.00
364.00	401.99	8.50
402.00	442.99	9.00
443.00	485.99	9.50
486.00	531.99	10.00

Column I Wages Paid During Base Period		Column II Weekly Benefit Amount Ineligible
Less than $200.00		
532.00	579.99	10.50
580.00	631.99	11.00
632.00	684.99	11.50
685.00	742.99	12.00
743.00	802.99	12.50
803.00	865.99	13.00
866.00	932.99	13.50
933.00	1,003.99	14.00
1,004.00	1,077.99	14.50
1,078.00	1,155.99	15.00
1,156.00	1,237.99	15.50
1,238.00	1,324.99	16.00
1,325.00	1,415.99	16.50
1,416.00	1,490.99	17.00
1,491.00	1,579.99	17.50
1,580.00	1,636.99	18.00
1,637.00	1,696.99	18.50
1,697.00	1,772.99	19.00
1,773.00	1,851.99	19.50
1,852.00	1,915.99	20.00
1,916.00	1,980.99	20.50
1,981.00	2,047.99	21.00
2,048.00	2,115.99	21.50
2,116.00	2,184.99	22.00
2,185.00	2,254.99	22.50
2,255.00	2,315.99	23.00
2,316.00	2,375.99	23.50
2,376.00	2,437.99	24.00
2,438.00	2,499.99	24.50
2,500.00	and over	25.00

(c) Weekly Benefit for Partial Unemployment.—Each eligible individual who is partially unemployed (as defined in § 96-8 (k) (2)) in any week shall be paid with respect to such week a partial benefit. Such partial benefit shall be an amount figured to the nearest multiple of fifty cents (50c) which is equal to the difference between the weekly benefit amount as defined in § 96-8 (q) plus two dollars ($2.00) and the wages payable to him, if any, with respect to such week.

(d) Duration of Benefits.—The maximum amount of benefits payable to any eligible individual whose benefit year begins prior to March 21, 1949, shall be sixteen times his weekly benefit amount during such benefit year. The maximum amount of benefits payable to any eligible individual whose benefit year begins after the effective date of this act shall be twenty times his weekly benefit amount during any benefit year. The commission shall maintain accounts for each individual who earns wages in such manner and form as the commission may prescribe as being adequate to administer the provisions of this chapter. (Ex. Sess., 1936, c. 1, s. 3; 1937, c. 448, s. 1; 1939, c. 27, ss. 1-3, 14; c. 141; 1941, c. 108, s. 1; c. 276; 1943, c. 377, ss. 1-4; 1945, c. 522, ss. 24-26; 1947, c. 326, s. 21; 1949, c. 424, ss. 19-21.)

Editor's Note.—The 1945 amendment made changes in subsections (b) and (c) and in former subsection (e), which was repealed by the 1947 amendment. The 1949 amendment rewrote subsection (b), the second sentence of subsection (c) and subsection (d).

§ 96-13. Benefit eligibility conditions.—An unemployed individual shall be eligible to receive benefits with respect to any week only if the commission finds that—

(a) He has registered for work at and thereafter has continued to report at an employment office in accordance with such regulations as the commission may prescribe;

(b) He has made a claim for benefits in accordance with the provisions of § 96-15 (a);

(c) He is able to work, and is available for work: Provided that no individual shall be deemed available for work unless he establishes to the satisfaction of the commission that he is actively seeking work: Provided further, that an individual customarily employed in seasonal employment, shall during the period of nonseasonal operations, show to the satisfaction of the commission that such individual is actively seeking employment which such individual is qualified to perform by past experience or training during such nonseasonal period: Provided further, that no individual shall be considered able and available for work for any week during the three-month period immediately before the expected birth of a child to such individual, and for any week during the three-month period immediately following the birth of a child to such individual; however, no individual shall be denied benefits by reason of this proviso in the event of the death of such child, if such individual is otherwise eligible: Provided further, however, that effective January 1, 1949, no individual shall be considered available for work for any week not to exceed two in any calendar year in which the commission finds that his unemployment is due to a vacation. In administering this proviso, benefits shall be paid or denied on a payroll week basis as established by the employing unit. A week of unemployment due to a vacation as provided herein means any payroll week within which as much as sixty per cent of the full time working hours consists of a vacation period. For the purpose of this subsection, any unemployment which is caused by a vacation period and which occurs in the calendar year following that within which the vacation period begins shall be deemed to have occurred in the calendar year within which such vacation period begins.

(d) He has been totally unemployed for a waiting period of one week (and for the purpose of this subsection, two weeks of partial unemployment shall be deemed to be equivalent to one week of total unemployment. Such weeks of partial unemployment need not be consecutive). No week shall be counted as a week of total unemployment for the purpose of this subsection:

(1) If benefits have been paid with respect thereto;

(2) Unless the individual was eligible for benefits with respect thereto in all respects except for the requirements of this subsection and subsection (g) of § 96-14;

(3) Unless it occurred within the benefit year which includes the week with respect to which he claims benefits.

Provided, that no individual shall be required to accumulate more than one such waiting period week in any benefit year. (Ex. Sess. 1936, c. 1, s. 4; 1939, c. 27, ss. 4, 5; c. 141; 1941, c. 108, s. 2; 1943, c. 377, s. 5; 1945, c. 522, ss. 27-28; 1947, c. 326, s. 22; 1949, c. 424, s. 22.)

Editor's Note.—

The 1945 amendment made changes in subsection (c) and rewrote subsection (d).

The 1947 amendment rewrote subsection (c).

The 1949 amendment made changes in that part of subsection (c) beginning with "Provided" in line twenty-two.

Evidence Showing Failure Actively to Seek Work.—Evidence that during a period of six months claimant's efforts to obtain employment, in addition to reporting to the employment service office, were limited to two occasions at one mill and one occasion at each of three other mills, is sufficient to sustain the commission's finding that he had failed to show that he had been actively seeking work within the purview of subsection (c) of this section. State v. Roberts, 230 N. C. 262, 52 S. E. (2d) 890.

§ 96-14. Disqualification for benefits.—An individual shall be disqualified for benefits:

(a) For not less than four, nor more than twelve consecutive weeks of unemployment, which occur within a benefit year, beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits (in addition to the waiting period) if it is determined by the commission that such individual is, at the time such claim is filed, unemployed because he left work voluntarily without good cause attributable to the employer, and the maximum benefits due said individual during his then current benefit year shall be reduced by an amount determined by multiplying the number of such consecutive weeks of unemployment by the weekly benefit amount.

(b) For not less than five, nor more than twelve consecutive weeks of unemployment, which occur within a benefit year, beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits (in addition to the waiting period) if it is determined by the commission that such individual is, at the time such claim is filed, unemployed because he was discharged for misconduct connected with his work, and the maximum amount of benefits due said individual during his then current benefit year shall be reduced by an amount determined by multiplying the number of such consecutive weeks of unemployment by the weekly benefit amount.

(c) For not less than four, nor more than twelve consecutive weeks of unemployment, which occur within a benefit year, beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits (in addition to the waiting period) if it is determined by the commission that such individual has failed without good cause (i) to apply for available suitable work when so directed by the employment office of the commission; or (ii) to accept suitable work when offered him; or (iii) to return to his customary self-employment (if any) when so directed by the commission and the maximum amount of benefits due said individual during his then current benefit year shall be reduced by an amount determined by multiplying the number of such consecutive weeks of unemployment by the weekly benefit amount.

Provided, however, that in any case where any week or weeks of disqualification as provided in subsections (a), (b), and (c) of this section have not elapsed on account of the termination of an individual's benefit year, such remaining week or weeks of disqualification shall be applicable in the next benefit year at the then current benefit amount of such individual; provided such new benefit year is established by the individual within twelve months from the date of the ending of the preceding benefit year. When any individual who has been disqualified as provided in subsections (a), (b) and (c) of this section returns to employment before the disqualifying period has elapsed, the remaining week or weeks of disqualification shall be cancelled and no deduction based on such weeks shall be made from the maximum amount of benefits of such individual; provided such individual shows the fact of employment to the satisfaction of the commission.

(1) In determining whether or not any work is suitable for an individual, the commission shall consider the degree of risk involved to his health, safety, and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence.

(2) Notwithstanding any other provisions of this chapter, no work shall be deemed suitable and benefits shall not be denied under this chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (a) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; (b) if the remuneration, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (c) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona-fide labor organization.

(d) For any week with respect to which the commission finds that his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed, provided that this subsection shall not apply if it is shown to the satisfaction of the commission that—

(1) He is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and

(2) He does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute: Provided, for the purpose of this subsection (d), that if in any case separate branches of work which are commonly conducted as separate business in separate premises are conducted in separate departments of the same premises, each such department shall be deemed to be a separate factory, establishment, or other premises.

(e) For any week with respect to which he is receiving or has received remuneration in the form of remuneration in lieu of notice: Provided, that if such remuneration is less than the benefits which would otherwise be due under this chapter he shall be entitled to receive for such week, if otherwise eligible, benefits reduced by the amount of such remuneration.

(f) If the commission finds he is customarily self-employed and can reasonably return to self-employment.

(g) For any week after June thirtieth, one thousand nine hundred thirty-nine with respect to

which he shall have and assert any right to unemployment benefits under an employment security law of either the federal or a state government, other than the state of North Carolina. (Ex. Sess., 1936, c. 1, s. 5; 1937, c. 448, ss. 2, 3; 1939, c. 52, s. 1; 1941, c. 108, ss. 3, 4; 1943, c. 377, ss. 7, 8; 1945, c. 522, s. 29; 1947, c. 598, s. 10; c. 881, ss. 1, 2; 1949, c. 424, ss. 23-25.)

Editor's Note.—

The 1945 amendment added that part of the first paragraph of subsection (c) beginning with the words "and the" in line fourteen.

The 1947 amendment added provisions to subsections (a) and (b) which were struck out by the 1949 amendment, and substituted "and" for "or" in line three of subsection (g). The 1949 amendment also rewrote the second paragraph under subsection (c).

Where Labor Dispute Involves General Wage Increase.—Subsection (d) of this section disqualifies for unemployment compensation benefits employees belonging to a grade or class of workers some of whom participated in and were directly interested in the strike which brought about a stoppage of work, notwithstanding the fact that the employee-claimants were not members of the union and did not participate in, or help finance, the strike, especially where the strike involved, in addition to a maintenance of membership clause in the contract of employment, a general increase in wages, from which the employee-claimants stood to benefit. Unemployment Compensation Comm. v. Lunceford, 229 N. C. 570, 50 S. E. (2d) 497.

Employees Disqualified under Subsection (d) (2).—Employee-claimants who are not directly interested in the labor dispute which brings about the stoppage of work, and who do not participate in, help finance or benefit from the dispute, are nevertheless disqualified from unemployment compensation benefits if they belong to a grade or class of workers employed at the premises immediately before the commencement of the stoppage, some of whom, immediately before the stoppage occurs, participate in, finance or are directly interested in such labor dispute. State v. Martin, 228 N. C. 227, 45 S. E. (2d) 385.

§ 96-15. Claims for benefits. — (a) Filing. — Claims for benefits shall be made in accordance with such regulations as the commission may prescribe. Each employing unit shall post and maintain in places readily accessible to individuals performing services for it printed statements, concerning benefit rights, claims for benefits, and such other matters relating to the administration of this chapter as the commission may direct. Each employing unit shall supply to such individuals copies of such printed statements or other materials relating to claims for benefits as the commission may direct. Such printed statements and other materials shall be supplied by the commission to each employing unit without cost to the employing unit.

(e) Commission Review.—The commission may on its own motion affirm, modify, or set aside any decision of an appeals tribunal on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence, or may permit any of the parties to such decision to initiate further appeals before it, or may provide for group hearings in such cases as the commission may deem expedient. Provided, however, that upon denial by the commission of an application for appeal from the decision of an appeals tribunal, the decision of the appeals tribunal shall be deemed to be the decision of the commission within the meaning of this subsection for purposes of judicial review and shall be subject to judicial review within the time and in the manner provided for with respect to a decision of the commission, except that the time for initiating such review shall run from the date of mailing or delivery of the notice of the order of the commission denying the application for appeal. The commission shall permit such further appeal by any of the parties interested in the decision of an appeals tribunal which is not unanimous. The commission may remove to itself or transfer to another appeals tribunal, the proceedings on any claim pending before an appeals tribunal. Any proceedings so removed to the commission shall be heard by a quorum thereof in accordance with the requirements in subsection (c) of this section. The commission shall promptly notify the interested parties of its findings and decision.

(f) Procedure.—The manner in which disputed claims shall be presented, the reports thereon required from the claimant and from employers, and the conduct of hearings and appeals shall be in accordance with rules prescribed by the commission for determining the rights of the parties, whether or not such rules conform to common law or statutory rules of evidence and other technical rules of procedure. A full and complete record shall be kept of all proceedings in connection with a disputed claim. All testimony at any hearing before an appeals tribunal upon a disputed claim shall be recorded unless the recording is waived by all interested parties, but need not be transcribed unless the disputed claim is further appealed.

(1945, c. 522, ss. 30-32; 1947, c. 326, s. 23.)

Editor's Note.—

The 1945 amendment rewrote subsection (a), inserted in subsection (e) the proviso following the first sentence, and inserted in the last sentence of subsection (f) the words "before an appeals tribunal." The 1947 amendment inserted in the last sentence of subsection (f) the words "unless the recording is waived by all interested parties". Only the subsections affected by the amendment are set out.

Appeal to Superior Court.—Under subsection (a) of § 96-4 the chairman of the employment security commission is vested with all authority of the commission, and where it appears that a claim was heard on appeal by the chairman, and that claimant appealed therefrom "to the full commission or to the superior court," the hearing of the appeal by the superior court was in accordance with the statute. State v. Roberts, 230 N. C. 262, 52 S. E. (2d) 890.

Finding of Commission Held Conclusive on Appeal.—The finding of the unemployment compensation commission that employee-claimants belong to the same grade or class of workers as other employees, some of whom, immediately before the stoppage occurred, participated in and were directly interested in the labor dispute causing the stoppage, was supported by ample evidence and was therefore conclusive, there being no allegation or evidence of fraud. State v. Martin, 228 N. C. 277, 45 S. E. (2d) 385.

§ 96-16. Seasonal pursuits.—(a) A seasonal pursuit is one which, because of seasonal conditions making it impracticable or impossible to do otherwise, customarily carries on production operations only within a regularly recurring active period or periods of less than an aggregate of thirty-six weeks in a calendar year. No pursuit shall be deemed seasonal unless and until so found by the commission.

(b) Upon application therefor by a pursuit, the commission shall determine or redetermine whether such pursuit is seasonal and, if seasonal, the active period or periods thereof. The commission may, on its own motion, redetermine the active period or periods of a seasonal pursuit. An application for a seasonal determination must be made on forms prescribed by the commission and must be made at least twenty days prior to the beginning date of the period of production operations for which a determination is requested.

(c) Whenever the commission has determined or redetermined a pursuit to be seasonal, such

pursuit shall be notified immediately, and such notice shall contain the beginning and ending dates of the pursuit's active period or periods. Such pursuits shall display notices of its seasonal determination conspicuously on its premises in a sufficient number of places to be available for inspection by its workers. Such notices shall be furnished by the commission.

(d) A seasonal determination shall become effective unless an interested party files an application for review within ten days after the beginning date of the first period of production operations to which it applies. Such an application for review shall be deemed to be an application for a determination of status, as provided in § 96-4, subsections (m) through (q), of this chapter, and shall be heard and determined in accordance with the provisions thereof.

(e) All wages paid to a seasonal worker during his base period shall be used in determining his weekly benefit amount.

(f) (1) A seasonal worker shall be eligible to receive benefits based on seasonal wages only for a week of unemployment which occurs, or the greater part of which occurs within the active period or periods of the seasonal pursuit or pursuits in which he earned base period wages.

(2) A seasonal worker shall be eligible to receive benefits based on nonseasonal wages only for a week of unemployment which occurs, or the greater part of which occurs within the inactive period or periods of the seasonal pursuit or pursuits in which he earned base period wages.

(3) The maximum amount of benefits which a seasonal worker shall be eligible to receive based on seasonal wages shall be an amount, adjusted to the nearest multiple of fifty cents (50c.), determined by multiplying the maximum benefits payable in his benefit year, as provided in § 96-12 (d) of this chapter, by the percentage obtained by dividing the seasonal wages in his base period by all of his base period wages.

(4) The maximum amount of benefits which a seasonal worker shall be eligible to receive based on nonseasonal wages shall be an amount, adjusted to the nearest multiple of fifty cents (50c.), determined by multiplying the maximum benefits payable in his benefit year, as provided in § 96-12 (d) of this chapter, by the percentage obtained by dividing the nonseasonal wages in his base period by all of his base period wages.

(5) In no case shall a seasonal worker be eligible to receive a total amount of benefits in a benefit year in excess of the maximum benefits payable for such benefit year, as provided in § 96-12 (d) of this chapter.

(g) (1) All benefits paid to a seasonal worker based on seasonal wages shall be charged, as prescribed in § 96-9 (c) (2) of this chapter, against the reserve account of his base period employer or employers who paid him such seasonal wages, and for the purpose of this paragraph such seasonal wages shall be deemed to constitute all of his base period wages.

(2) All benefits paid to a seasonal worker based on nonseasonal wages shall be charged, as prescribed in § 96-9 (c) (2) of this chapter, against the reserve account of his base period employer or employers who paid him such nonseasonal wages, and for the purpose of this paragraph such nonseasonal wages shall be deemed to constitute all of his base period wages.

(h) The benefits payable to any otherwise eligible individual shall be calculated in accordance with this section for any benefit year which is established on or after the beginning date of a seasonal determination applying to a pursuit by which such individual was employed during the base period applicable to such benefit year, as if such determination had been effective in such base period.

(i) Nothing in this section shall be construed to limit the right of any individual whose claim for benefits is determined in accordance herewith to appeal from such determination as provided in § 96-15 of this chapter.

(j) As used in this section:

(1) "Pursuit" means an employer or branch of an employer.

(2) "Branch of an employer" means a part of an employer's activities which is carried on or is capable of being carried on as a separate enterprise.

(3) "Production operations" mean all the activities of a pursuit which are primarily related to the production of its characteristic goods or services.

(4) "Active period or periods" of a seasonal pursuit means the longest regularly recurring period or periods within which production operations of the pursuit are customarily carried on.

(5) "Seasonal wages" mean the wages earned in a seasonal pursuit within its active period or periods. The commission may prescribe by regulation the manner in which seasonal wages shall be reported.

(6) "Seasonal worker" means a worker at least twenty-five per cent of whose base period wages are seasonal wages.

(7) "Interested party" means any individual affected by a seasonal determination.

(8) "Inactive period or periods" of a seasonal pursuit means that part of a calendar year which is not included in the active period or periods of such pursuit.

(9) "Nonseasonal wages" means the wages earned in a seasonal pursuit within the inactive period or periods of such pursuit, or wages earned at any time in a nonseasonal pursuit.

(10) "Wages" mean remuneration for employment. (1939, c. 28; 1941, c. 108, s. 7; 1943, c. 377, s. 14½; 1945, c. 522, s. 33.)

The 1945 amendment rewrote this section.

§ 96-18. Penalties.

(b) Any employing unit or any officer or agent of an employing unit or any other person who makes a false statement or representation, knowing it to be false, or who knowingly fails to disclose a material fact to prevent or reduce the payment of benefits to any individual entitled thereto, or to avoid becoming or remaining subject hereto or to avoid or reduce any contributions or other payment required from an employing unit under this chapter, or who wilfully fails or refuses to furnish any reports required hereunder, or to produce or permit the inspection or copying of records as required hereunder, shall be punished by a fine of not less than twenty dollars ($20.00) or more than fifty dollars ($50.00) or by imprisonment for not longer than thirty

days; and each such false statement or representation or failure to disclose a material fact, and each day of such failure or refusal shall constitute a separate offense.

(c) Any person who shall wilfully violate any provisions of this chapter or any rule or regulation thereunder, the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or for which a penalty is neither prescribed herein nor provided by any other applicable statute, shall be punished by a fine of not less than twenty dollars ($20.00) or more than fifty dollars ($50.00) or by imprisonment for not longer than thirty days, and each day such violation continues shall be deemed to be a separate offense.

(f) Any individual discharged for larceny or embezzlement in connection with his employment, if such individual is convicted thereof in a court of competent jurisdiction, or if the commission finds that he has made a voluntary confession of guilt, shall not be entitled to receive any benefits based on wages earned by such individual prior to and including the quarter within which such discharge occurred; provided the provisions of this subsection shall not be effective as to any benefits accrued or paid under a claim filed by such individual prior to the date of such discharge. (Ex. Sess. 1936, c. 1, s. 16; 1943, c. 319; 1943, c. 377, ss. 29, 30; 1945, c. 552, s. 34; 1949, c. 424, s. 26.)

Editor's Note.—
The 1945 amendment made changes in subsections (b) and (c), and the 1949 amendment made changes in subsection (f). As the other subsections were not affected by the amendments they are not set out.

§ 96-19. Enforcement of employment security law discontinued upon repeal or invalidation of federal acts.—It is the purpose of this chapter to secure for employers and employees the benefits of Title III and Title IX of the Federal Social Security Act, approved August fourteenth, one thousand nine hundred thirty-five, as to credit on payment of federal taxes, of state contributions, the receipt of federal grants for administrative purposes, and all other provisions of the said Federal Social Security Act; and it is intended as a policy of the state that this chapter and its requirements for contributions by employers shall continue in force only so long as such employers are required to pay the federal taxes imposed in said Federal Social Security Act by a valid act of congress. Therefore, if Title III and Title IX of the said Federal Social Security Act shall be declared invalid by the United States supreme court, or if such law be repealed by congressional action so that the federal tax cannot be further levied, from and after the declaration of such invalidity by the United States supreme court, or the repeal of said law by congressional action, as the case may be, no further levy or collection of contributions shall be made hereunder. The enactment by the Congress of the United States of the Railroad Retirement Act and the Railroad Unemployment Insurance Act shall in no way affect the administration of this law except as herein expressly provided.

All federal grants and all contributions heretofore collected, and all funds in the treasury by virtue of this chapter, shall, nevertheless, be disbursed and expended, as far as may be possible, under the terms of this chapter: Provided, however, that contributions already due from any employer shall be collected and paid into the said fund, subject to such distribution; and provided further, that the personnel of the state employment security commission shall be reduced as rapidly as possible.

The funds remaining available for use by the North Carolina Employment Security Commission shall be expended, as necessary, in making payment of all such awards as have been made and are fully approved at the date aforesaid, and the payment of the necessary costs for the further administration of this chapter, and the final settlement of all affairs connected with same. After complete payment of all administrative costs and full payment of all awards made as aforesaid, any and all moneys remaining to the credit of any employer shall be refunded to such employer, or his duly authorized assignee: Provided, that the state employment service, created by chapter one hundred six, Public Laws of one thousand nine hundred thirty-five, and transferred by chapter one, Public Laws of one thousand nine hundred thirty-six, Extra Session, and made a part of the Employment Security Commission of North Carolina, shall in such event return to and have the same status as it had prior to enactment of chapter one, Public Laws of one thousand nine hundred thirty-six, Extra Session, and under authority of chapter one hundred six, Public Laws of one thousand nine hundred thirty-five, shall carry on the duties therein prescribed; but, pending a final settlement of the affairs of the Employment Security Commission of North Carolina, the said state employment service shall render such service in connection therewith as shall be demanded or required under the provisions of this chapter or the provisions of chapter one, Public Laws of one thousand nine hundred thirty-six, Extra Session. (1937, c. 363; 1939, c. 52, s. 8; 1947, c. 598, s. 1.)

Editor's Note.—The 1947 amendment substituted "Employment Security Commission" for "unemployment compensation commission".

Art. 3. Employment Service Division.

§ 96-20. Duties of division; conformance to Wagner-Peyser Act; organization; director; employees.—The employment service division of the Employment Security Commission shall establish and maintain free public employment offices in such number and in such places as may be necessary for the proper administration of this chapter, and for the purpose of performing such duties as are within the purview of the Act of Congress entitled "An act to provide for the establishment of a national employment system and for cooperation with the states in the promotion of such system and for other purposes," approved June 6th, 1933, (48 Stat., 113; U.S.C., Title 29, § 49 (c), as amended). The said division shall be administered by a full time salaried director. The Employment Security Commission shall be charged with the duty to cooperate with any official or agency of the United States having powers or duties under the provisions of the said Act of Congress, as amended, and to do and perform all things necessary to secure to this state

the benefits of the said Act of Congress, as amended, in the promotion and maintenance of a system of public employment offices. The provisions of the said Act of Congress, as amended, are hereby accepted by this state, in conformity with § 4 of said Act, and this state will observe and comply with the requirements thereof. The Employment Security Commission is hereby designated and constituted the agency of this state for the purpose of said Act. The commission is directed to appoint the director, other officers, and employees of the employment service division. (Ex. Sess. 1936, c. 1, s. 12; 1941, c. 108, s. 11; 1947, c. 326, s. 24.)

Editor's Note.—The 1947 amendment rewrote this section.

§ 96-23. Job placement; information; research and reports.—The employment service division shall make public, through the newspapers and other media, information as to situations it may have applicants to fill, and establish relations with employers for the purpose of supplying demands for labor. The division shall collect, collate, and publish statistical and other information relating to the work under its jurisdiction; investigate economic developments, and the extent and causes of unemployment and remedies therefor within and without the state, with the view of preparing for the information of the general assembly such facts as in its opinion may make further legislation desirable. All information obtained by the North Carolina state employment service division from workers, employers, applicants, or other persons, or groups of persons in the course of administering the state public employment service program shall be absolute privileged communications and shall not be disclosed directly or indirectly except as by regulations prescribed by the commission. (1921, c. 131, s. 5; Ex. Sess. 1936, c. 1, s. 12; 1947, c. 326, s. 25; C. S. 7312(e).)

Editor's Note.—The 1947 amendment added the last sentence to this section.

§ 96-27. Method of handling employment service funds.—All federal funds received by this state under the Wagner-Peyser Act (48 Stat. 113; Title 29, U. S. C., § 49) as amended, and all state funds appropriated or made available to the employment service division shall be paid into the employment security administration fund, and said moneys are hereby made available to the state employment service to be expended as provided in this article and by said act of Congress. For the purpose of establishing and maintaining free public employment offices, said division is authorized to enter into agreements with any political subdivision of this state or with any private, nonprofit organization, and as a part of any such agreement the commission may accept moneys, services, or quarters as a contribution to the employment security administration fund. (1935, c. 106, s. 7; Ex. Sess. 1936, c. 1, s. 12; 1941, c. 108, s. 11; 1947, c. 598, s. 1.)

Editor's Note.—
The 1947 amendment substituted at the end of the section "employment security administration fund" for "unemployment compensation administration fund."

§ 96-28. Annual appropriation.—There is hereby appropriated to the Employment Security Commission seventy-five thousand dollars annually, for the purpose of paying the state's contribution towards the expenses of the employment service division. (Ex. Sess. 1936, c. 1, s. 13; 1941, c. 108, s. 12; 1947, c. 598, s. 1.)

Editor's Note.—The 1947 amendment substituted "Employment Security Commission" for "unemployment compensation commission."

Chapter 97. Workmen's Compensation Act.

Art. 1. Workmen's Compensation Act.

Art. 2. Compensation Rating and Inspection Bureau.

Art. 1. Workmen's Compensation Act.

§ 97-1. Official title.

Purpose.—The primary purpose of legislation of this kind is to compel industry to take care of its own wreckage. Barber v. Minges, 223 N. C. 213, 216, 25 S. E. (2d) 837.

The general purpose of the Workmen's Compensation Act, in respect to compensation for disability, is to substitute, for common law or statutory rights of action and grounds of liability, a system of money payments by way of financial relief for loss of capacity to earn wages. There is no compensation provided for physical pain or discomfort. Branham v. Denny Roll, etc., Co., 223 N. C. 233, 25 S. E. (2d) 865.

Application. — The Workmen's Compensation Act deals with the incidents and risks of the contract of employment, in which is included the negligence of the employer in that relation. It has no application outside the field of industrial accident; and does not intend, by its general terms, to take away common law or other rights which pertain to the parties as members of the general public, disconnected from the employment. Barber v. Minges, 223 N. C. 213, 25 S. E. (2d) 837.

Cited in Dark v. Johnson, 225 N. C. 651, 36 S. E. (2d) 237.

§ 97-2. Definitions.—When used in this article, unless the context otherwise requires—

(a) Employment.—The term "employment" includes employment by the State and all political subdivisions thereof, and all public and quasi-public corporations therein and all private employments in which five or more employees are regularly employed in the same business or establishment, except agriculture and domestic services, and an individual sawmill and logging operator with less than ten (10) employees, who saws and logs less than sixty (60) days in any six consecutive months and whose principal business is unrelated to sawmilling or logging.

(b) Employee.—The term "employee" means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also minors, whether lawfully or unlawfully employed, but excluding persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer, and as relating to those so employed by the state, the term "employee" shall include all officers and employees of the state, except only such as are elected by the people, or by the general assembly, or appointed by the governor, either with or without the confirmation of the senate; as relating to municipal corporations and political subdivisions of the state, the term "employee" shall include all officers and employees thereof, except such as are elected by the people or elected by the council or other governing body of said municipal corporation or political subdivision, who act in purely administrative capacities, and to serve for a definite term of office. The term "employee" shall include members of the North Carolina National Guard, except when called into the service of the United States, and members of the North Carolina State Guard, and members of these organizations shall be entitled to compensation for injuries arising out of and in the course of the performance of their duties at drill, in camp, or on special duty under orders of the governor. The term "employee" shall include deputy sheriffs and all persons acting in the capacity of deputy sheriffs, whether appointed by the sheriff or by the governing body of the county and whether serving on a fee basis or on a salary basis, or whether deputy sheriffs serving upon a full time basis or a part time basis, and including deputy sheriffs appointed to serve in an emergency, but as to those so appointed, only during the continuation of the emergency. The sheriff shall furnish to the board of county commissioners a complete list of all deputy sheriffs named or appointed by him immediately after their appointment, and notify the board of commissioners of any changes made therein promptly after such changes are made. Any reference to an employee who has been injured shall, when the employee is dead, include also his legal representative, dependents, and other persons to whom compensation may be payable: Provided, that the third and fourth sentences herein shall not apply to Pender, Cherokee, Avery, Perquimans, Gates, Macon, Watauga, Ashe, Union, Wilkes, Hyde, Caswell, Bladen and Carteret Counties: Provided, further, that any employee as herein defined of a municipality, county, or of the state of North Carolina while engaged in the discharge of his official duty outside the jurisdictional or territorial limits of the municipality, county, or the state of North Carolina and while acting pursuant to authorization or instruction from any superior officer, shall have the same rights under this article as if such duty or activity were performed within the territorial boundary limits of his employer.

(e) Average Weekly Wages.—"Average weekly wages" shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two weeks immediately preceding the date of the injury, including the subsistence allowance paid to veteran trainees by the United States government, provided the amount of said allowance shall be reported monthly by said trainee to his employer, divided by fifty-two; but if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such fifty-two weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. Where the employment prior to the injury extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained. Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the fifty-two weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.

But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

Wherever allowances of any character made to an employee in lieu of wages are specified part of the wage contract they shall be deemed a part of his earnings.

Where a minor employee, under the age of twenty-one years, sustains a permanent disability or dies, the compensation payable for permanent disability or death shall be calculated, first, upon the average weekly wage paid to adult employees employed by the same employer at the time of the accident in a similar or like class of work which the injured minor employee would probably have been promoted to if not injured, or, second, upon such other method as may be used to compute the average weekly wage as will most nearly approximate the amount which the injured employee would be earning as an adult if it were not for the accident. Compensation for temporary total disability shall be computed upon the average weekly wage at the time of the accident, unless the total disability extends more than fifty-two weeks and then the compensation may be increased in proportion to his expected earnings.

(1945, c. 766; 1947, c. 698; 1949, c. 399.)

Editor's Note.—

The 1945 amendment rewrote the latter part of subsection (a) relating to sawmilling and logging, and added the fourth paragraph of subsection (e). The 1947 amendment inserted in subsection (e), beginning in line six thereof, the provision as to subsistence allowance paid to veteran trainees. The 1949 amendment added the last proviso to subsection (b). As the other subsections were not affected by the amendments they are not set out.

For a brief comment on the 1949 amendment, see 27 N. C. Law Rev. 495.

Subsection (a) of This Section Modified by § 97-19.—As a general proposition the only private employments covered by the Workmen's Compensation Act are those "in which

five or more employees are regularly employed in the same business or establishment." But this general rule is subject to the exception created by § 97-19, which was manifestly enacted to protect the employees of financially irresponsible sub-contractors who do not carry workmen's compensation insurance, and to prevent principal contractors, immediate contractors, and sub-contractors from relieving themselves of liability under the Act by doing through subcontractors what they would otherwise do through the agency of direct employees. Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668.

As to Secondary Liability of Contractor to Employees of Sub-contractor.—Where a contractor sublets a part of the contract to a sub-contractor without requiring from the subcontractor certificate that he had procured compensation insurance or had satisfied the industrial commission of his financial responsibility as a self-insurer under § 97-93, such contractor is properly held secondarily liable for compensation to an employee of the sub-contractor, even though the contractor regularly employs less than five employees. Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668.

Evidence Sufficient to Show Five or More Persons Regularly Employed.—Evidence tending to show that the employer regularly employed three persons in his general mercantile business and that for more than two months prior to the accident in suit he had employed two other persons at stated weekly wages to deliver fertilizers by truck in the operation of his mercantile business, supports the finding of the industrial commission that the employer had five or more persons regularly employed in his business and that he was therefore subject to the Workmen's Compensation Act. Hunter v. Peirson, 229 N. C. 356, 49 S. E. (2d) 653.

One who seeks to avail himself of the Workmen's Compensation Act must come within its terms and must be held to proof that he is in a class embraced in the act. Hayes v. Board of Trustees, 224 N. C. 11, 29 S. E. (2d) 137.

Employees and Independent Contractors.—Generally independent contractor is one who exercises independent employment and contracts to do a piece of work according to his own judgment and method, without being subject to his employer except as to the results of his work. Smith v. Southern Waste Paper Co., 226 N. C. 47, 36 S. E. (2d) 730, 731.

Where evidence tended to show that deceased, a machinist, contracted to construct a conveyor from materials furnished by defendant and in accordance with his rough sketch, hourly wage being basis of pay, and parties appeared to have treated contract as one of employment, such evidence was sufficient to sustain finding of commission that deceased was employee and not independent contractor. Id.

The evidence tended to show that deceased was a licensed contract hauler, and was engaged to haul sand, gravel and concrete from the defendant's bins to defendant's concrete mixer along a route selected by defendant, but that defendant had no control over the number of hours deceased worked or whether deceased drove his own truck or employed a driver, and that deceased paid for his own gas and oil and made his own repairs to his truck. Deceased was paid a stipulated sum per load and was also paid the hourly wage of truck drivers employed by defendant for that time lost waiting in line when the concrete mixer broke down. Deceased was killed when struck by a train at a grade crossing while hauling for defendant on the route selected. It was held that, upon the evidence, deceased was an independent contractor and not an employee within the meaning of this section and the judgment of the superior court affirming the award of compensation by the industrial commission, was reversed. Perley v. Ballenger Paving Co., 228 N. C. 479, 46 S. E. (2d) 298.

Evidence held sufficient to support finding of industrial commission that intestate was an employee within the coverage of the Workmen's Compensation Act and not an independent contractor. Cooper v. Colonial Ice Co., 230 N. C. 43, 51 S. E. (2d) 889.

The distinction between an independent contractor and an employee entitled to benefits under the Workmen's Compensation Act has frequently been considered by the supreme court and applied to the particular circumstances of individual cases. Cooper v. Colonial Ice Co., 230 N. C. 43, 51 S. E. (2d) 889, citing Perley v. Ballenger Paving Co., 228 N. C. 479, 46 S. E. (2d) 298; Bell v. Williamston Lbr. Co., 227 N. C. 173, 41 S. E. (2d) 281; Creighton v. Snipes, 227 N. C. 90, 40 S. E. (2d) 612; Smith v. Southern Waste Paper Co., 226 N. C. 47, 36 S. E. (2d) 730; Hayes v. Board of Trustees of Elon College, 224 N. C. 11, 29 S. E. (2d) 137; Beach v. McLean, 219 N. C. 521, 14 S. E. (2d) 515; Creswell v. Charlotte News Pub. Co., 204 N. C. 380, 168 S. E. 408; Johnson v. Asheville Hosiery Co., 199 N. C. 38, 153 S. E. 591.

The threefold conditions antecedent to the right to compensation under the North Carolina Workmen's Compensation Act are, namely: (1) That claimant suffered a personal injury by accident; (2) that such injury arose in the course of the employment; and (3) that such injury arose out of the employment. Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668.

An injury compensable under the Workmen's Compensation Act must be the result of an accident which arises out of and in the course of the employment. Taylor v. Wake Forest, 228 N. C. 346, 45 S. E. (2d) 387.

Injury Arising out of and in the Course of Employment.—

In accord with 4th paragraph in original. See Brown v. Carolina Aluminum Co., 224 N. C. 766, 32 S. E. (2d) 320; Taylor v. Wake Forest, 228 N. C. 346, 45 S. E. (2d) 387; Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668.

As to note on accidents arising out of and in the course of employment of traveling employees, see 23 N. C. Law Rev. 159.

An injury "arises out of" the employment when it occurs in the course of the employment and is a natural and probable consequence or incident of it, so that there is some causal relation between the accident and the performance of some service of the employment. Rewis v. New York Life Ins. Co., 226 N. C. 325, 38 S. E. (2d) 97.

An injury is one "arising out of the employment" within the purview of the Workmen's Compensation Act, when it occurs in the course of the employment and is a natural or probable consequence or incident of it. Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668.

"Arising out of" has been defined to mean coming from the work the employee is to do, or out of the services he is to perform, and as a natural result of one of the risks of the employment. The injury must spring from the employment or have its origin therein. Bolling v. Belkwhite Co., 228 N. C. 749, 46 S. E. (2d) 838.

The accident "arises out of" the employment when it occurs in the course of the employment and is the result of a risk involved therein or incident thereto, or to the conditions under which it is required to be performed. There must be some causal connection between the employment and the injury. Id.

The term "arising out of the employment" within the meaning of the Workmen's Compensation Act refers to the origin or cause of the accident, and while it must be interpreted in the light of the facts and circumstances of each case and may not be precisely defined, there must be some causal connection between the injury and the employment. Taylor v. Wake Forest, 228 N. C. 346, 45 S. E. (2d) 387.

The test for determining whether an accidental injury arises out of an employment is this: "There must be some causal relation between the employment and the injury; but if the injury is one which, after the event, may be seen to have had its origin in the employment, it need not be shown that it is one which ought to have been foreseen or expected." Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668.

The finding that the claimant's injury arose in the course of the employment was required by the evidence that it occurred during the hours of the employment and at the place of the employment while the claimant was actually engaged in the performance of the duties of the employment. Id.

Where there was friction and enmity between two employees, growing out of criticism of the work of one of them by the other and complaint thereof to the employer, and the employee, whose work was criticised, assaulted his fellow worker from anger and revenge over such criticism, which resulted in the death of the one assaulted, such death occurred from an accident in the course of the employment. Hegler v. Cannon Mills Co., 224 N. C. 669, 31 S. E. (2d) 918.

Where a workmen is injured by a fellow employee because of a dispute about the manner of doing the work he is employed to do, the accident to the injured workman grows out of the employment and is compensable. Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668.

Where the evidence discloses that the two employees had no personal contacts outside of the employment, and there was evidence that the dispute between them arose over the work they were performing for their common employer, the evidence was sufficient to sustain the finding by the industrial commission that an assault made by the one upon the other arose out of the employment. Id.

The fact that deceased was not actually engaged in the performance of his duties as watchman, at the time he was pushed over and injured unintentionally by a fellow employee in a hurry, does not perforce defeat his claim for compensation under this act where both employees had checked in for work, were on the premises and where they

had a right to be. Brown v. Carolina Aluminum Co., 224 N. C. 766, 32 S. E. (2d) 320.

Determination of the industrial commission that employee's death resulting from heat exhaustion or sunstroke was an injury which arose out of and in course of employment, was held supported by the evidence, where evidence showed that the general outside temperature was 104° Fahrenheit and employee's work required that he be in close proximity to melted lead which increased the temperature in the partly finished building where employee was working on day of his death. Fields v. Tompkins-Johnston Plumbing Co., 224 N. C. 841, 32 S. E. (2d) 623.

Where the employment subjects a workman to a special or particular hazard from the elements, such as excessive heat or cold, likely to produce sunstroke or freezing, death or disability resulting from such cause usually comes within the purview of the compensation acts. On the other hand, where the employee is not by reason of his work peculiarly exposed to injury by sunstroke or freezing, such injuries are not ordinarily compensable. The test is whether the employment subjects the workman to a greater hazard or risk than that to which he otherwise would be exposed. Fields v. Tompkins-Johnston Plumbing Co., 224 N. C. 841, 32 S. E. (2d) 623.

Employee Need Not Be in Exact Spot Designated by Employer.—The Workmen's Compensation Act must be liberally construed, and the term "out of the employment" will not preclude recovery for an accident occurring while an employee is not in the exact spot designated by the employer if the employee is at the place he is required to be in the performance of his duties. Howell v. Standard Ice, etc., Co., 226 N. C. 730, 40 S. E. (2d) 197.

Acts which are necessary to the health and comfort of an employee while at work, though personal to himself and not technically acts of service, such as visits to the washroom, are incidental to the employment. Rewis v. New York Life Ins. Co., 226 N. C. 325, 38 S. E. (2d) 97.

Evidence tending to show that the employee was suffering from a disease which weakened him and subjected him to frequent fainting spells, that during the course of his employment he went to the men's washroom, and while there felt faint, and in seeking fresh air, went to the open window, slipped on the tile floor, and fell through the window to his death, held sufficient to support the finding of the industrial commission that his death was the result of an accident arising out of and in the course of his employment. Id.

Voluntarily Helping Another Employee.—Claimant was employed as a lumber-piler and was instructed to stay away from the saws, but there was evidence that on the day of his injury he was instructed to leave his regular job and to perform some work in the vicinity of one of the saws, and that while waiting at the place designated he started to assist another employee, in the absence of the regular sawyer, in cutting off a board, and suffered an injury when his hand came in contact with the saw. Two men were usually required to operate the saw. The court held the evidence was sufficient to sustain the finding of the industrial commission that the injury arose out of and in the course of his employment. Riddick v. Richmond Cedar Works, 227 N. C. 647, 43 S. E. (2d) 850.

Injury to Policeman Pursuing Offender Beyond Jurisdiction.—

Note the effect of the 1949 amendment to subsection (b) of this section.

Evidence tending to show that deceased employee, a township constable, was also employed by a municipality of the township to maintain order in its business district during certain hours of the night, and that prior to the hours of his employment by the town, a policeman of the municipality, who knew he was a constable but did not know of his employment by the town, requested him to go with him on a call outside the limits of the town, and that there he was fatally injured in attempting to make an arrest, was held to show that the fatal injury did not arise in the course of his employment by the municipality. Taylor v. Wake Forest, 228 N. C. 346, 45 S. E. (2d) 387.

Evidence tending to show that deceased came to his death as a result of a pistol wound while at a place where he had a right to be in the course of his employment, without evidence that he was authorized to keep a pistol or use it in the business of the employer, is insufficient to support an award of compensation on the ground that in the absence of a showing of suicide it will be presumed that the death resulted from an accident, since, even so, there is neither presumption nor evidence to support the necessary basis for compensation that the accident arose out of the employment. Bolling v. Belkwhite Co., 228 N. C. 749, 46 S. E. (2d) 838.

Hernia.—

The evidence tended to show that employee lifted a plate weighing 40 or 50 pounds in the regular and usual course of his employment, and while handing it to the pressman with his body in a twisted position, felt a sharp pain. Expert testimony was introduced to the effect that the employee had ruptured an inter-vertebral disc and that the lifting of the weight in the manner described was sufficient to have produced the injury. Plaintiff employee admitted that on two different occasions, several years previously, when he arose from a sitting position he had a catch in his back. It was held that the evidence is sufficient to support the finding of the industrial commission that the injury resulted from an accident. Edwards v. Piedmont Pub. Co., 227 N. C. 184, 41 S. E. (2d) 592.

Ordinarily, heart disease is not an injury and death therefrom is not ordinarily compensable. West v. North Carolina Dept. of Conservation and Development, 229 N. C. 232, 49 S. E. (2d) 398.

Dilatation of the Heart Due to Unusual Exertion.—A policeman fifty-six years of age who was in good health and without any physical defect or disease, arrested a young man who, because of intoxication, violently and viciously resisted, and after the officer subdued him and transported him to the jail, the officer and another had to carry the prisoner up three flights of stairs because the elevator was out of order. The officer collapsed with acute dilatation of the heart due to the unusual exertion. This injury to the heart muscle was chronic and progressive and the policeman suffered a fatal heart attack some ten months thereafter. It was held that the evidence warranted the conclusion that the injury to the heart resulted not from inherent weakness or disease but from an unusual and unexpected happening, and that therefore death resulted from an accident within the meaning of this section. Gabriel v. Newton, 227 N. C. 314, 42 S. E. (2d) 96.

As to falls due to dizziness, vertigo, epilepsy and like causes as compensable accidents, see 26 N. C. Law Rev. 320.

Casual Employment.—

Employment continuously for five or six weeks in construction of facilities for defendant's plant may not be held to be either casual or not in the course of defendant's business. Smith v. Southern Waste Paper Co., 226 N. C. 47, 36 S. E. (2d) 730.

The evidence tended to show that the defendant operated a general mercantile business, which included the selling and delivery of commercial fertilizers, and that plaintiffs' intestates had been working for a period of more than two months at stated weekly wages in delivering the fertilizers by truck when they met with fatal accident arising out of and in the course of their employment. It was held that decedents were not casual employees, and further, the injury arose within the scope of the employer's regular business, and therefore they were employees of defendant within the coverage of the Workmen's Compensation Act. Hunter v. Peirson, 229 N. C. 356, 49 S. E. (2d) 653.

An accident.—

In accord with 1st paragraph in original. See Brown v. Carolina Aluminum Co., 224 N. C. 766, 32 S. E. (2d) 320; Gabriel v. Newton, 227 N. C. 314, 42 S. E. (2d) 96.

The word "accident" as used in this act is an unlooked for and untoward event which is not expected or designed by the injured employee. Edwards v. Piedmont Pub. Co., 227 N. C. 184, 41 S. E. (2d) 592.

An assault is an "accident" within the meaning of the Workmen's Compensation Act, when from the point of view of the workman who suffers from it it is unexpected and without design on his part, although intentionally caused by another. Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668.

Deputy Sheriff as Employee.—

The 1939 amendment including deputy sheriffs within the meaning of the term "employee" as used in this section is not violative of art. I, § 7 or art. II, § 29 of the constitution. Towe v. Yancey County, 224 N. C. 579, 31 S. E. (2d) 754.

"Employee."—Except as to public officers the definition of "employee" contained in this section adds nothing to the common law meaning of the term. Nor does it encroach upon or limit the common law meaning of "independent contractor." These terms must be given their natural and ordinary meaning in their accepted legal sense. Hayes v. Board of Trustees, 224 N. C. 11, 29 S. E. (2d) 137.

Disability, under the Workmen's Compensation Act, is measured by the capacity or incapacity of the employee to earn the wages he was receiving at the time of the injury, by the same or any other employment. And the fact that the same wages are paid by the employer, because of long service, does not alter the rule. Branham v. Denny Roll, etc., Co., 223 N. C. 233, 25 S. E. (2d) 865.

There is no "disability" if the employee is receiving the same wages in the same or any other employment. That "in the same" employment he is not required to perform all the physical work theretofore required of him can make no difference. Even so, if this be not "the same employment" then it clearly comes within the term "other employment." To remove the employment from one classification necessarily shifts it to the other. Furthermore, there is no language used in this section or in any other part of the statute which even suggests that "other employment" must be with a different employer. Branham v. Denny Roll, etc., Co., 223 N. C. 233, 237, 25 S. E. (2d) 865.

Attending a good will picnic at the invitation of the employer was held not to invoke the relation of the master and servant where the employee did no work and was not paid for attendance, nor penalized for nonattendance, nor ordered to go. Barger v. Minges, 223 N. C. 213, 25 S. E. (2d) 837.

Payment of medical or hospital expenses constitutes no part of compensation to an employee or his dependents under the provisions of our Workmen's Compensation Act. Whitted v. Palmer-Bee Co., 228 N. C. 447, 46 S. E. (2d) 109.

Review of Decision.—

Where the evidence is such that several inferences appear equally plausible, the finding of the industrial commission is conclusive on appeal, and courts are not at liberty to reweigh the evidence and set aside the finding simply because other conclusions might have been reached. Rewis v. New York Life Ins. Co., 226 N. C. 325, 38 S. E. (2d) 97.

Cited in Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797; Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504.

§ 97-3. Presumption that all employers and employees have come under provisions of chapter.

Applied in Ward v. Bowles, 228 N. C. 273, 45 S. E. (2d) 354.

Stated in Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504.

§ 97-4. Notice of nonacceptance and waiver of exemption.—Either an employer or an employee, who has exempted himself by proper notice from the operation of this article, may at any time waive such exemption, and thereby accept the provisions of this article by giving notice as herein provided.

The notice of nonacceptance of the provisions of this article shall be given thirty days prior to any accident resulting in injury or death: Provided, that if any such accident occurred less than thirty days after the date of employment, notice of such exemption or acceptance given at the time of employment shall be sufficient notice thereof. An employee may waive notice of nonacceptance by giving five days notice in the manner provided for nonacceptance. The notice shall be in writing or print, in substantially the form prescribed by the Industrial Commission, and shall be given by the employer by posting the same in a conspicuous place in the shop, plant, office, room, or place where the employee is employed, or by serving it personally upon him; and shall be given by the employee by sending the same in registered letter, addressed to the employer at his last known residence or place of business, or by giving it personally to the employer or any of his agents upon whom a summons in civil action may be served under the laws of the state. A copy of the notice in prescribed form shall also be filed with the Industrial Commission.

In any suit by an employer or an employee who has exempted himself by proper notice from the application of this article, a copy of such notice duly certified by the Industrial Commission shall be admissible in evidence as proof of such exemption. (1929, c. 120, s. 5; 1945, c. 766.)

Editor's Note.—The 1945 amendment struck out the words "and notice of waiver of exemption heretofore referred to" formerly appearing after the word "article" in line two of the second paragraph. It also inserted the second sentence of the paragraph.

Cited in Ward v. Bowles, 228 N. C. 273, 45 S. E. (2d) 354.

§ 97-6. No special contract can relieve an employer of obligations.

Applied in Brown v. Bottoms Truck Lines, 227 N. C. 299, 42 S. E. (2d) 71.

Stated in Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504.

§ 97-7. State or subdivision and employees thereof.—Neither the State nor any municipal corporation within the State, nor any political subdivision thereof, nor any employee of the State or of any such corporation or subdivision, shall have the right to reject the provisions of this article relative to payment and acceptance of compensation, and the provisions of §§ 97-4, 97-5, 97-14, 97-15, and 97-16 shall not apply to them: Provided, that all counties are hereby authorized to self-insure or purchase insurance to secure its liability under this article and to include thereunder the liability of such subordinate governmental agencies as the county board of health, the school board, and other political and quasi-political subdivisions supported in whole or in part by the county, and to appropriate an amount sufficient for this purpose and levy a special tax if a special tax is necessary to pay the costs of same. (1929, c. 120, s. 8; 1931, c. 274, s. 1; 1945, c. 766.)

Editor's Note.—

The 1945 amendment rewrote the part of the section beginning with "Provided" in line nine.

§ 97-9. Employer to secure payment of compensation.

Cited in Barber v. Minges, 223 N. C. 213, 25 S. E. (2d) 837 (dis. op.).

§ 97-10. Other rights and remedies against employer excluded; employer or insurer may sue third party tort-feasors; attorney's fees; subrogation; amount of compensation as evidence; minors illegally employed.

Editor's Note.—

For comment on the 1943 amendment, see 21 N. C. Law Rev. 382.

In General.—

Expressions in this section regarding the surrender of the right to maintain common law or statutory actions against the employer are not absolute—not words of universal import, making no contact with time, place or circumstance. They must be construed within the framework of the act, and as qualified by its subject and purposes. Barber v. Minges, 223 N. C. 213, 216, 25 S. E. (2d) 837.

Remedy under Act Is Exclusive as against Employer Only.—The remedies given an employee under the Workmen's Compensation Act are exclusive as against the employer only, and the Act does not preclude an employee from waiving his claim against his employer and pursuing his remedy against a third-party tort-feasor by common law action for negligence, although his rights against such third party after a claim for compensation is filed are limited. Ward v. Bowles, 228 N. C. 273, 45 S. E. (2d) 354.

Illegal Agreement between Employee's Dependents and Employer.—In an action by the administrator of a deceased employee against the third-party tort-feasor, allegations in defendant's answer of an illegal agreement between the dependents and the employer for the distribution of the fund, are properly stricken on motion, since the administrator is an official of the court under duty to make disbursement of any recovery in conformity with statute, and could not be bound by the terms of the agreement alleged. Penny v. Stone, 228 N. C. 295, 45 S. E. (2d) 362.

Allegations Failing to Show Contract by Employer and Carrier Not to Sue.—An action was instituted by the ad-

ministrator of a deceased employee against the third-party tort-feasor. Compensation had been paid for the employee's death under the Workmen's Compensation Act. Defendant alleged in its answer that in the collision causing the death of plaintiff's intestate, other persons were killed or injured, that the other actions growing out of the collision were compromised, and that in the settlement defendant made a substantial contribution upon the assurance of the attorneys for the employer and insurance carrier that they would recommend that this action not be instituted. It was held that the allegations failed to show a contract by the employer or the insurance carrier not to sue, or that the attorneys did not make the promised recommendation in good faith; and the allegations were properly stricken upon motion in the administrator's action. Penny v. Stone, 228 N. C. 295, 45 S. E. (2d) 362.

Evidence as to Amount of Compensation Prohibited.—In an action by the administrator of an employee against the third-party tort-feasor, evidence concerning amount of compensation paid by the employer, or the amount thereof to which dependents are entitled, is prohibited. Penny v. Stone, 228 N. C. 295, 45 S. E. (2d) 362.

Stated in Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504.

Cited in Lee v. Carolina Upholstery Co., 227 N. C. 88, 40 S. E. (2d) 688.

§ 97-13. Exceptions from provisions of article.

(b) Casual Employment, Domestic Servants, Farm Laborers, Federal Government, Employer of Less than Five Employees.—This article shall not apply to casual employees, farm laborers, federal government employees in North Carolina, and domestic servants, nor to employees of such persons, nor to any person, firm or private corporation that has regularly in service less than five employees in the same business within this state. Except that any employer, without regard to number of employees, including an employer of domestic servants, farm laborers, or one who previously had exempted himself, who has purchased workmen's compensation insurance to cover his compensation liability shall be conclusively presumed during life of the policy to have accepted the provisions of this article from the effective date of said policy, and his employees shall be so bound unless waived as provided in this article.

(1945, c. 766.)

Editor's Note.—
The 1945 amendment rewrote subsection (b). As the rest of the section was not affected by the amendment it is not set out.

§ 97-14. Employers not bound by article may not use certain defenses in damage suit.

Employer Is Not an Insurer.—This section although abolishing an employer's most cherished defenses, does not make him an insurer, nor does it relieve the employee of establishing a breach of duty. It is elementary, however, that this section leaves the employer in a completely exposed position. Great Atlantic, etc., Tea Co. v. Robards, 161 F. (2d) 929, 932.

Cited in Dark v. Johnson, 225 N. C. 651, 36 S. E. (2d) 237.

§ 97-19. Liability of principal contractors; certificate that sub-contractor has complied with law; right to recover compensation of those who would have been liable; order of liability.

The principal or owner may insure any or all of his contractors and their employees in a blanket policy, and when so insured such contractor's employees will be entitled to compensation benefits regardless of whether the relationship of employer and employee exists between the principal and the contractor. (1929, c. 120, s. 19; 1941, c. 358, s. 1; 1945, c. 766.)

Editor's Note.—
The 1945 amendment added the above paragraph at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

This Section Modifies § 97-2 (a).—As a general proposition the only private employments covered by the Workmen's Compensation Act are those "in which five or more employees are regularly employed in the same business or establishment." § 97-2 (a). But this general rule is subject to the exception created by this section, which was manifestly enacted to protect the employees of financially irresponsible subcontractors who do not carry workmen's compensation insurance, and to prevent principal contractors, immediate contractors, and subcontractors from relieving themselves of liability under the Act by doing through subcontractors what they would otherwise do through the agency of direct employees. Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668.

Number of Persons Regularly Employed by Contractor Is Immaterial.—Where a contractor sublets a part of the contract to a subcontractor without requiring from the subcontractor certificate that he had procured compensation insurance or had satisfied the industrial commission of his financial responsibility as a self-insurer under § 97-93, such contractor is properly held secondarily liable for compensation to an employee of the subcontractor, even though the contractor regularly employs less than five employees. Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668. See § 97-2.

§ 97-21. Claims unassignable and exempt from taxes and debts; agreement of employee to contribute to premium or waive right to compensation void; unlawful deduction by employer.

Stated in Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504.

§ 97-22. Notice of accident to employer.

Cited in Matros v. Owen, 229 N. C. 472, 50 S. E. (2d) 509; Jacobs v. Safie Mfg. Co., 229 N. C. 660, 50 S. E. (2d) 738.

§ 97-23. What notice is to contain; defects no bar; notice personally or by registered letter.

Cited in Matros v. Owen, 229 N. C. 472, 50 S. E. (2d) 509.

§ 97-24. Right to compensation barred after one year.

(c) When all claims and reports required by this article have been filed, and the cases and records of which they are a part have been closed by proper reports, receipts, awards or orders, these records, may after five years, in the discretion of the commission, with and by the authorization and approval of the North Carolina department of archives and history, be destroyed by burning or otherwise. (1929, c. 120, s. 24; 1933, c. 449, s. 2; 1945, c. 766.)

Editor's Note.—
The 1945 amendment added subsection (c). As the rest of the section was not affected by the amendment it is not set out.

Claim Need Not Be Filed with Commission as Court of First Instance.—This section does not require plaintiff to file a claim with the industrial commission, as a court of first instance, before bringing an action in the Superior Court. Barber v. Minges, 223 N. C. 213, 25 S. E. (2d) 837.

Where the industrial commission finds a general partial disability, in adjudging the rights and liabilities of the parties, the commission may direct compensation at the statutory rate, whenever it is shown, within 300 weeks of the accident, that claimant is earning less than his former wages, due to the injury. By so doing the commission retains jurisdiction for future adjustments and does not exceed its authority. Branham v. Denny Roll, etc., Co., 223 N. C. 233, 25 S. E. (2d) 865.

Implied Agreement Not to Plead Statute.—
Evidence held not to show any representation by the employer that the accident had been reported, or any agreement, express or implied, that the bar of the statute of limitations in this section would not be pleaded, and therefore the employer was not estopped from setting up the defense of the bar of the statute. Jacobs v. Safie Mfg. Co., 229 N. C. 660, 50 S. E. (2d) 738.

Claim Not Filed within Time Prescribed.—
Claimant was injured by accident arising out of and in the course of his employment. He reported the accident to the employer, who, on the day of the accident, reported it to the industrial commission as required by § 97-92. Subsequently bills for medical services rendered claimant as a

result of the injury were approved for payment by the commission. No claim for compensation was filed by the employee, the employer or the insurance carrier. More than a year after the accident the employee first discovered the serious effects of the accident and requested a hearing before the industrial commission. It was held that no claim for compensation having been filed within twelve months from the date of the accident and no request for a hearing having been made within that time, and no payment of bills for medical treatment having been made within the twelve months prior to the request for a hearing, the claim was barred by this section. Whitted v. Palmer-Bee Co., 228 N. C. 447, 46 S. E. (2d) 109.

Cited in Matros v. Owen, 229 N. C. 472, 50 S. E. (2d) 509.

§ 97-25. Medical treatment and supplies.

As to independent suit by physician against employee to recover for medical services, see notes to §§ 97-90, 97-91.

Stated in Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504.

Cited in Matros v. Owen, 229 N. C. 472, 50 S. E. (2d) 509.

§ 97-26. Liability for medical treatment measured by average cost in community; malpractice of physician.

As to independent suit by physician against employee to recover for medical services, see notes to §§ 97-90, 97-91.

Stated in Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504.

Cited in Matros v. Owen, 229 N. C. 472, 50 S. E. (2d) 509.

§ 97-28. Seven-day waiting period; exceptions.

Cited in Branham v. Denny Roll, etc., Co., 223 N. C. 233, 25 S. E. (2d) 865.

§ 97-29. Compensation rates for total incapacity.—Where the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such total disability a weekly compensation equal to 60 per centum of his average weekly wages, but not more than twenty-four dollars, nor less than eight dollars, a week; and in no case shall the period covered by such compensation be greater than four hundred weeks, nor shall the total amount of all compensation exceed six thousand dollars. Except that in cases in which total disability is due to paralysis resulting from injuries to the spinal cord, compensation including reasonable and necessary medical and hospital care shall be paid during the life of the injured employee, without regard to the four hundred weeks limited herein, or to the six thousand dollars ($6,000.00) maximum compensation under this article. Provided, however, should death result from the injury and within three hundred and fifty weeks from the date of the accident and before the maximum compensation is paid, compensation for the remaining weeks or until the full six thousand dollars ($6,000.00) including two hundred dollars ($200.00) funeral expense shall be paid as in any other death case and as provided for in §§ 97-38 and 97-40 of this article.

In cases of total and permanent disability due to paralysis resulting from an injury to the spinal cord the commission may, in its discretion taking into consideration the financial need and necessity of the injured employee, enter an award and pay compensation and reasonable, necessary medical, nursing, hospital and other treatment expenses from the second injury fund during the life of the injured employee where the injury occurred prior to the effective date of this amendment and compensation is still being paid or in cases where the last payment of compensation has been made subsequent to January 1, 1941; such compensation, to be paid only from April 4, 1947 and after the employer's liability for compensation, medical, nursing, hospital and other treatment expenses has ceased; but when compensation is allowed in any case under this amendment, the commission may authorize payment of medical, nursing, hospital and other treatment expenses accrued prior to the date compensation was allowed but after the employer's liability therefor has ceased; provided funds are available after paying claims in second injury cases; provided, further, should the fund be insufficient to pay compensation, medical, nursing and hospital expenses, then the said expenses shall be paid first and compensation thereafter according to the availability of funds.

The basis for compensation of members of the North Carolina national guard and the North Carolina state guard shall be the maximum amount of twenty-four dollars per week as fixed herein. The basis for compensation of deputy sheriffs, or those acting in the capacity of deputy sheriffs, who serve upon a fee basis shall be the minimum amount of eight dollars a week as fixed herein. Provided that the last sentence herein shall not apply to Pender, Cherokee, Avery, Perquimans, Gates, Macon, Watauga, Ashe, Union, Wilkes, Hyde, Caswell, Bladen and Carteret Counties. (1929, c. 120, s. 29; 1939, c. 277, s. 1; 1943, c. 502, s. 3; 1943, cc. 543, 672, s. 2; 1945, c. 766; 1947, c. 823; 1949, c. 1017.)

Editor's Note.—

The 1945 amendment struck out the former second sentence which read: "In case of death the total sum paid shall be six thousand dollars less any amount that may have been paid as partial compensation during the period of disability, payable in one sum to the personal representative of deceased."

The 1947 amendment, effective April 4, 1947, substituted in line seven of the first paragraph "twenty-four" for "twenty-one" and "eight" for "seven", added the second sentence and the proviso to such paragraph, and inserted the second paragraph. It also substituted "twenty-four" for "eighteen" and "eight" for "seven" in the last paragraph.

The 1949 amendment, effective April 15, 1949, rewrote the second paragraph.

For comment on the 1943 amendments, see 21 N. C. Law Rev. 384.

For comment on the 1949 amendment, see 27 N. C. Law Rev. 495.

Cited in Branham v. Denny Roll, etc., Co., 223 N. C. 233, 25 S. E. (2d) 865.

§ 97-30. Partial incapacity.—Except as otherwise provided in § 97-31, where the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such disability, a weekly compensation equal to 60 per centum of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than twenty-four dollars a week, and in no case shall the period covered by such compensation be greater than three hundred weeks from the date of injury. In case the partial disability begins after a period of total disability, the latter period shall be deducted from the maximum period herein allowed for partial disability. (1929, c. 120, s. 30; 1943, c. 502, s. 4; 1947, c. 823.)

Editor's Note.—

The 1947 amendment substituted "twenty-four" for "twenty-one" in line ten.

For comment on the 1943 amendment, see 21 N. C. Law Rev. 384.

The Workmen's Compensation Act is only intended to furnish compensation for loss of earning capacity. Without such loss there is no provision for compensation in this section, although even permanent physical injury may have been suffered. Branham v. Denny Roll, etc., Co., 223 N. C. 233, 236, 25 S. E. (2d) 865.

Test of Earning Capacity.—Under the act wages earned, or the capacity to earn wages, is the test of earning capacity, or, to state it differently, the diminution of the power or capacity to earn is the measure of compensability. Branham v. Denny Roll, etc., Co., 223 N. C. 233, 237, 25 S. E. (2d) 865.

§ 97-31. Schedule of injuries; rate and period of compensation.

Editor's Note.—

For comment on the 1943 amendment, see 21 N. C. Law Rev. 384.

Total Loss of 95% of Vision of Each Eye.—Upon evidence showing that claimant had suffered permanent loss of 95% of the vision of each eye, an award for permanent and total loss of vision of each eye is proper. Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668.

Disfigurement must be evidenced by an outward observable blemish, scar or mutilation, under the Workmen's Compensation Act, and it must be so permanent and serious as to hamper or handicap the person in his earning or in securing employment. Branham v. Denny Roll, etc., Co., 223 N. C. 233, 25 S. E. (2d) 865.

Compensation for disfigurement is not required by the act. Its allowance or disallowance is within the legal discretion of the industrial commission. Branham v. Denny Roll, etc., Co., 223 N. C. 233, 25 S. E. (2d) 865.

§ 97-32. Refusal of injured employee to accept suitable employment as suspending compensation.

The purpose of this section is to guard against the possibility that an injured employee may refuse to work when, in fact, he is able to work and earn wages, and thus increase or attempt to increase the amount of his compensation. Branham v. Denny Roll, etc., Co., 223 N. C. 233, 236, 25 S. E. (2d) 865.

§ 97-36. Accidents taking place outside state; employee receiving compensation from another state.

Concurrence of Three Factors Is Requisite for Jurisdiction.—

"In Reaves v. Earle-Chesterfield Mill Co., 216 N. C. 462, 5 S. E. (2d) 305, it is said that insofar as it depends upon the statute alone the jurisdiction of the industrial commission attaches (a) if the contract of employment was made in this State; (b) if the employer's place of business is in this State; and (c) if the residence of the employee is in this State. A practical application of the statute requires the addition of one other requisite: the employer-employee relation must exist at the time of and in respect to the injury or death or to the transaction out of which such injury or death arose." Barber v. Minges, 223 N. C. 213, 221, 25 S. E. (2d) 837 (dis. op.).

§ 97-37. Where injured employee dies before total compensation is paid.—When an employee receives or is entitled to compensation under this article for an injury covered by § 97-31 and dies from any other cause than the injury for which he was entitled to compensation, payment of the unpaid balance of compensation shall be made: First, to the surviving whole dependents; second, to partial dependents, and, if no dependents, to the next of kin as defined in the article; if there are no whole or partial dependents or next of kin as defined in the article, then to the personal representative and second injury fund as provided in the article, in lieu of the compensation the employee would have been entitled to had he lived.

Provided, however, that if the death is due to a cause that is compensable under this article, and the dependents of such employee are awarded compensation therefor, all right to unpaid compensation provided by this section shall cease and determine. (1929, c. 120, s. 37; 1947, c. 823.)

Editor's Note.—Prior to the 1947 amendment the unpaid balance was made to the employee's next of kin dependent upon him for support.

§ 97-38. Where death results proximately from the accident; dependents; burial expenses; compensation to aliens; election by partial dependents.—If death results proximately from the accident and within two years thereafter, or while total disability still continues, and within six years after the accident, the employer shall pay for or cause to be paid, subject, however, to the provisions of the other sections of this article in one of the methods hereinafer provided, to the dependents of the employee, wholly dependent upon his earnings for support at the time of accident, a weekly payment equal to 60 per centum of his average weekly wages, but not more than twenty-four dollars, nor less than eight dollars, a week for a period of three hundred and fifty weeks from the date of the injury, and burial expenses not exceeding two hundred dollars.

(1947, c. 823.)

Editor's Note.—

The 1947 amendment substituted "twenty-four" for "twenty-one" and "eight" for "seven" near the end of the first sentence. As the rest of the section was not changed only the first sentence is set out.

For comment on the 1943 amendment, see 21 N. C. Law Rev. 384.

§ 97-40. Commutation of benefit and payment on absence of dependents; second injury fund.—If the deceased employee leaves no dependents the employer shall pay to the next of kin as herein defined the commuted amount provided for in § 97-38 for whole dependents; but if the deceased left no next of kin as herein defined, then said commuted amount shall be paid to the Industrial Commission to be held and disbursed by it in the manner hereinafter provided; one-half of said commuted amount shall be retained by the Industrial Commission and the other one-half paid to the personal representative of the deceased to be by him distributed to the next of kin as defined in the Statutes of Distribution; but if there be no next of kin as defined in the Statutes of Distribution, then the personal representative shall pay the same to the Industrial Commission after payment of costs of administration. For the purpose of this section the term "next of kin" shall include only father, mother, widow, child, brother, or sister of the deceased.

For the purpose of providing additional money for the Second Injury Fund, hereinafter provided for, the Industrial Commission shall assess against the employer or its insurance carrier the payment of twenty-five dollars ($25.00) in all cases of permanent partial disability where there is a loss of, or loss of use of, each minor member; and one hundred dollars ($100.00) in each case of a major member where the permanent partial disability is fifty per cent (50%) or more loss of, or loss of use of. Major members are defined as a foot, leg, hand, arm, eye or hearing.

Amounts paid to the Industrial Commission under this section shall constitute a Second Injury Fund, to be held by the commission and disbursed by it in unusual cases of second injuries as follows: (1) To provide additional compensation in case of second injuries referred to in § 97-33: Provided, however, such additional compensation when added to the compensation awarded under

said section, shall not exceed the amount which would have been payable for both injuries had both been sustained in the subsequent accident: Provided, further, that the original and the increased permanent disabilities were each at least 20% of the entire member. (2) To provide for an injured employee who has sustained permanent total disability, in the manner referred to in § 97-35, compensation in addition to the compensation which shall be awarded under said section; such additional compensation, however, when added to the compensation awarded under said section shall not exceed the compensation for permanent total disability as provided in § 97-29.

The additional compensation herein provided for is to be paid out of the Second Injury Fund exclusively and only to the extent which the assets of said fund shall permit. (1929, c. 120, s. 40; 1931, c. 274, s. 5; 1931, c. 319; 1945, c. 766.)

Editor's Note.—
The 1945 amendment inserted the second paragraph. It also inserted the second proviso under subdivision (1) of the third paragraph.

§ 97-41. Total compensation not to exceed $6,000.—The total compensation payable under this article shall in no case exceed six thousand ($6,000) dollars, except in cases of total disability due to paralysis resulting from injuries to the spinal cord when the terms of § 97-29 shall apply. (1929, c. 120, s. 41; 1947, c. 823.)

Editor's Note.—The 1947 amendment added the exception clause.

§ 97-47. Change of condition; modification of award.—Upon its own motion or upon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded, subject to the maximum or minimum provided in this article, and shall immediately send to the parties a copy of the award. No such review shall affect such award as regards any moneys paid but no such review shall be made after twelve months from the date of the last payment of compensation pursuant to an award under this article, except that in cases in which only medical or other treatment bills are paid, no such review shall be made after twelve months from the date of the last payment of bills for medical or other treatment, paid pursuant to this article. (1929, c. 120, s. 46; 1931, c. 274, s. 6; 1947, c. 823.)

Editor's Note.—
The 1947 amendment added the exception clause at the end of the section.

The review of an award for change of condition must be made within twelve months from the date of the last payment of compensation pursuant to an award, and while the right to review as enlarged by the 1947 amendment to this section, to include instances in which only medical or other treatment bills are paid, the amendment provides for review in such cases only within twelve months of the date of last payment of bills for medical or other treatment. Whitted v. Palmer-Bee Co., 228 N. C. 447, 46 S. E. (2d) 109.

Cited in Matros v. Owen, 229 N. C. 472, 50 S. E. (2d) 509.

§ 97-48. Receipts relieving employer; payment to minors; when payment of claims to dependents subsequent in right discharges employer.

(d) A minor employee under the age of eighteen (18) years may sign agreements and receipts for payments of compensation for temporary total disability, and such agreements and receipts executed by such minor shall acquit the employer. Where the injury results in a permanent disability and the sum to be paid does not exceed five hundred dollars the minor employee may execute agreements and sign receipts and such agreements and receipts shall acquit the employer; provided, that when deemed necessary the commission may require the signature of a parent or person standing in place of a parent. (1929, c. 120, s. 47; 1931, c. 274, s. 7; 1945, c. 766.)

Editor's Note.—
The 1945 amendment added subsection (d). As the rest of the section was not affected by the amendment it is not set out.

§ 97-52. Occupational disease made compensable; "accident" defined.

Special Provisions Relating to Asbestosis and Silicosis.— When the special provisions of the occupational disease amendment relating to asbestosis and silicosis are read in their entirety, it is apparent that they are designed to effect these objects: (1) To prevent the employment of unaffected persons peculiarly susceptible to asbestosis or silicosis in industries with dust hazards; (2) to secure compensation to those workers affected with asbestosis or silicosis, whose principal need is compensation; and (3) to provide compulsory changes of occupations for those workmen affected by asbestosis or silicosis, whose primary need is removal to employments without dust hazards. Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797.

A proper consideration of the special provisions of this chapter relating to asbestosis and silicosis must rest upon a conviction that in passing these laws the legislature gave due heed to the nature of these diseases. Id.

Cited in Edwards v. Piedmont Pub. Co., 227 N. C. 184, 41 S. E. (2d) 592.

§ 97-53. Occupational diseases enumerated; when due to exposure to chemicals.

26. In case of members of fire departments of cities, counties or municipal corporations or political subdivisions of the state, whether such members are voluntary, partly paid or fully paid, coronary thrombosis, coronary occlusion, anginapectoris or acute coronary insufficiency shall each be deemed to be an occupational disease within the meaning of this article, provided:

(a) Such disease develops or first manifests itself during a period while such member is an active member of such department or unit, and

(b) Said member, prior to such manifestation or development, shall have served five consecutive years or more immediately preceding such manifestation or development as an active member of said fire service, and

(c) Said member, upon entering said fire service or not less than five years prior to first manifestation or development of said heart disease, shall have undergone a medical examination, which examination failed to disclose the presence of such disease.

(d) Cities may adopt their own plans for the purpose of carrying out the intent of this subsection.

For the purpose of the foregoing, the time of development or first manifestation of such diseases shall only be determined by and run from the date of first notice of the existence of such diseases to such member by a physician or the date of death as a result of such diseases. (1935, c. 123; 1949, c. 1078.)

Editor's Note.—The 1949 amendment added subsection 26 to this section. As the rest of the section was not affected by the amendment it is not set out.

For a brief comment on the 1949 amendment, see 27 N. C. Law Rev. 495.

Heart disease is not an occupational disease. West v.

North Carolina Dept. of Conservation and Development, 229 N. C. 232, 49 S. E. (2d) 398.

Common Law Actions Excluded as to Certain Occupational Diseases.—In dealing with certain unscheduled occupational diseases, the Supreme Court has held common law actions to be excluded by the Workmen's Compensation Act; but in these cases the condition admittedly and allegedly arose out of the employment. Barber v. Minges, 223 N. C. 213, 25 S. E. (2d) 837.

§ 97-54. "Disablement" defined.

Criterion of Disability in Cases of Asbestosis and Silicosis.—There is a radical difference between the criterion of disability in cases of asbestosis and silicosis and that of disability in cases of injuries and other occupational diseases. An employee is disabled by injury or an ordinary occupational disease within the purview of the Workmen's Compensation Act only if he suffers incapacity because of the injury or disease to earn the wages which he was receiving at the time of the injury or disease in the same or any other employment. § 97-2. But a worker is disabled in cases of asbestosis or silicosis if he is "actually incapacitated, because of such occupational disease, from performing normal labor in the last occupation in which remuneratively employed." Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797.

The distinction in tests is highly significant, and arises out of the legislative consciousness that any attempt to compel an indiscriminate transfer of workers affected by asbestosis or silicosis from their accustomed occupations to other employments under the economic threat of deprivation of compensation would inevitably lead to unjust and oppressive consequences, because of their doubtful capacity to engage in other work or because of the inherent difficulty of forecasting the courses of their diseases. Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797.

Evidence that plaintiff could do "light work" if no silicosis dust were involved is insufficient to support a finding that he was not disabled from doing "ordinary work," since the two terms are not synonymous in the realm of manual labor. Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797.

The fact that a worker performed his duties with regularity until the date he was dismissed because he was affected with silicosis does not require a finding that he was not disabled at that time as defined by this section. Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797.

§ 97-57. Employer liable.—In any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable.

For the purpose of this section when an employee has been exposed to the hazards of asbestosis or silicosis for as much as thirty working days, or parts thereof, within seven consecutive calendar months, such exposure shall be deemed injurious but any less exposure shall not be injurious. (1935, c. 123; 1945, c. 762.)

Editor's Note.—The 1945 amendment added the second paragraph.

Liability of Insurance Carrier.—The carrier of the insurance during the employee's last thirty day period of exposure to the hazards of an occupational disease is solely liable for compensation allowed for total disability from the occupational disease. This result is not affected by the fact that prior to the time such insurance company became the carrier, medical examinations had disclosed that the employee was suffering with the disease, that the industrial commission had advised him as to the compensation and rehabilitation provisions of the Act, but had, in the exercise of its discretion, failed to order him to quit the occupation pursuant to § 97-61. Bye v. Interstate Granite Co., 230 N. C. 334, 53 S. E. (2d) 274.

§ 97-58. Claims for certain diseases restricted; time limit for filing claims. — (a) An employer shall not be liable for any compensation for asbestosis, silicosis or lead poisoning unless disablement or death results within two years after the last exposure to such disease, or, in case of death, unless death follows continuous disability from such disease, commencing within the period of two years limited herein, and for which compensation has been paid or awarded or timely claim made as hereinafter provided and results within seven years after such last exposure.

(b) The report and notice to the employer as required by § 97-22 shall apply in all cases of occupational disease except in case of asbestosis, silicosis, or lead poisoning. The time of notice of an occupational disease shall run from the date that the employee has been advised by competent medical authority that he has same.

(c) The right to compensation for occupational disease shall be barred unless a claim be filed with the industrial commission within one year after death, disability, or disablement as the case may be. (1935, c. 123; 1945, c. 762.)

Editor's Note.—The 1945 amendment inserted the letter (a) at the beginning of the section, substituted "two" for "three" in lines four and seven, and struck out the former last sentence reading: "Claims for all other occupational diseases shall be barred unless claims shall be filed with the industrial commission within one year from the disablement or death caused by such occupational disease." The amendment also added subsections (b) and (c).

In this section the legislature recognizes that silicosis is a progressive disease, and provides that an employer may be held liable for compensation for silicosis if disablement results at any time within two years after the last exposure to the disease. Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797.

Cited in Whitted v. Palmer-Bee Co., 228 N. C. 447, 46 S. E. (2d) 109.

§ 97-59. Employer to provide treatment. — In the event of disability from an occupational disease, the employer shall provide reasonable medical and/or other treatment for such time as in the judgment of the industrial commission will tend to lessen the period of disability or provide needed relief; provided, however, medical and/or other treatment for asbestosis and/or silicosis shall not exceed a period of three years nor cost in excess of one thousand ($1,000.00) dollars in any one year; and, provided further, all such treatment shall be first authorized by the industrial commission after consulting with the advisory medical committee. (1935, c. 123; 1945, c. 762.)

Editor's Note.—The 1945 amendment increased the amount mentioned in this section from $334.00 to $1,000.00.

§ 97-60. Examination of employees by advisory medical committee; designation of industries with dust hazards.

Applied in Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797.

§ 97-61. Compensation for employee temporarily removed from hazardous employment; payment for training for readjustment to other work; waiver of right to compensation.—Where an employee, though not actually disabled, is found by the industrial commission to be affected by asbestosis and/or silicosis, and it is also found by the industrial commission that such employee would be benefited by being taken out of his employment and that such disease with such employee has progressed to such a degree as to make it hazardous for him to continue in his employment and is in consequence removed therefrom by order of the industrial commission, or where an employee affected by asbestosis and/or silicosis as hereinbefore set forth is unable to secure employ-

ment by reason of such disease; he shall be paid compensation as for temporary total or partial disability, as the case may be, until he can obtain employment in some other occupation in which there are no hazards of such occupational disease: Provided, however, compensation in no such case shall be paid for a longer period than twenty weeks to an employee without dependents, nor for a longer period than forty weeks to an employee with dependents, and in either case said period shall begin from the date of removal from the employment, unless actual disablement from such disease results later and within the time limited in § 97-58. When in any such case the forced change of occupation shall in the opinion of the industrial commission require that the employee be given special training in order to properly readjust himself there shall be paid for such training and incidental traveling and living expenses an additional sum which shall not exceed three hundred ($300.00) dollars, in the case of an employee without dependents, and which shall not exceed five hundred ($500.00) dollars in the case of an employee with dependents, such payment to be made for the benefit of the employee to such person or persons as the industrial commission may direct; provided, however, no such payment shall be made unless the employee accepts the special training herein provided, nor shall payment be made for a longer period of time than the employee shall accept such special training. Except that where it is shown to the satisfaction of the commission that some other form of rehabilitation will be beneficial to the employee the payments may be authorized therefor in lieu of the special training. If an employee has been so compensated, and whether or not specially trained for another occupation, and he thereafter engages in any occupation which exposes him to hazards of silicosis and/or asbestosis without first having obtained the written approval of the industrial commission, neither he, his dependents, personal representative nor any other person shall be entitled to any compensation for disablement or death from silicosis and/or asbestosis: Provided, however, that an employee so affected, as an alternative to forced change of occupation, may, subject to the approval of the industrial commission, waive in writing his right to compensation for any aggravation of his condition that may result from his continuing in his hazardous occupation; but in the event of total disablement and/or death as a result of asbestosis and/or silicosis with which the employee was so affected compensation shall nevertheless be payable, but in no case, whether for disability or death or both, for a longer period than one hundred (100) weeks. Such written waiver must be filed with the industrial commission, and the commission shall keep a record of each waiver, which record shall be open to the inspection of any interested person. (1935, c. 123; 1945, c. 762.)

Editor's Note.—The 1945 amendment inserted after the word commission in line eleven the words "or where an employee affected by asbestosis and/or silicosis as hereinbefore set forth is unable to secure employment by reason of such disease." The amendment also inserted the third sentence.

Employee May Contest Order for Compensation under This Section.—A summary order of the industrial commission directing that an employee be removed from employment having attendant hazards of silicosis, and stipulating that the employee is entitled to compensation as stipulated in this section, does not preclude the worker from contesting before the industrial commission the applicability of the statute to him, since such order is entered without notice or hearing. Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797.

He Must Be Capable of Pursuing Gainful Non-Hazardous Occupation.—Obviously, the legislature enacted this section for the paramount purpose of securing to an affected worker undergoing a compulsory change of occupation an independent position as a wage earner in some work free from dust hazards. When the language of the statute is considered in the light of the mischief sought to be avoided and the remedies intended to be applied, it becomes manifest that the legislature has authorized the industrial commission to order a forced change of occupation for an employee affected by asbestosis or silicosis only in case it appears to the commission that there is a reasonable basis for the conclusion that such employee possesses the actual or potential capacity of body and mind to work with substantial regularity during the foreseeable future in some gainful occupation free from the hazards of asbestosis and silicosis. Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797.

If Not, He Is Entitled to Ordinary Compensation.—If an employee is disabled by silicosis from performing normal labor in an occupation subject to the hazard of silica dust, such worker is entitled to ordinary compensation under the general provisions of the Workmen's Compensation Act unless the industrial commission further finds that there is a reasonable basis for the conclusion that he shows the actual or potential capacity of body and mind to work with substantial regularity during the foreseeable future in another occupation free from this hazard, and findings as to disablement and employability in other occupations are necessary for a proper determination by the commission of the applicability of this section. Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797.

"Occupation" and "Employment."—The term "occupation" denotes a vocation, trade, or business in which a person engages as the means of making a livelihood. The word "employment," as used here, implies continuity and some degree of permanency of occupation for hire or profit. Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797.

Effect of Failure to Order Change of Occupation.—The carrier of the insurance during the employee's last thirty day period of exposure to the hazards of an occupational disease is solely liable for compensation allowed for total disability from the occupational disease. § 97-57. This result is not affected by the fact that prior to the time such insurance company became the carrier, medical examinations had disclosed that the employee was suffering with the disease, and that the industrial commission had advised him as to the compensation and rehabilitation provisions of the Act, but had, in the exercise of its discretion, failed to order him to quit the occupation. Bye v. Interstate Granite Co., 230 N. C. 334, 53 S. E. (2d) 274.

Effect of Voluntary Transfer.—It is clearly implicit in the special provisions relating to asbestosis and silicosis that the lawmaking body did not contemplate that a worker suffering disablement by asbestosis or silicosis within the meaning of § 97-54 should forfeit any right to ordinary compensation under the general provisions of the Act by voluntarily transferring his activities from an industry with dust hazards to an employment where no such hazards prevail. But the general assembly did recognize that under exceptional circumstances salutary effects would follow a forced change of occupation by a worker affected by asbestosis or silicosis. Consequently, the legislature enacted this section. Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797.

§ 97-62. "Silicosis" and "asbestosis" defined.

Asbestosis is a disease of the lungs occurring in persons working in air laden with asbestos dust. It is infrequent as compared to silicosis, but has somewhat similar symptoms and consequences. Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797.

§ 97-64. General act to control as regards benefits.

Purpose of Section.—With a view to averting the unjust and oppressive results of an indiscriminate transfer of workers affected by asbestosis or silicosis from their accustomed occupations to other employments under the economic threat of deprivation of compensation, the legislature established, in this section, the general rule that an employee becoming disabled by asbestosis or silicosis within the terms of the specific definition embodied in § 97-54 should

be entitled to ordinary compensation measured by the general provisions of the Workmen's Compensation Act. Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797.

§ 97-66. Claim where benefits are discontinued.—Where compensation payments have been made and discontinued, and further compensation is claimed, whether for disablement, disability, or death from asbestosis, silicosis, or lead poisoning, the claim for such further compensation shall be made within two years after the last payment, but in all other cases of occupational disease claim for further compensation shall be made within one year after the last payment. (1935, c. 123; 1945, c. 762.)

Editor's Note.—Prior to the 1945 amendment the section also related to requirements as to notice of disease to employer or industrial commission, and to waiver of notice and claim where payments are made.

§ 97-76. Inspection of hazardous employments; refusal to allow inspection made misdemeanor.

Cited in Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797.

§ 97-77. North Carolina Industrial Commission created; members appointed by Governor; terms of office; chairman.

Editor's Note.—For act authorizing the industrial commission to hear and determine certain listed tort claims against certain state departments and agencies, see Session Laws 1949, c. 1138.

The industrial commission is not a court of general jurisdiction. It can have no implied jurisdiction beyond the presumption that it is clothed with power to perform the duties required of it by the law entrusted to it for administration. Barber v. Minges, 223 N. C. 213, 217, 25 S. E. (2d) 837.

Cited in Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504.

§ 97-78. Salaries and expenses; secretary and other clerical assistance; annual report.

(c) The members of the commission and its assistants shall be entitled to receive from the state their actual and necessary expenses while traveling on the business of the commission, but such expenses shall be certified by the person who incurred the same, and shall be approved by the chairman of the commission before payment is made.

(1947, c. 823.)

Editor's Note.—

The 1947 amendment substituted "certified" for "sworn to" in line five of subsection (c). As the rest of the section was not affected by the amendment it is not set out.

§ 97-80. Rules and regulations; subpoena of witnesses; examination of books and records; depositions; costs.

Stated in Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504.

§ 97-83. In event of disagreement, commission is to make award after hearing.

Section Provides for Settlement of Any Matter in Dispute.—In this section and §§ 97-84 to 97-86 the general assembly has prescribed an adequate remedy by which any matter in dispute and incident to any claim under the provisions of the Workmen's Compensation Act may be determined and settled. Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504.

Physician May Request Hearing on Claim for Medical Services.—Where a physician renders services to an injured employee under private contract without knowledge that the injury was covered by the Compensation Act, and thereafter upon discovery that the injury is compensable files claim for such services with the industrial commission in order that the employee may get the benefit thereof, his remedy upon approval by the industrial commission in a sum less than the full amount of his claim, is to request a hearing before the commission with right of appeal to the courts for review, this section and §§ 97-84 to 97-86, and this remedy is exclusive and precludes the physician from maintaining an action against the employee to recover the full contractual amount for the services and attacking the constitutionality of the relevant provisions of the Compensation Act. Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504.

Remedy Is Exclusive.—The remedy provided by this and the three following sections is exclusive. Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504.

The sole remedy of a physician to recover for services to an injured employee, where the employee and employer are subject to the Workmen's Compensation Act, is by implication to the industrial commission in accordance with this section and §§ 97-84 to 97-86 to consider plaintiff's bill for such services, notwithstanding that the employer denies liability for the injury on the ground that it did not arise out of and in the course of the employment. The physician may not challenge the constitutionality of the relevant provisions of this chapter by an independent suit against the employee to recover for the medical services. Matros v. Owen, 229 N. C. 472, 50 S. E. (2d) 509.

§ 97-84. Determination of disputes by commission.

Cross Reference.—As to exclusiveness of remedy provided by §§ 97-83 to 97-86, see notes to § 97-83.

Cited in Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504, treated under § 97-83.

§ 97-85. Review of award.

Cross Reference.—As to exclusiveness of remedy provided by §§ 97-83 to 97-86, see notes to § 97-83.

Cited in Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504, treated under § 97-83.

§ 97-86. Award conclusive as to facts; appeal; certified questions of law.

Provided the commission shall have sixty days after receipt of notice of appeal, properly served on the opposing party and the industrial commission, within which to prepare and furnish to the appellant or his attorney a certified transcript of the record in the case for filing in superior court.

(1947, c. 823.)

Cross Reference.—As to exclusiveness of remedy provided by §§ 97-83 to 97-86, see notes to § 97-83.

Editor's Note.—The 1947 amendment directed that the above proviso be placed at the end of the first sentence. As the rest of the section was not changed it is not set out.

Matters to Be Considered on Appeal.—While findings of fact by industrial commission, when supported by competent evidence, are conclusive, the rulings of commission are subject to review on questions of law, whether the industrial commission has jurisdiction, whether the findings are supported by the evidence, and whether upon the facts established the decision is correct. Smith v. Southern Waste Paper Co., 226 N. C. 47, 36 S. E. (2d) 730, 731.

An appeal from the industrial commission is permitted only on matters of law. Fox v. Cramerton Mills, 225 N. C. 580, 35 S. E. (2d) 869.

Evidence Not Considered on Appeal.—

The factual determinations of the industrial commission are conclusive on appeal to the superior court and in the supreme court. Brown v. Carolina Aluminum Co., 224 N. C. 766, 32 S. E. (2d) 320.

Findings Supported by Competent Evidence Are Conclusive on Appeal.—

In accord with 5th paragraph in original. See Hegler v. Cannon Mills Co., 224 N. C. 669, 31 S. E. (2d) 918; Fox v. Cramerton Mills, 225 N. C. 580, 35 S. E. (2d) 869; DeVine v. Dave Steel Co., 227 N. C. 684, 44 S. E. (2d) 77.

A finding of fact of the industrial commission is conclusive on appeal if supported by evidence notwithstanding that the evidence upon the entire record might also support a contrary finding. Riddick v. Richmond Cedar Works, 227 N. C. 647, 43 S. E. (2d) 850.

Determination of the industrial commission that additional hazard created by artificial heat was the direct and super-inducing cause of plaintiff's intestate's death was conclusive on appeal. Fields v. Tompkins-Johnston Plumbing Co., 224 N. C. 841, 843, 32 S. E. (2d) 623.

Though Court Might Reach Different Conclusion.—"Under G. S. § 97-86, 'findings of fact by the industrial commission, on a claim properly constituted under the Workmen's Compensation Act, are conclusive on appeal, both in the superior court and in this court, when supported by competent evidence.' Fox v. Mills, Inc., 225 N. C. 580, 35 S.

E. (2d) 869. This is so even in proceedings where the courts would reach different conclusions if they were clothed with fact-finding authority. McGill v. Lumberton, 218 N. C. 586, 11 S. E. (2d) 873." Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668.

But Court Is Not Bound by Facts Found under Misapprehension of Law. — In order to implement the remedial purposes of the Workmen's Compensation Act the industrial commission is constituted the fact-finding body, and the statute declares that the findings of the commission shall be "conclusive and binding as to all questions of fact." But this does not mean that the conclusions of the commission from the facts found are in all respects unexceptionable, and when facts are found by the commission under a misapprehension of the law, the court is not bound by such findings. Cooper v. Colonial Ice Co., 230 N. C. 43, 51 S. E. (2d) 889.

Facts found by the industrial commission under a misapprehension of law are not binding on appeal. Whitted v. Palmer-Bee Co., 228 N. C. 447, 46 S. E. (2d) 109.

Or Where Findings Are Not Supported by Evidence.— The rule declared by the statute and uniformly upheld by the supreme court that the findings of fact made by the industrial commission, when supported by any competent evidence, are conclusive on appeal, does not mean, however, that the conclusions of the commission from the evidence are in all respects unexceptionable. If those findings, involving mixed questions of law and fact, are not supported by evidence, the award cannot be upheld. Perley v. Ballenger Paving Co., 228 N. C. 479, 46 S. E. (2d) 298.

The Statutes Regulating Appeals from a Justice of the Peace Are Applicable.—

While the Workmen's Compensation Act does not set out with particularity the procedure on appeal, it has been held by supreme court that by analogy that prescribed for appeals from judgments of justices of the peace, when practical, should apply; but this rule refers only to the mechanics of appeal, as to notice and docketing, for the appeal from the industrial commission is only on matters of law and not de novo. Fox v. Cramerton Mills, 225 N. C. 580, 35 S. E. (2d) 869.

Judgment Should Refer to Specific Assignments of Error. —Where upon an appeal from the industrial commission the exceptions point out specific assignments of error, the judgment in the superior court thereon properly should overrule or sustain respectively each of the exceptions on matters of law thus designated. And where the judgment in the superior court merely decreed that the award be in all respects affirmed, the supreme court will presume the judge below considered each of the assignments of error and overruled them. Fox v. Cramerton Mills, 225 N. C. 580, 35 S. E. (2d) 869.

Cited in Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504, treated under § 97-83.

§ 97-90. Legal and medical fees to be approved by commission; misdemeanor to receive fees unapproved by commission, or to solicit employment in adjusting claims.

Agreement by Employee to Pay Physician Held Void.— An agreement by an injured employee to pay the physician engaged by him any balance due on his account after application of the amount approved by the industrial commission for the services is unenforceable and void, since this section makes the receipt of any fee for such services not approved by the commission a misdemeanor. Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504.

Remedy Where Physician's Bill Approved for Less than Full Amount.—Where a physician has submitted his bill to the industrial commission for its approval, and received approval for less than the full amount, his remedy is to request a hearing before the commission with the right of appeal to the courts under §§ 97-83 to 97-86, and this remedy is exclusive. Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504.

Independent Action by Physician against Employee. — Where a physician has submitted his bill to the industrial commission for its approval, and received approval for less than the full amount, and has failed to pursue his exclusive statutory remedy of a hearing before the industrial commission with the right of appeal to the courts under §§ 97-83 to 97-86, he has no standing to attack the constitutionality of this section in an independent suit against the employee to recover for the medical services. Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504.

§ 97-91. Commission to determine all questions.

Applied, as to physician's claim for medical services, in Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504.

§ 97-92. Employer's record and report of accidents; records of Commission not open to public; supplementary report upon termination of disability; penalty for refusal to make report; when insurance carrier liable. — (a) Every employer shall hereafter keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment on blanks approved by the Commission. Within five days after the occurrence and knowledge thereof, as provided in § 97-22, of an injury to an employee, causing his absence from work for more than one day, a report thereof shall be made in writing and mailed to the Industrial Commission on blanks to be procured from the Commission for this purpose.

(1945, c. 766.)

Editor's Note.—The 1945 amendment substituted "five" for "ten" in line five and "one day" for "three days" in line eight. As only subsection (a) was affected by the amendment the rest of the section is not set out.

Applied in Whitted v. Palmer-Bee Co., 228 N. C. 447, 46 S. E. (2d) 109.

§ 97-93. Employers required to carry insurance or prove financial ability to pay for benefits.

Cited in Matros v. Owen, 229 N. C. 472, 50 S. E. (2d) 509.

§ 97-94. Employers required to give proof within 30 days that they complied with preceding section; fine for not keeping liability insured; review; liability for compensation.

(b) Any employer required to secure the payment of compensation under this article who refuses or neglects to secure such compensation shall be punished by a fine of ten cents for each employee, but not less than one dollar nor more than fifty dollars for each day of such refusal or neglect, and until the same ceases; and he shall be liable during continuance of such refusal or neglect to an employee either for compensation under this article or at law in the same manner as provided in § 97-14.

The fine herein provided may be assessed by the Commission in an open hearing, with the right of review and appeal as in other cases. (1929, c. 120, s. 68; 1945, c. 766.)

Editor's Note.—The 1945 amendment struck out the words "at the time of the insurance becoming due" formerly appearing after the word "employee" in line five of subsection (b). As subsection (a) was not affected by the amendment it is not set out.

§ 97-99. Law written into each insurance policy; form of policy to be approved by insurance commissioner; cancellation; single catastrophe hazards.—(a) Every policy for the insurance of the compensation herein provided, or against liability therefor, shall be deemed to be made subject to the provisions of this article. No corporation, association, or organization shall enter into any such policy of insurance unless its form shall have been approved by the insurance commissioner. No policy form shall be approved unless the same shall provide a thirty-day prior notice of an intention to cancel same by the carrier to the insured by registered mail. This shall not apply to the expiration date shown in the policy. The carrier may cancel the policy for nonpayment of premium on ten days' written notice to the insured, and the insured may cancel the policy on ten days written notice by registered mail to the carrier.

(b) This article shall not apply to policies of

insurance against loss from explosion of boilers or fly-wheels or other similar single catastrophe hazards: Provided, that nothing herein contained shall be construed to relieve the employer from liability for injury or death of an employee as a result of such explosion or catastrophe. (1929, c. 120, s. 72; 1945, c. 381, s. 1.)

Editor's Note.—The 1945 amendment added the last three sentences of subsection (a).

§ 97-100. Rates for insurance; carrier to make reports for determination of solvency; tax upon premium; returned or canceled premiums; reports of premiums collected; wrongful or fraudulent representation of carrier punishable as misdemeanor; notices to carrier; employer who carries own risk shall make report on payroll.

(d) Every such insurance carrier shall, for the six months ending December thirty-first, nineteen hundred and twenty-nine, and annually thereafter, make a return, verified by the affidavit of its president and secretary, or other chief officers or agents, to the Commissioner of Insurance, stating the amount of all such premiums and credits during the period covered by such return. Every insurance carrier required to make such return shall file the same with the Commissioner of Insurance on or before the first day of April after the close of the period covered thereby, and shall at the same time pay to the State Insurance Commissioner the tax provided in the Revenue Act then in force on such premium ascertained, as provided in sub-section (c) hereof, less returned premium on canceled policies.

(1947, c. 574.)

Editor's Note.—The 1947 amendment substituted "annually" for "semi-annually" in line three of subsection (d). It also struck out the words "within thirty days" formerly appearing in line eleven and inserted in lieu thereof the words "on or before the first day of April." As only this subsection was changed the rest of the section is not set out.

Art. 2. Compensation Rating and Inspection Bureau.

§ 97-102. Compensation rating and inspection bureau created; objects, functions, etc.; hearings where rates changed.

(d) The bureau shall provide reasonable means to be approved by the commissioner whereby any person affected by a rate made by it may be heard in person or by his authorized representative before the governing or rating committee or other proper executive of the bureau. (1931, c. 279, s. 1; 1945, c. 381, s. 1.)

Editor's Note.—The 1945 amendment added subsection (d). As the rest of the section was not changed it is not set out.

§ 97-103. Membership in Bureau of carriers of insurance; acceptance of rejected risks; rules and regulations for maintenance; Insurance Commissioner or deputy ex-officio Chairman.—Before the Insurance Commissioner shall grant permission to any mutual association, reciprocal or stock company, or any other insurance organization to write compensation or employers' liability insurance in this State, it shall be a requisite that they shall subscribe to and become members of the Compensation Rating and Inspection Bureau of North Carolina.

It shall be the duty of all companies underwriting workmen's compensation insurance in this State and being members of the compensation rating and inspection bureau of North Carolina, as defined in this section, to insure and accept any workmen's compensation insurance risk which shall have been tendered to and rejected by any three members of said bureau in the manner hereinafter provided. When any such rejected risk is called to the attention of the compensation rating and inspection bureau of North Carolina and it appearing that said risk is in good faith entitled to such coverage, the bureau shall fix the initial premium therefor, (subject to the approval of the insurance commissioner), and upon its payment said bureau shall designate a member whose duty it shall be to issue a standard workmen's compensation policy of insurance containing the usual and customary provisions found in such policies therefor. Upon receipt of the required premium at the office of the bureau during regular working hours the bureau shall instruct the designated carrier to issue its policy of insurance to become effective as of twelve one a. m. the following day, and the carrier shall be so bound; provided, that the carrier may request of the bureau a certificate of the department of labor that the insured is complying with the laws, rules and regulations of that department. Said certificate shall be furnished within thirty days by the department of labor, unless extension of time is granted by agreement between the bureau and the department of labor. The bureau shall within thirty days after March 8, 1935, make and adopt such rules as may be necessary to carry this article into effect, subject to final approval of the insurance commissioner. As a prerequisite to the transaction of workmen's compensation insurance in this State every member of said bureau shall file with the insurance commissioner written authority permitting said bureau to act in its behalf as provided in this section, and an agreement to accept such risks as are assigned to said insurance by said bureau, as provided in this section.

(a) Each member of the Compensation Rating and Inspection Bureau writing compensation insurance in the State of North Carolina shall, as a requisite thereto, be represented in the aforesaid Bureau and shall be entitled to one representative and one vote in the administration of the affairs of the Bureau. They shall, upon organization, elect a governing committee, which governing committee shall be composed of equal representation by participating and non-participating members.

(b) The Bureau, when created, shall adopt such rules and regulations for its procedure as may be necessary for its maintenance and operation.

No such rules or regulations shall discriminate against any type of insurer because of its plan of operation, nor shall any insurer be prevented from returning any unused or unabsorbed premium, deposit, savings or earnings to its policyholders or subscribers. The expense of such bureau shall be borne by its members by quarterly contributions to be made in advance, such necessary expense to be advanced by prorating such expense among the members in accordance with the amount of gross Workmen's Compensation premiums written in North Carolina during the preceding year ending December the thirty-first, one thousand nine hun-

dred and thirty, and members entering since that date to advance an amount to be fixed by the governing committee. After the first fiscal year of operation of the bureau the necessary expenses of the bureau shall be advanced by the members in accordance with rules and regulations to be established and adopted by the governing committee.

(c) The Insurance Commissioner of the State of North Carolina, or such deputy as he may appoint, shall be ex officio chairman of the Compensation Rating and Inspection Bureau of North Carolina, and the Insurance Commissioner or such deputy designated by him shall preside over all meetings of the governing committee or other meetings of the Bureau and it shall be his duty to determine any controversy that may arise by reason of a tie vote between the members of the governing committee. (1931, c. 279, s. 2; 1935, c. 76; 1945, c. 381, s. 1.)

Editor's Note.—
The 1945 amendment inserted the third and fourth sentences in the second paragraph in lieu of a sentence which read: "Before any such risk shall be assigned under the provisions of this section such risk shall, if demanded, furnish the bureau a certificate of the division of standards and inspection of the department of labor that he is complying with the rules and regulations of that department."
The amendment also inserted the second sentence of subsection (b).

§ 97-104.1. Commissioner can order adjustment of rates and modification of procedure.—Whenever the commissioner, upon his own motion or upon petition of any aggrieved party, shall determine, after notice and a hearing, that the rates charged or filed on any class of risks are excessive, inadequate, unreasonable, unfairly discriminatory, or otherwise not in the public interest, or that a classification or classification assignment is unwarranted, unreasonable, improper or unfairly discriminatory he shall issue an order to the bureau directing that such rates, classifications or classification assignments be altered or revised in the manner and to the extent stated in such order to produce rates, classifications or classification assignments which are reasonable, adequate, not unfairly discriminatory, and in the public interest. (1945, c. 381, s. 1.)

§ 97-104.2. General provisions.—No insurer subject to this article shall enter into any agreement for the purpose of making or establishing rates except in accordance with the provisions hereof. No member of the bureau shall charge or receive any rate which deviates from the rates, rating plans, classifications, schedules, rules and standards made and filed by the bureau. No insurer and no agent or other representative of any insurer and no insurance broker shall knowingly charge, demand or receive a rate or premiums which deviate from the rates, rating plans, classifications, schedules, rules and standards, made and last filed by or on behalf of the insurer, or issue or make any policy or contract involving a violation of such rate filings. (1945, c. 381, s. 1.)

§ 97-104.3. Commissioner can revoke license for violations.—If the commissioner shall find, after due notice and hearing that any insurer, officer, agent or representative thereof has violated any of the provisions of this article, he may issue an order revoking or suspending the license of any such insurer, agent, broker or representative thereof. (1945, c. 381, s. 1.)

§ 97-104.4. Violation a misdemeanor. — Any insurer, officer, agent or representative thereof failing to comply with, or otherwise violating any of the provisions of this article, shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than one hundred ($100.00) dollars nor more than five hundred ($500.00) dollars. (1945, c. 381, s. 1.)

§ 97-104.5. Appeal from decision of commissioner.—A review of any order made by the commissioner in accordance with the provisions of this article, shall be by appeal to the superior court of Wake county in accordance with the provisions of § 58-9.3. (1945, c. 381, s. 1.)

§ 97-104.6. Appeals from bureau to commissioner.—Any member of the bureau may appeal to the commissioner from any decision of such bureau and the commissioner shall, after a hearing held on not less than ten days' written notice to the appellant and to the bureau, issue an order approving the decision of the bureau or directing it to give further consideration to such proposal. In the event the bureau fails to take satisfactory action, the commissioner shall make such order as he may see fit. (1945, c. 381, s. 1.)

Chapter 98. Burnt and Lost Records.

§ 98-1. Copy of destroyed record as evidence; may be recorded.

Editor's Note.—Add to section history: 1865-6, c. 41, ss. 1, 2.

§ 98-2. Originals may be again recorded.

Editor's Note.—Add to section history: 1865-6, c. 41, s. 3.

§ 98-3. Establishing boundaries and interest, where conveyance and copy lost.

Editor's Note.—Add to section history: 1865-6, c. 41, s. 3.

§ 98-4. Copy of lost will may be probated.

Editor's Note.—Add to section history: 1868-69, c. 160, s. 1.

§ 98-5. Copy of lost will as evidence; letters to issue.

Editor's Note.—Add to section history: 1868-69, c. 160, s. 2.

§ 98-6. Establishing contents of will, where original and copy destroyed.

Editor's Note.—Add to section history: 1865-6, c. 41, s. 4.

§ 98-7. Perpetuating destroyed judgments and proceedings.

Editor's Note.—Add to section history: 1865-6, c. 41, s. 5.

§ 98-8. Color of title under destroyed instrument.

Editor's Note.—Add to section history: 1865-6, c. 41, s. 6.

§ 98-9. Action on destroyed bond.

Editor's Note.—Add to section history: 1865-6, c. 41, s. 7.

§ 98-10. Destroyed witness tickets; duplicates may be filed.

Editor's Note.—Add to section history: 1865-6, c. 41, s. 8.

§ 98-11. Replacing lost official conveyances.

Editor's Note.—Add to section history: 1865-6, c. 41, s. 9.

§ 98-12. Court records as proof of destroyed instruments set out therein.

Editor's Note.—Add to section history, 1865-6, c. 41, s. 10.

§ 98-13. Copies contained in court records may be recorded.

Editor's Note.—Add to section history: 1865-6, c. 41, § 11.

§ 98-14. Rules for petitions and motions.

Editor's Note.—Add to section history: 1865-6, c. 41, s. 12; 1874-5, c. 51; 1874-5, c. 254, s. 3.

Verification of Pleadings.—The requirement that when one pleading in a court of record is verified, every subsequent pleading in the same proceeding, except a demurrer, must be verified also, is one which may be waived, except in those cases where the form and substance of the verification is made an essential part of the pleading; as in an action for divorce in which a special form of affidavit is required, § 50-8, in a proceeding to restore a lost record, § 98-14, and in an action against a county or municipal corporation, § 153-64. Calaway v. Harris, 229 N. C. 117, 47 S. E. (2d) 796.

§ 98-15. Records allowed under this chapter to have effect of original records.

Editor's Note.—Add to section history: 1865-6, c. 41, s. 14.

§ 98-16. Destroyed court records proved prima facie by recitals in conveyances executed before their destruction.

Editor's Note.—Add to section history: 1870-1, c. 86, s. 1; 1871-2, c. 64, s. 1.

§ 98-17. Conveyances reciting court records prima facie evidence thereof.

Editor's Note.—Add to section history: 1870-1, c. 86, s. 2.

§ 98-18. Court records and conveyances to which chapter extends.

Editor's Note.—Add to section history: 1871-2, c. 64, s. 2; 1874-5, c. 254, s. 2.

Chapter 99. Libel and Slander.

Sec.

99-5. Negligence in permitting defamatory statements by others essential to liability of operator, etc., of broadcasting station.

§ 99-2. Effect of publication or broadcast in good faith and retraction.

Editor's Note.—

The word "restraction" in line 9 of subsection (b) should be "retraction" and the word "audibile" in line 13 should be "audible."

§ 99-5. Negligence in permitting defamatory statements by others essential to liability of operator, etc., of broadcasting station.—The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such owner, licensee or operator, shall not be liable for any damage for any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast, by one other than such owner, licensee or operator, or agent or employee thereof, unless such owner, licensee or operator shall be guilty of negligence in permitting any such defamatory statement. (1949, c. 262.)

Editor's Note.—For a brief comment on this section, see 27 N. C. Law Rev. 488.

Chapter 100. Monuments, Memorials and Parks.

Art. 2. Memorials Financed by Counties and Cities.

§ 100-10. Counties, cities, and towns may contribute toward erection of memorials.—Any county, city or town by resolution first adopted by its governing body may become a member of any memorial association or organization for perpetuating the memory of the soldiers and sailors of North Carolina who served the United States in the great World War, or in the global war known as World War II, or who fought in the war between the states, and may subscribe and pay toward the cost of the erection of any memorial to the memory of such soldiers and sailors such sums of money as its governing body may determine, and may be represented in such association or organization by such persons as its governing body may select. Any contribution so made shall be paid out of the general fund of such county, city, or town making same, on such terms as may be agreed upon by its governing body, and the officers having the control and management of the association or organization to which subscription and contributions are made. (1919, c. 21, ss. 1, 2, 3; 1924, c. 200; 1945, c. 117; C. S. 6938.)

Editor's Note.—

The 1945 amendment inserted the words "or in the global war known as World War II."

Chapter 101. Names of Persons.

§ 101-2. Procedure for changing name; petition; notice.—A person who wishes, for good cause shown, to change his name must file his application before the clerk of the superior court of the county in which he lives, having first given ten days' notice of the application by publication at the courthouse door.

Applications to change the name of minor children may be filed by their parent or parents or guardian or next friend of such minor children, and such applications may be joined in the application for a change of name filed by their parent or parents: Provided nothing herein shall be construed to permit one parent to make such application on behalf of a minor child without the consent of the other parent of such minor child if both parents be living. (Rev., s. 2147; 1891, c. 145; 1947, c. 115; C. S. 2971.)

Local Modification.—Chowan: 1945, c. 455; Mitchell: 1945, c. 389.

Editor's Note.—The 1947 amendment added the second paragraph.

§ 101-3. Contents of petition.—The applicant shall state in the application his true name, the name he desires to adopt, his reasons for desiring such change, and whether his name has ever before been changed by law, and, if so, the facts with respect thereto. (Rev., s. 2147; 1891, c. 145; 1945, c. 37, s. 1; C. S. 2972.)

Editor's Note.—Prior to the 1945 amendment the part of the section after "and" in line four read "that his name has never been changed before by law."

§ 101-6. Effect of change; only one change.—When the order is made and the applicant's name changed, he is entitled to all the privileges and protection under his new name as he would have been under the old name. No person shall be allowed to change his name under this chapter but once, except that he shall be permitted to resume his former name upon compliance with the requirements and procedure set forth in this chapter for change of name. (Rev., ss. 2147, 2149; 1891, c. 145; 1945, c. 37, s. 2; C. S. 2975.

Editor's Note.—The 1945 amendment added the exception clause at the end of the section.

Chapter 103. Sundays and Holidays.

Sec.
103-2. Hunting on Sunday.

§ 103.1. Work in ordinary calling on Sunday forbidden.

Local Modification.—Catawba: 1949, c. 1117.

§ 103-2. Hunting on Sunday.—If any person shall, except in defense of his own property, hunt on Sunday, having with him a shotgun, rifle, or pistol, he shall be guilty of a misdemeanor and pay a fine not exceeding fifty dollars ($50.00) or imprisoned not exceeding thirty days. (Rev., s. 3842; Code, s. 3783; 1868-9, c. 18, ss. 1, 2; 1945, c 1047; C. S. 3956.)

Editor's Note.—The 1945 amendment rewrote this section.

Chapter 104. United States Lands.

Art. 1. Authority for Acquisition.

§ 104-1. Acquisition of lands for specified purposes authorized; concurrent jurisdiction reserved.

As to note on jurisdiction relative to lands acquired by federal government, see 23 N. C. Law Rev. 258.

Jurisdiction of the United States is exclusive over property in this state acquired in 1899 with the state's legislative consent, and such exclusive jurisdiction is not affected by the restrictive provisions of this section and § 104-7 subsequently enacted, which are prospective only. State v. DeBerry, 224 N. C. 834, 32 S. E. (2d) 617.

§ 104-7. Acquisition of lands for public buildings; cession of jurisdiction; exemption from taxation.

See note to § 104-1. As to note on jurisdiction relative to lands acquired by federal government, see 23 N. C. Law Rev. 258.

Chapter 105. Taxation.

Art. 1. Schedule A. Inheritance Tax.

Sec.
105-16. Interest and penalty.

Art. 2. Schedule B. License Taxes.

105- 36.1. Amusements—outdoor theatres.
105-37.1. Amusements—forms of amusement not otherwise taxed.
105-65. Music machines.
105-65.1. Merchandising dispensers and weighing machines.
105-81. [Repealed.]
105-89. Automobiles, wholesale supply dealers and service stations.
105-89.1. Motorcycle dealers.
105-94, 105-95. [Repealed.]

Art. 3. Schedule C. Franchise Tax.

105-114. Nature of taxes; definitions.
105-121. [Repealed.]

Art. 4. Schedule D. Income Tax.

105-143. Subsidiary and affiliated corporations.
105-144.1. Involuntary conversions; recognition of gain or loss; replacement fund and surety bond.

Art. 7. Schedule H. Intangible Personal Property.

105-210. Moneyed capital coming into competition with the business of banks.
Sec.
105-214. [Repealed.]

Art. 8B. Schedule I-B. Taxes upon Insurance Companies.

105-228.3. To whom this article shall apply.
105-228.4. Annual registration fees for insurance companies.
105-228.5. Taxes measured by gross premiums.
105-228.6. Taxes in case of withdrawal from state.
105-228.7. Registration fees for agents, brokers and others.
105-228.8. Uniformity of taxes.
105-228.9. Powers of the commissioner of insurance.
105-228.10. No additional local taxes.

Art. 9. Schedule J. General Administration—Penalties and Remedies.

105-241. Taxes payable in national currency; for what period, and when a lien; priorities.
105-241.1. Additional taxes; assessment procedure.
105-242. Warrant for the collection of taxes; certificate or judgment for taxes.
105-244.1. Cancellation of certain assessments.
105-250.1. Distributors of coin operated machines required to make quarterly reports.

SUBCHAPTER I. LEVY OF TAXES.

§ 105-1. Title and purpose of subchapter.

The Revenue Act reflects the same philosophy which underlies the statutes of descent and distribution. It recognizes in the decedent the privilege of disposition of his property; and, if not the moral and social obligations which rest upon him with respect to its exercise, yet, indeed, the fitness of his provision for those more closely related to him by consanguinity or marital ties. This privilege may be exercised either by testamentary disposition or by leaving his property to be distributed under the law. Valentine v. Gill, 223 N. C. 396, 400, 27 S. E. (2d) 2.

Art. 1. Schedule A. Inheritance Tax.

§ 105-2. General provisions.

Editor's Note.—For comment on changes in the inheritance tax law made by the 1947 General Assembly, see 25 N. C. Law Rev. 470.

For a leading article on planning for North Carolina death and gift taxes, see 27 N. C. Law Rev. 114.

Whole Act Construed in Pari Materia.—The whole Revenue Act of 1939 and all of its parts are to be considered in pari materia, and construed accordingly. Valentine v. Gill, 223 N. C. 396, 27 S. E. (2d) 2.

§ 105-3. Property exempt.

(d) The amount of twenty thousand dollars ($20,000.00), only, of the total proceeds of life insurance policies, when such policy or policies are payable to a beneficiary or beneficiaries named in such policy or policies, and such beneficiary or beneficiaries are any such person or persons as are designated in § 105-4, subsection (a); and the amount of two thousand dollars ($2,000.00) only, of the total proceeds of life insurance policies, when such policy or policies are payable to a beneficiary or beneficiaries named in such policy or policies, and such beneficiary or beneficiaries are any person or persons as are designated in §§ 105-5 and 105-6. Provided, that no more than the amounts so specified of any such policy or policies shall be exempt from taxation, whether in favor of one beneficiary or more, and the exemption thus provided shall be prorated between the beneficiaries in proportion to the amounts received under the policies, unless otherwise provided by the decedent; provided further, that the exemption herein provided in the sum of two thousand dollars ($2,000.00) as to insurance policies payable to beneficiaries designated in §§ 105-5 and 105-6 shall be allowed only to the extent that such amount is not allowed as to insurance policies payable to beneficiaries designated in § 105-4, subsection (a), it being the intention to grant an exemption as to policies payable to Class B and Class C beneficiaries only in those cases where the exemption allowed as to Class A beneficiaries is less than two thousand dollars ($2,000.00). And also proceeds of all life insurance policies payable to beneficiaries named in sub-sections (a), (b), and (c) of this section. And also proceeds of all policies of insurance and the proceeds of all adjusted service certificates that have been or may be paid by the United States Government, or that have been or may be paid on account of policies required to be carried by the United States government or any agency thereof, to the estate, beneficiary, or beneficiaries of any person who has served in the armed forces of the United States or in the merchant marine during the first or second World War; and proceeds, not exceeding the sum of ten thousand dollars ($10,000.00), of all policies of insurance paid to the estate, beneficiary or beneficiaries of any person whose death was caused by enemy action during the second World War. This provision will be operative only when satisfactory proof that the death was caused by enemy action is filed by the executor, administrator or beneficiary with the commissoner of revenue. (1939, c. 158, s. 2; 1943, c. 400, s. 1; 1947, c. 501, s. 1.)

Editor's Note.—
The 1947 amendment rewrote subsection (d). As the rest of the section was not affected by the amendment it is not set out.

Applied in Nash v. Tarboro, 227 N. C. 283, 42 S. E. (2d) 209.

§ 105-4. Rate of tax—Class A.

Categories of Relationship Named Are Inclusive and Exclusive.—The categories of relationship named in this and the following section are stated with that precision which is necessary to a taxing measure, and are both inclusive and exclusive, and are controlling in applying the exemption. To qualify for the exemption there must, of course, be an identity of the property which is the subject of the transfer and claimed to be recurrently taxed. However, the tax is not on the property, but on the transfer; and the exemption is to the transferee. Valentine v. Gill, 223 N. C. 396, 400, 27 S. E. (2d) 2.

§ 105-5. Rate of tax—Class B.

The inheritance tax of the 1939 Revenue Act is not a tax on the property, but on the transfer of the property; and, while there must be an identity of the property, which is the subject of the transfer and claimed to be recurrently taxed, to qualify for the exemption provided in § 105-14, the exemption is allowed only to the transferees as set out in this and the preceding section. Valentine v. Gill, 223 N. C. 396, 27 S. E. (2d) 2.

§ 105-6. Rate of tax—Class C.

Cited in Valentine v. Gill, 223 N. C. 396, 27 S. E. (2d) 2.

§ 105-13. Life insurance proceeds.

(b) Or where, with respect to such insurance, the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. The term "incident of ownership," as used herein, does not include a reversionary interest.

The decedent shall not be deemed to have paid premiums or other consideration, within the meaning of this section, where the decedent has made a gift, either before or after the issuance of the policy, of money or property and the gift tax, if any, has been paid with respect to such gift, and the said money or property has been used by the donee to pay any premium or premiums.

This section shall not apply to the proceeds of insurance policies transferred, by assignment or otherwise, during the life of the decedent if the transfer did not constitute a gift, in whole or in part, under article 6, Schedule G, of this chapter, or in case the transfer was made at a time when said article was not in effect, if the transfer would not have constituted a gift, in whole or in part, under said article had it been in effect at such time.

If a gift tax has been paid with respect to any gift of an insurance policy by the decedent, the amount of tax so paid shall be credited against the amount of inheritance tax due on the proceeds of such policy under this article, and if there was more than one beneficiary to such insurance, such credit shall be apportioned against the inheritance tax payable by each beneficiary in the ratio that the interest receivable by each beneficiary bears to the total amount of the insurance proceeds. (1939, c. 158, s. 11; 1943, c. 400, s. 1; 1945, c. 708, s. 1; 1947, c. 501, s. 1.)

Editor's Note.—
The 1945 amendment struck out the word "or" formerly appearing after the word "effect" in line seven of the third paragraph under subdivision (b) of subsection 2.

The 1947 amendment struck out the former proviso to the first paragraph of said subdivision. As the rest of the section was not affected by the amendments, only this subdivision is set out.

For comment on the 1943 amendment, see 21 N. C. Law Rev. 366.

§ 105-14. Recurring taxes.

Construed in Pari Materia.—The whole Revenue Act, of which this section and its inclusive references are a part, has a connotation of application to the current transfer upon which the tax is imposed—and all of its parts are to be considered in pari materia. Valentine v. Gill, 223 N. C. 396, 400, 27 S. E. (2d) 2.

Exemption Is Limited to Circumstances Attending Immediate Transfer.—When there have been successive transfers of the property during the two-year period, the law intends to limit and define the exemption to the circumstances attending the immediate transfer sought to be taxed, and to limit the transferee claiming the exemption to the relationship existing between such transferee and the decedent from whom the estate is received—such transferee must be a Class A or Class B beneficiary of such decedent. Valentine v. Gill, 223 N. C. 396, 400, 27 S. E. (2d) 2.

Second Tax Required to Be Paid.—Where inheritance taxes, under the Revenue Act of 1939, are paid on property passing from a wife's estate to her husband, who dies within less than two years thereafter leaving the same property to a sister of his deceased wife, a second inheritance tax must be paid thereon. Valentine v. Gill, 223 N. C. 396, 27 S. E. (2d) 2.

§ 105-16. Interest and penalty. — All taxes imposed by this article shall be due and payable at the death of the testator, intestate, grantor, donor, or vendor; if not paid within twelve months from date of death of the testator, intestate, grantor, donor, or vendor, such tax shall bear interest at the rate of six per centum (6%) per annum, to be computed from the expiration of twelve months from the date of the death of such testator, intestate, grantor, donor, or vendor until paid: Provided, that if the taxes herein levied shall not be paid in full within two years from date of death of testator, intestate, grantor, donor, or vendor, then and in such case a penalty of five per centum (5%) upon the amount of taxes remaining due and unpaid shall be added: Provided further, that the penalty of five per centum (5%) herein imposed may be remitted by the commissioner of revenue in case of unavoidable delay in settlement of estate or of pending litigation, and the commissioner of revenue is further authorized, in case of protracted litigation or other delay in settlement not attributable to laches of the party liable for the tax, to remit all or any portion of the interest charges accruing under this schedule, with respect to so much of the estate as was involved in such litigation or other unavoidable cause of delay: Provided, that time for payment and collection of such tax may be extended by the commissioner of revenue for good reasons shown. (1939, c. 158, s. 14; 1947, c. 501, s. 1.)

Editor's Note.—The 1947 amendment struck out the former provision relating to discount for payment within six months from date of death of testator, etc.

§ 105-23. Information by administrator and executor.

The statement herein provided for shall be filed with the commissioner of revenue at Raleigh, North Carolina, within twelve months after the qualification of the executor or administrator, upon blank forms to be prepared by the commissioner of revenue.

(1947, c. 501, s. 1.)

Editor's Note.—The 1947 amendment substituted "twelve" for "six" in the fourth sentence. As the rest of the section was not affected by the amendment it is not set out.

Art. 2. Schedule B. License Taxes.

§ 105-33. Taxes under this article.

Editor's Note.—
For comment on the 1943 amendment, see 21 N. C. Law Rev. 368.

Cited in Duke Power Co. v. Bowles, 229 N. C. 143, 48 S. E. (2d) 287.

§ 105-36. Amusements — manufacturing, selling, leasing, or distributing moving picture films or checking attendance at moving picture shows.— Every person, firm, or corporation engaged in the business of manufacturing, selling, leasing, furnishing and/or distributing films to be used in this state in moving picture theatres or other places at which an admission fee is charged shall apply for and obtain from the commissioner of revenue a state-wide license for the privilege of engaging in such business in this state, and shall pay for such license a tax of six hundred and twenty-five dollars ($625.00): Provided, that persons, firms, or corporations engaged exclusively in the business of selling, leasing, furnishing and/or distributing films for use in places where no admission fee is charged or in schools, public or private, and other institutions of learning in this state, shall pay a tax of twenty-five dollars ($25.00).

(1947, c. 981.)

Editor's Note.—The 1947 amendment rewrote the first paragraph. As the second and third paragraphs were not changed they are not set out.

§ 105-36.1. Amusements — outdoor theatres.— (a) Every person, firm or corporation engaged in the business of operating an outdoor or drive-in moving picture show or places where vaudeville exhibitions or performances are given for compensation shall apply for and obtain in advance from the commissioner of revenue a state license for the privilege of engaging in such business and shall pay a tax in accordance with the following schedule:

For drive-in or outdoor theatres located in or within 10 miles of the corporate limits of cities and

	Car Capacity Up to 150
towns of less than 3,000 pop.	1.00 per car
towns of 3,000 to 5,000 pop.	1.10 per car
towns of 5,000 to 10,000 pop.	1.20 per car
towns of 10,000 to 20,000 pop.	1.30 per car
towns of 20,000 to 40,000 pop.	1.40 per car
towns of 40,000 and over	1.50 per car

Car Capacity 150 to 300	Car Capacity 300 to 500	Car Capacity 500 or over
1.10 per car	1.20 per car	1.30 per car
1.20 per car	1.30 per car	1.40 per car
1.30 per car	1.40 per car	1.50 per car
1.40 per car	1.50 per car	1.60 per car
1.50 per car	1.60 per car	1.75 per car
1.60 per car	1.75 per car	2.00 per car

In addition to the foregoing tax based upon population and car capacity, every operator of a business taxed under this section shall pay a tax of one dollar ($1.00) for each seat or seating space provided for patrons outside of motor vehicles driven into the enclosure by patrons. For the purpose of this section, car capacity shall be determined by the number of outlets provided for individual speakers. In the case of drive-in or outdoor theatres not equipped with individual speakers or outlets therefor, but which are equipped with one or more central speakers, the car capacity shall be regarded and rated as two hundred (200).

In the case of drive-in or outdoor theatres located within ten miles of the corporate limits of more than one municipality, the tax herein levied shall be paid in accordance with the rate applicable to the largest of such municipalities.

For the purpose of this section, unincorporated communities shall be regarded as incorporated municipalities, with the corporate limits deemed to extend one mile in every direction from the intersection of the two principal streets in such unincorporated community; and if there is no such intersection, then from the recognized business center of such unincorporated community.

In the case of drive-in or outdoor theatres located more than ten miles from the corporate limits of any municipality, the tax shall be paid at the rate herein provided for such theatres located within ten miles of the corporate limits of a municipality having a population of 3,000 to 5,000.

In the case of drive-in or outdoor theatres operating less than six months each year, the tax shall be one-half the tax herein levied.

(b) Cities and towns may levy a tax upon the businesses taxed in this section not in excess of the following amounts:

In cities or towns of less than 1,500 population	$ 12.50
In cities or towns of 1,500 and less than 3,000 population	31.25
In cities or towns of 3,000 and less than 5,000 population	62.50
In cities or towns of 5,000 and less than 10,000 population	87.50
In cities or towns of 10,000 and less than 15,000 population	137.50
In cities or towns of 15,000 and less than 25,000 population	187.50
In cities or towns of 25,000 population or over	212.50

(1949, c. 392, s. 1.)

This section became effective on June 1, 1949.

§ 105-37. Amusements — moving pictures or vaudeville shows—admission.

(b) For any moving picture show operated within the city limits or within one mile of the corporate limits of any city having a population of twenty-five thousand (25,000), or over, and known as neighborhood or suburban theatres, or for any theatre operated exclusively for colored people in a city having a population of two thousand five hundred (2,500), or over, the tax levied shall be one-third of the above tax, based upon the population of such city.

(e) Counties shall not levy any license tax on the business taxed under the foregoing portions of this section. On the business described in the first paragraph of this section, cities and towns may levy a license tax not in excess of the following:

In cities or towns of less than 1,500 population	$ 12.50
In cities or towns of 1,500 and less than 3,000 population	31.25
In cities or towns of 3,000 and less than 5,000 population	62.50
In cities or towns of 5,000 and less than 10,000 population	87.50
In cities or towns of 10,000 and less than 15,000 population	137.50
In cities or towns of 15,000 and less than 25,000 population	187.50
In cities or towns of 25,000 population or over	212.50

On the business described in subsection (a) of this section, cities and towns may levy a license tax not in excess of one hundred dollars ($100.00); and on a business described in subsections (b), (c) or (d) of this section, cities and towns may levy a license tax not in excess of one-half of the tax authorized by the schedule set forth in this subsection. (1939, c. 158, s. 105; 1943, c. 400, s. 2; 1947, c. 501, s. 2; 1949, c. 392, s. 1; c. 1201.)

Editor's Note.—

The 1945 amendment rewrote the last paragraph of former subsection (f). The 1947 amendment rewrote subsection (e), which ends the section as it now stands, and also rewrote former subsections (f) and (g) as new section 105-37.1. The first 1949 amendment, effective June 1, 1949, rewrote subsection (b) of this section. The second 1949 amendment, which was in the identical language of the first amendment and effective April 23, 1949, provides: "The commissioner of revenue is hereby authorized to refund, without interest, the difference between the amount actually paid for privilege license taxes under this subsection for the license tax years 1947-1948 and 1948-1949 and the tax which would have been due if this amendment had been in effect during such years provided, that request for such refund is made within one year after the effective date of this act."

Only the subsections affected by the amendments are set out.

For comment on the 1943 amendment, see 21 N. C. Law Rev. 368.

§ 105-37.1. Amusements — forms of amusement not otherwise taxed.—(a) Every person, firm or corporation engaged in the business of giving, offering or managing any form of entertainment or

amusement not otherwise taxed or specificially exempted in this article, for which an admission is charged, shall pay an annual license tax for each room, hall, tent or other place where such admission charges are made, graduated according to population, as follows:

In cities or towns of less than 1,500 population	$10.00
In cities or towns of 1,500 and less than 3,000 population	15.00
In cities or towns of 3,000 and less than 5,000 population	20.00
In cities or towns of 5,000 and less than 10,000 population	25.00
In cities or towns of 10,000 and less than 15,000 population	30.00
In cities or towns of 15,000 and less than 25,000 population	40.00
In cities or towns of 25,000 population or over	50.00

In addition to the license tax levied in the above schedule, such person, firm, or corporation shall pay an additional tax upon the gross receipts of such business at the rate of tax levied in article V, schedule E, §§ 105-164 to 105-187, upon retail sales of merchandise. Reports shall be made to the commissioner of revenue, in such form as he may prescribe, within the first ten days of each month covering all such gross receipts for the previous month, and the additional tax herein levied shall be paid monthly at the time such reports are made. The annual license tax herein levied shall be treated as an advance payment of the tax upon gross receipts herein levied, and the annual license tax shall be applied as a credit upon or advance payment of the gross receipts tax.

Every person, firm, or corporation giving, offering, or managing any dance or athletic contest of any kind, except high school and elementary school athletic contests, for which an admission fee in excess of fifty cents (50c) is charged, shall pay an annual license tax of five dollars ($5.00) for each location where such charges are made, and, in addition, a tax upon the gross receipts derived from admission charges in excess of fifty cents (50c) at the rate of tax levied in article V, schedule E, §§ 105-164 to 105-187, upon retail sales of merchandise. The additional tax upon gross receipts shall be levied and collected in accordance with such regulations as may be made by the commissioner of revenue. No tax shall be levied on admission fees for high school and elementary school contests. The tax levied in this last portion of this section shall apply to all privately owned toll bridges, including all charges made for all vehicles, freight and passenger, and the minimum charge of fifty cents (50c) for admission shall not apply to bridge tolls.

(b) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one-half the base tax levied herein. (1943, c. 400, s. 2; 1945, c. 708, s. 2; 1947, c. 501, s. 2.)

Editor's Note.—Prior to the 1947 amendment the provisions of this section were covered by former subsections (f) and (g) of § 105-37.

§ 105-39. Amusements—carnival companies, etc. It is not the purpose of this article to discourage agricultural fairs in the state, and to further this cause, no carnival company will be allowed to play a "still date" in any county where there is a regularly advertised agricultural fair, thirty days prior to the dates of said fair. An agricultural fair shall be construed as meaning one that has operated at least one year prior to March 24, 1939.

(1947, c. 501, s. 2.)

Editor's Note.—
The 1947 amendment substituted "thirty" for "fifteen" in line five of the second paragraph of subsection (b). As only this paragraph was affected by the amendment the rest of the section is not set out.

§ 105-41. Attorneys at law and other professionals.—Every practicing attorney at law, practicing physician, veterinary, surgeon, osteopath, chiropractor, chiropodist, dentist, oculist, optician, optometrist, any person practicing any professional art of healing for a fee or reward, civil engineer, electrical engineer, mining engineer, mechanical engineer, architect and landscape architect, photographer, canvasser for any photographer, agent of a photographer in transmitting pictures or photographs to be copied, enlarged or colored (including all persons enumerated in this section employed by the state, county, municipality, a corporation, firm or individual), and every person, whether acting as an individual, as a member of a partnership, or as an officer and/or agent of a corporation, who is engaged in the business of selling or offering for sale, buying or offering to buy, negotiating the purchase, sale, or exchange of real estate, or who is engaged in the business of leasing or offering to lease, renting or offering to rent, or of collecting any rents as agent for another for compensation, or who is engaged in the business of soliciting and/or negotiating loans on real estate as agent for another for a commission, brokerage and/or other compensation, shall apply for and obtain from the commissioner of revenue a state-wide license for the privilege of engaging in such business or profession, or the doing of the act named, and shall pay for such license twenty-five dollars ($25.00): Provided, that no professional man or woman shall be required to pay a privilege tax after he or she has arrived at the age of seventy-five years. Further provided, that it shall be unlawful for a nonresident of this state to engage in the real estate business in this state, as defined in this section, unless the state of residence of such person will permit a resident of this state to engage in such business. Any person who shall engage in the real estate business in this state in violation of the terms of this provision shall be guilty of a misdemeanor and shall be punished in the discretion of the court; and further provided, that the obtaining of a real estate dealer's license by such person shall not authorize such nonresident to engage in the real estate business in this state, and provided further that in all prosecutions under this section, a certificate under the hand and seal of the commissioner of revenue that the accused filed no income tax returns with his department for the preceding taxable year shall be prima facie evidence that the accused is a nonresident and that his license is void.

(1949, c. 683.)

Editor's Note.—
The 1949 amendment added that part of the first paragraph beginning with the proviso preceding the last sen-

tence. As only the first paragraph was affected by the amendment the rest of the section is not set out.

For comment on the 1943 amendment, see 21 N. C. Law Rev. 367.

§ 105-41.1. Bondsmen. — Every person, firm, or corporation, excepting agents of insurance or bonding companies which are licensed by the commissioner of insurance to issue bonds, engaged in the business of writing or executing, for a consideration, appearance, compliance, or bail bonds, or any type of bond or undertaking required in connection with criminal proceedings in any of the courts of this state, shall apply for and obtain from the commissioner of revenue a state-wide license for the privilege of engaging in such business and shall pay for such license the following tax:

In cities or towns of less than 2000 population	$10.00
In cities or towns of 2,000 and less than 5,000 population	15.00
In cities or towns of 5,000 and less than 10,000 population	20.00
In cities or towns of 10,000 population or over	40.00

If any person, firm, or corporation, required to be licensed under the provisions of this section, engages in said business in two or more cities or towns, such person, firm, or corporation shall procure a license based on the population of the largest city or town in which the business taxed under this section is carried on.

Counties, cities and towns may levy a license tax on the business taxed under this section in an amount not in excess of the tax levied by the state.

Persons, firms or corporations licensed hereunder who or which do not engage in any of the kinds of insurance business described in § 58-72 shall be exempt from being licensed or regulated by the commissioner of insurance. (1943, c. 400, s. 2; 1945, c. 708, s. 2; 1947, c. 501, s. 2.)

Editor's Note.—

The 1945 amendment inserted the paragraph following the table of tax amounts. The 1947 amendment added the last paragraph.

§ 105-47. Dealers in horses and/or mules.

Section Does Not Discriminate against Interstate Commerce.—The license tax imposed on dealers purchasing horses or mules for resale by this section both in its provisions for graduation according to the number of carloads of horses or mules purchased for resale and the head tax on such animals purchased for resale is imposed and the exceptions to the head tax are applicable regardless of whether such animals were raised in this state or are shipped into the state from other states, and therefore the statute makes no discrimination between local or interstate commerce. Nesbitt v. Gill, 227 N. C. 174, 41 S. E. (2d) 646.

Head Tax on Animals Bought for Resale Is Just and Equitable.—The imposition of an additional license tax of $3.00 per head on horses and mules, required to be paid by dealers purchasing such animals for resale, is a just and equitable manner for determining the amount of license tax to be paid by such dealers, based upon the quantity of business done by them, particularly in view of the fact that such sales have been exempt from the 3% sales tax and the head tax substituted. Nesbitt v. Gill, 227 N. C. 174, 41 S. E. (2d) 646.

Exemptions Not Unconstitutional.—Under the provisions of this section, a dealer is exempt from the head tax on horses and mules therein imposed: On horses and mules purchased from another dealer within the state who has paid the tax; on horses and mules received in part payment; and on horses and mules repossessed for failure of a purchaser to pay the purchase price, and such exemptions are based upon reasonable distinctions and apply to all dealers alike and therefore do not violate any provisions of the state or federal constitutions. Nesbitt v. Gill, 227 N. C. 174, 41 S. E. (2d) 646.

§ 105-53. Peddlers.

(b) Any person, firm, or corporation employing the services of another as a peddler, either on a salary or commission basis, and/or furnishing spices, flavoring extracts, toilet articles, soaps, insecticide, proprietary medicine and household remedies in original packages of the manufacturer and other packaged articles of the kind commonly used on the farm and in the home, to be sold by a peddler, under any kind of contractual agreement, shall be liable for the payment of taxes levied in this section, instead of the peddler.

Provided, however, any person peddling fruits, vegetables, or products of the farm shall pay a license tax of twenty-five dollars ($25.00) per year, which license shall be state-wide. Counties, cities and towns may levy a tax under this subsection not in excess of one-half of the state tax. Provided, however, no county, city or town shall issue any license, or permit any person, firm, or corporation to do any business under the provisions of this subsection, until and unless such person shall produce and exhibit to the tax collector of such county, city or town, his or its state license for the privilege of engaging in such business.

(e) The provisions of this section shall not apply to any person, firm, or corporation who sells or offers for sale books, periodicals, printed music, ice, wood for fuel, fish, beef, mutton, pork, bread, cakes, pies, products of the dairy, poultry, eggs, livestock, or articles produced by the individual vendor offering them for sale, but shall apply to medicines, drugs, or articles assembled.

(f) The board of county commissioners of any county in this state, upon proper application, may exempt from the annual license tax levied in this section Confederate soldiers, disabled veterans of the Spanish-American War, disabled soldiers of the first and second World Wars, who have been bona fide residents of this state for twelve or more months continuously, and the blind who have been bona fide residents of this state for twelve or more months continuously, widows with dependent children; and when so exempted, the board of county commissioners shall furnish such person or persons with a certificate of exemption, and such certificate shall entitle the holder thereof to peddle within the limits of such county without payment of any license tax to the state.

(1945, c. 708, s. 2.)

Editor's Note.—

The 1945 amendment, effective June 1, 1945, rewrote the first paragraph of subsection (b), substituted "for" for "or" in line four of subsection (e) and substituted "first and second World Wars" for "World War" in line six of subsection (f). As the rest of the section was not affected by the amendment it is not set out.

For comment on the 1943 amendment, see 21 N. C. Law Rev. 367.

§ 105-56. Repairing and servicing elevators and automatic sprinkler systems.

(b) If any person, firm, or corporation, required to be licensed under the provisions of this section, engages in said business in two or more cities or towns, such person, firm or corporation shall procure a license based on the population of the largest

city or town in which the business taxed under this section is carried on.

(c) The tax under this section shall not apply to the business taxed in §§ 105-55 and 105-91. (1939, c. 158, s. 122¾; 1947, c. 501, s. 2.)

Editor's Note.—The 1947 amendment added present subsection (b) to this section and redesignated former subsection (b) as (c). As the section down through subsection (a) was not affected by the amendment it is not set out.

§ 105-58. Gypsies and fortune tellers.

(c) Counties, cities, and towns may levy any license tax on the business taxed in this section. (1939, c. 158, s. 124; 1945, c. 708, s. 2.)

Editor's Note.—The 1945 amendment, effective June 1, 1945, rewrote subsection (c). As the rest of the section was not affected by the amendment it is not set out.

§ 105-60. Hotels.

Editor's Note.—
For comment on the 1943 amendment, see 21 N. C. Law Rev. 367.

§ 105-64. Billiard and pool tables.

(a) This section shall not apply to fraternal organizations having a national charter, American Legion Posts, or posts or other local organizations of other veterans' organizations chartered by congress or organized and operating on a state-wide or nation-wide basis, Young Men's Christian Associations, and Young Women's Christian Associations.

(1945, c. 995, s. 1.)

Editor's Note.—
The 1945 amendment inserted in subsection (a) the reference to other veterans' organizations. As the rest of the section was not affected by the amendment only this subsection is set out.

§ 105-64.1. Bowling alleys.—Every person, firm, or corporation who shall rent, maintain, or own a building wherein, or any premises on which, there is a bowling alley or alleys of like kind shall apply for and procure from the commissioner of revenue a state license for the privilege of operating such bowling alley or alleys, and shall pay for such license a tax of ten dollars ($10.00) for each alley kept or operated.

(1947, c. 501, s. 2.)

Editor's Note.—The 1947 amendment inserted the words "or any premises on which" in the first paragraph. As the rest of the section was not affected by the amendment it is not set out.

§ 105-65. Music machines. — (1) Every person, firm, or corporation engaged in the business of operating, maintaining, or placing on location anywhere within the state of North Carolina, any machine or machines which plays records, or produces music, shall apply for and procure from the commissioner of revenue a state-wide license to be known as an annual operator's license, and shall pay for such license the sum of one hundred ($100.00) dollars.

(2) In addition to the above annual operator's license, every person, firm, or corporation operating any of the above machines, shall apply for and obtain from the commissioner of revenue, what shall be termed an annual state-wide license for each machine operated and shall pay therefor the sum of ten ($10.00) dollars.

(3) The applicant for license under this section shall, in making application for license, specify the serial number of the machine or machines proposed to be operated, together with a description of the service offered for sale thereby, and the amount of deposit required by or in connection with the operation of such machine or machines. The license shall carry the serial number to correspond with that on the application, and no such license shall under any condition be transferable to any other machines. It shall be the duty of the person in whose place of business the machine is operated or located to see that the proper state license is attached in a conspicuous place on the machine before its operation shall commence.

(4) If any person, firm, or corporation shall fail, neglect or refuse to comply with the terms and provisions of this section, or shall fail to attach the proper state license to any machine as herein provided, the commissioner of revenue, or his agents, or deputies, shall forthwith seize and remove such machine, and shall hold the same until the provisions of this section have been complied with. In addition to the above provision the applicant shall be further liable for the additional tax imposed under § 105-112.

(5) Counties, cities and towns may levy and collect a license tax not in excess of fifty per cent (50%) of the total amount collected by the state from music machines: Provided, that counties, cities and towns shall not levy and collect an annual operator's occupational license levied for the operation of the above machines.

(6) Counties, cities and towns levying a tax under the provisions of this section shall have power through their tax collecting officers, upon nonpayment of the tax levied by them, or of any interest or penalty thereon, or upon failure to attach the evidence of license issued by them to any such machines, to seize, remove and hold such machines until all such defaults have been remedied. (1939, c. 158, s. 130; 1941, c. 50, s. 3; 1943, c. 105; 1943, c. 400, s. 2; 1945, c. 708, s. 2.)

Editor's Note.—
The 1945 amendment, effective June 1, 1945, rewrote this section.

§ 105-65.1. Merchandising dispensers and weighing machines.—(1) Every person, firm or corporation engaged in the business of operating, maintaining or placing on location anywhere within the state of North Carolina any merchandising dispenser, in which is kept any article or merchandise to be purchased, or any weighing machine shall apply for and procure from the commissioner of revenue a state-wide license to be known as an annual distributor's or operator's license, and shall pay for such license the following tax:

Distributors or operators of cigarette dispensers or dispensers of other tobacco products	$100.00
Distributors or operators of drink dispensers	100.00
Distributors or operators of food or other merchandising dispensers	25.00
Distributors or operators of weighing machines	25.00

(2) In addition to the above annual distributor's or operator's license, every person, firm or corporation distributing or operating any of the above dispensers or machines shall apply for and obtain from the commissioner of revenue what shall be termed a state-wide license for each dispenser or

machine operated, and shall pay therefor the following annual tax:

Cigarette dispensers or dispensers of other tobacco products	$ 5.00
Drink dispensers	15.00
One cent food or merchandising dispensers	.50
Five-cent food or merchandising dispensers	1.00
Weighing machines	2.50

Provided, that the above tax on food or merchandising dispensers shall not apply to dispensers that vend solely peanuts, neither shall the tax apply to dispensers that vend no other commodity than candy containing fifty per cent (50%) or more peanuts, nor to penny self-service dispensers or machines contributing twenty per cent (20%) of their gross revenue to work for the visually handicapped. The applicant for license under this section shall, in making application for license, specify the serial number of the dispenser, or dispensers, and of the weighing machine, or machines, proposed to be distributed or operated, together with a description of the merchandise or service offered for sale thereby, and the amount of deposit required by or in connection with the operation of such dispenser, or dispensers, and such machine, or machines. The license shall carry the serial number to correspond with that on the application, and no such license shall under any condition be transferable to any other dispensers or machines. It shall be the duty of the person in whose place of business the dispenser or machine is operated or located to see that the proper state license is attached in a conspicuous place on the dispenser or machine before its operation shall commence. Provided, that when application is made under this section for license to operate a machine dispensing bottled drinks or cigarettes, the applicant for such license shall pay or cause to be paid the license fee provided for under §§ 105-79 and 105-84, as the case may be.

(3) If any person, firm, or corporation shall fail, neglect or refuse to comply with the terms and provisions of this section or shall fail to attach the proper state license to any dispenser or machine as herein provided, the commissioner of revenue, or his agent or deputies, shall forthwith seize and remove such dispenser or machine, and shall hold the same until the provisions of this section have been complied with. In addition to the above provision the applicant shall be further liable for the additional tax imposed under § 105-112.

(4) Sales of merchandise herein referred to shall be subject to the provisions of Article V, Schedule "E", §§ 105-164 to 105-187, and the tax therein levied shall be paid by the distributor or operator of such dispensers or machines.

(5) Counties, cities and towns may levy and collect a license tax not in excess of fifty per cent (50%) of the total amount collected by the state from weighing machines: Provided, that counties, cities and towns shall not levy and collect an annual distributor's or operator's occupational license levied for the distribution or operation of the above named dispensers and machines, neither shall any county, city or town levy and collect any tax whatsoever from distributors and operators of soft drink dispensers and one cent and five-cent food dispensers: Provided, further, that counties, cities and towns shall not levy and collect any per dispenser or machine license tax from distributors or operators of cigarette dispensers, or dispensers of other tobacco products. Counties, cities and towns may levy and collect an annual distributor's or operator's occupational license on cigarette dispensers not in excess of ten ($10.00) dollars.

(6) Counties, cities and towns levying a tax under the provisions of this section shall have power through their tax collecting officers, upon nonpayment of the tax levied by them, or of any interest or penalty thereon, or upon failure to attach the evidence of license issued by them to any such dispensers or machines, to seize, remove and hold such dispensers or machines until all such defaults have been remedied.

(7) The word "dispenser" or "dispensers" as used in this section shall include any machine or mechanical device through the medium of which any of the merchandise referred to in this section is purchased, distributed or sold.

(8) Neither the tax levied under subsection (2) upon dispensers, nor the tax levied under subsection (1) upon distributors or operators, shall apply to dispensers or vending machines which dispense only milk, milk drinks, products of the dairy, or pure uncarbonated fruit or vegetable juices. (1939, c. 158, s. 130; 1941, c. 50, s. 3; 1943, c. 105; 1943, c. 400, s. 2; 1945, c. 708, s. 2; 1949, c. 1220, s. 1.)

Editor's Note.—The 1949 amendment added subsection (8).

§ 105-69. Manufacturers, producers, bottlers and distributors of soft drinks.

Provided, that counter-pressure or pre-mix fillers shall be deemed to have the following equivalent capacities and shall be taxed in accordance with the above schedule upon the basis of the nearest equivalent capacity; 24 spout pre-mix, equivalent to 40 spout low-pressure; 34 spout pre-mix, equivalent to 50 spout low-pressure; 40 spout pre-mix, equivalent to 60 spout low-pressure. For a 50 spout counter-pressure or pre-mix filler, the tax shall be two thousand and one hundred dollars ($2,100.00).

(1949, c. 782.)

Editor's Note.—The 1949 amendment inserted the above paragraph in subsection (a) immediately following the schedule of license tax fees for low-pressure equipment. As the rest of the section was not changed by the amendment only this paragraph is set out.

§ 105-74. Pressing clubs, dry cleaning plants and hat blockers.

Editor's Note.—

For comment on the 1943 amendment, see 21 N. C. Law Rev. 370.

§ 105-79. Soda fountains, soft drink stands.

On each stand at which soft drinks are sold, the same not being strictly a soda fountain, and on each place of business where bottled carbonated drinks are sold at retail, the license tax shall be five dollars ($5.00); provided, that the tax herein levied shall not apply to stands which sell no drinks except milk, milk drinks, products of the dairy, or pure uncarbonated fruit or vegetable juices.

(1949, c. 1220, s. 2.)

Editor's Note.—The 1949 amendment added the proviso to

the fourth paragraph. As only this paragraph was changed the rest of the section is not set out.

§ 105-81: Repealed by Session Laws 1947, c. 501, s. 2.

§ 105-85. Laundries.—Every person, firm, or corporation engaged in the business of operating a laundry, including wet or damp wash laundries and businesses known as "launderettes," "launderalls" and similar type businesses, where steam, electricity, or other power is used, or who engages in the business of supplying or renting clean linen or towels, shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business, and shall pay for such license the following tax:

In cities or towns of less than 5,000 population	$ 12.50
In cities or towns of 5,000 and less than 10,000 population	25.00
In cities or towns of 10,000 and less than 15,000 population	37.50
In cities or towns of 15,000 and less than 20,000 population	50.00
In cities or towns of 20,000 and less than 25,000 population	60.00
In cities or towns of 25,000 and less than 30,000 population	72.50
In cities or towns of 30,000 and less than 35,000 population	85.00
In cities or towns of 35,000 and less than 40,000 population	100.00
In cities or towns of 40,000 and less than 45,000 population	112.50
In cities or towns of 45,000 population and above	125.00

Provided, however, that any laundry or other concern herein referred to where the work is performed exclusively by hand or home-size machines only, and where not more than twelve persons are employed, including the owners, the license tax shall be one-third of the amount stipulated in the foregoing schedule.

Every person, firm, or corporation soliciting laundry work or supplying or renting clean linen or towels in any city or town, outside of the city or town wherein said laundry or linen supply or towel supply business is established, shall procure from the commissioner of revenue a state license as provided in the above schedule, and shall pay for such license a tax based according to the population of the city or town, for the privilege of soliciting therein. The additional tax levied in this paragraph shall apply to the soliciting of laundry work or linen supply or towel supply work in any city or town in which there is a laundry, linen supply or towel supply establishment located in the said city or town. The soliciting of business for or by any person, firm, or corporation engaged in the business of laundry work and/or supplying or renting clean linen or towels shall and the same is hereby construed to be engaging in the said business. Any person, firm, or corporation soliciting in said city or town shall procure from the commissioner of revenue a state license for the privilege of soliciting in said city or town, said tax to be in the sum equal to the amount which would be paid if the solicitor had an establishment and actually engaged in such business in the said city or town; provided the solicitor has paid a state, county and municipal license in this state.

Counties, cities and towns, respectively, may levy a license tax not in excess of twelve dollars and fifty cents ($12.50) on any person, firm, or corporation engaged in the business of laundry work and/or supplying or renting clean linens or towels in instances when said work is performed outside the said county or town, or when the linen or towels are supplied by business outside said county or town.

In addition to the annual tax levied in this section, there is hereby levied a tax of one per cent (1%) on the gross receipts of such laundries, as the same are defined in this section, or of such persons, firms or corporations supplying or renting clean linen or towels. The word "laundry" or "laundries" as hereafter used in this section, shall include laundries as defined in this section and persons, firms or corporations renting clean linen or towels. Laundries shall add to the amount charged each customer, except those exempted herein one per cent (1%) of said amount and this added amount shall be paid by each customer as a tax. Provided, the failure of any laundry to add, and collect from its customers one per cent (1%) of the amount charged its customers shall not relieve said laundry from liability for the tax herein imposed. Reports shall be made to the commissioner of revenue in such form as he may prescribe within the first ten days of each month, covering all such gross receipts for the previous month, and the tax herein levied shall be paid monthly at the time such reports are made. There shall be excluded from the gross receipts taxed under this section, all sales to the United States government, the state of North Carolina or any agency or subdivision thereof, and sales to charitable or religious organizations or institutions, and hospitals not operated for profit. The one per cent gross receipts tax levied by this paragraph shall not be due or payable by laundries as defined herein on that portion of their business upon which a three per cent sales tax is due and payable.

(1945, c. 708, s. 2; 1949, c. 392, s. 1.)

Editor's Note.—

The 1945 amendment, effective June 1, 1945, substituted "twelve" for "four" in the first proviso of this section.

The 1949 amendment, effective June 1, 1949, made this section applicable to launderettes, launderalls and similar type businesses and added the last sentence of the fifth paragraph relating to additional tax of one per cent on gross receipts. The last two paragraphs are not set out.

§ 105-88. Loan agencies or brokers.

As to regulation of loan agencies or brokers, see §§ 53-164 to 53-168.

§ 105-89. Automobiles, wholesale supply dealers and service stations.—(1) Automotive Service Stations.—Every person, firm, or corporation engaged in the business of servicing, storing, painting, repairing, welding, or upholstering motor vehicles, trailers, semi-trailers, or engaged in the business of retail selling and/or delivering of any tires, tools, batteries, electrical equipment, automotive accessories, including radios designed for exclusive use in automobiles, or supplies, motor fuels and/or lubricants, or any of such commodities, in this state, shall apply for and obtain from

the commissioner of revenue a state license for the privilege of engaging in such business in this state, and shall pay for such license an annual tax for each location where such business is carried on, as follows:

In rural sections and/or cities or towns of less than 2,500 population	$10.00
In cities or towns of 2,500 and less than 5,000 population	15.00
In cities or towns of 5,000 and less than 10,000 population	20.00
In cities or towns of 10,000 and less than 20,000 population	30.00
In cities or towns of 20,000 and less than 30,000 population	40.00
In cities or towns of 30,000 or more	50.00

(a) In rural sections where a service station is operated the tax shall be five dollars ($5.00), unless more than one pump is operated, in which event the tax shall be five dollars ($5.00) per pump: Provided, that any person, firm, or corporation operating a motor vehicle repair shop or garage in rural sections shall be liable for a minimum annual tax of ten dollars ($10.00).

(b) The tax levied in this section shall in no case be less than five dollars ($5.00) per pump.

(c) No additional license tax under this subsection shall be levied upon or collected from any employee, agent, or salesman whose employer or principal has paid the tax for each location levied in this subsection.

(d) The tax imposed in § 105-53 shall not apply to the sale of gasoline to dealers for resale.

(e) Counties, cities, and towns may levy a license tax upon each place of business located therein under this subsection not in excess of one-fourth of that levied by the state.

(2) Automotive Equipment and Supply Dealers at Wholesale.—Every person, firm, or corporation engaged in the business of buying, selling, distributing, exchanging, and/or delivering automotive accessories, including radios designed for exclusive use in automobiles, parts, tires, tools, batteries, and/or other automotive equipment or supplies or any of such commodities at wholesale shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business in this state, and shall pay for such license an annual tax for each location where such business is carried on as follows:

In unincorporated communities and in cities or towns of less than 2,500 population	$ 25.00
In cities or towns of 2,500 and less than 5,000 population	30.00
In cities or towns of 5,000 and less than 10,000 population	50.00
In cities or towns of 10,000 and less than 20,000 population	75.00
In cities or towns of 20,000 and less than 30,000 population	100.00
In cities or towns of 30,000 population or more	125.00

Provided, any person, firm, or corporation engaged in the business enumerated in this section and having no located place of business, but selling to retail dealers by use of some form of vehicle, shall obtain from the commissioner of revenue a state-wide license for the privilege of engaging in such business in this state, and shall pay for such license an annual tax for each vehicle used in carrying on such business fifty dollars ($50.00).

(a) For the purpose of this section, the word "wholesale" shall apply to manufacturers, jobbers, and such others who sell to retail dealers, except manufacturers of batteries.

(b) No additional license tax under this subsection shall be levied upon or collected from any employee, agent, or salesman whose employer or principal has paid the tax for each location levied in this subsection.

(c) Counties, cities, and towns may levy a license tax on each place of business located therein, taxed under this subsection, not in excess of one-half of that levied by the state, with the exception that the minimum tax may be as much as ten dollars ($10.00).

(d) No person, firm, or corporation paying the wholesalers' tax as levied in subsection two hereof shall be required to pay any additional tax under subsection one of this section for engaging in any of the types of business levied upon in said subsection one.

(3) Motor Vehicle Dealers.—Every person, firm, or corporation engaged in the business of buying, selling, distributing, servicing, storing and/or exchanging motor vehicles, trailers, semi-trailers, tires, tools, batteries, electrical equipment, lubricants, and/or automotive equipment, including radios designed for exclusive use in automobiles, and supplies in this state shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business in this state, and shall pay for such license an annual tax for each location where such business is carried on, as follows:

In unincorporated communities and in cities or towns of less than 1,000 population	$ 25.00
In cities or towns of 1,000 and less than 2,500 population	50.00
In cities or towns of 2,500 and less than 5,000 population	75.00
In cities or towns of 5,000 and less than 10,000 population	110.00
In cities or towns of 10,000 and less than 20,000 population	140.00
In cities or towns of 20,000 and less than 30,000 population	175.00
In cites or towns of 30,000 or more	200.00

Provided, that persons, firms, or corporations dealing in secondhand or used motor vehicles exclusively shall be liable for the tax as set out in the foregoing schedule unless such business is of a seasonal, temporary, transient, or itinerant nature, in which event the tax shall be three hundred dollars ($300.00) for each location where such business is carried on.

(a) Any person, firm, or corporation who or which deals exclusively in motor fuels and lubricants, and has paid the license tax levied under subsection one of this section, shall not be subject to any license tax under subsections two and three of this section.

(b) No additional license tax under this subsection shall be levied upon or collected from any employee or salesman whose employer has paid the tax levied in this subsection; nor shall the tax

apply to dealers in semi-trailers weighing not more than five hundred pounds and carrying not more than one-thousand-pound load, and to be towed by passenger cars, nor to dealers in four-wheel, farm type wagons equipped with rubber tires and designed to be pulled or towed by passenger cars or farm tractors.

(c) Premises on which used cars are stored or sold when owned or operated by a licensed new car dealer under the same name shall not be deemed as a separate place of business when conducted within the corporate limits of any city or town in which such new car business is conducted.

(d) Counties, cities, and towns may levy a license tax on each place of business located therein, taxed under this subsection, not in excess of one-fourth of that levied by the state, with the exception that the minimum tax may be as much as twenty dollars ($20.00): Provided, if such business is of a seasonal, temporary, transient, or itinerant nature, counties, cities, and towns may levy a tax of three hundred dollars ($300.00) for each location where such business is carried on. (1939, c. 158, s. 153; 1945, c. 708, s. 2; 1947, c. 501, s. 2; 1949, c. 392, s. 1.)

Editor's Note.—The 1945 amendment inserted the words "rural sections and/or" in line seventeen of subsection (l) and added the proviso to paragraph (a) thereof.

The 1947 amendment renumbered former subsection (3) as (2) and substituted "two" for "three" in paragraph (d) thereof. The amendment rewrote former subsection (2) as new section 105-89.1. It also renumbered former subsection (4) as (3), omitted the former reference in paragraph (a) thereof to subsection (4), struck out former paragraph (c) and redesignated former paragraphs (d) and (e) as (c) and (d), respectively.

The 1949 amendment, effective June 1, 1949, added to subdivision (b) of subsection (3) the provision relating to dealers in farm type wagons.

§ 105-89.1. Motorcycle dealers. — Every person, firm, or corporation, foreign or domestic, engaged in the business of buying, selling, distributing, and/or exchanging motorcycles or motorcycle supplies or any of such commodities in this state shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business in this state, and shall pay for such license an annual tax for each location where such business is carried on, as follows:

In unincorporated communities and cities or towns of less than 2,500 population	$10.00
In cities or towns of 2,500 and less than 5,000 population	15.00
In cities or towns of 5,000 and less than 10,000 population	20.00
In cities or towns of 10,000 and less than 20,000 population	25.00
In cities or towns of 20,000 and less than 30,000 population	30.00
In cities or towns of 30,000 or more	40.00

(a) A motorcycle dealer paying the license tax under this section may buy, sell, and/or deal in bicycles and bicycle supplies without the payment of an additional license tax.

(b) No additional license tax shall be levied upon or collected from any employee or salesman whose employer has paid the tax levied in this section.

(c) No motorcycle dealer shall be issued dealer's tags until the license tax levied under this section has been paid.

(d) Counties, cities, and towns may levy a license tax on each place of business located therein, taxed under this section, not in excess of one-fourth of that levied by the state, with the exception that the minimum tax may be as much as ten dollars ($10.00). (1939, c. 158, s. 153; 1947, c. 501, s. 2.)

Editor's Note.—Prior to the 1947 amendment the subject matter of this section appeared as subsection (2) of § 105-89.

§ 105-90. Emigrant and employment agents.— (a) Every person, firm, or corporation, either as agent or principal, engaged in the business of soliciting, hiring, and/or contracting with laborers, male or female, in this state, for employment out of the state shall apply for and obtain from the commissioner of revenue a state license for each county for the privilege of engaging in such business, and shall pay for such license a tax of five hundred dollars ($500.00) for each county in which such business is carried on.

(1945, c. 635.)

Editor's Note.—The 1945 amendment inserted the words "the business of" after the word "in" appearing in line two of subsection (a). As the rest of the section was not affected by the amendment it is not set out.

§ 105-91. Plumbers, heating contractors, and electricians.

Provided, that when an individual required to be licensed under this section employs only one additional person the tax shall be one-half.

(1945, c. 708, s. 2.)

Editor's Note.—The 1945 amendment, effective June 1, 1945, struck out in the first proviso the words "a licensed plumber" and inserted in lieu thereof the words "an individual required to be licensed under this section." As the rest of the section was not affected by the amendment only this proviso is set out.

§ 105-94: Repealed by Session Laws 1947, c. 501, s. 2.

§ 105-95: Repealed by Session Laws 1947, c. 831, s. 2.

§ 105-97. Manufacturers of ice cream. — (a) Every person, firm, or corporation engaged in the business of manufacturing or distributing ice cream at wholesale shall apply for and obtain from the commissioner of revenue a state license for the privilege of doing business in this state and shall pay for each factory or place where manufactured and/or stored for distribution the following base tax: Where the machine or the equipment unit used is of the continuous freezer type the rate of tax shall be one dollar and fifty cents ($1.50) per gallon capacity based on the rated capacity in gallons per hour according to manufacturer's rating of such freezer or freezers, but in no case shall the tax be less than ten dollars ($10.00) per annum for any freezer or freezers used; and where the machine or equipment unit used is not of the continuous freezer type the rate of tax shall be five ($5.00) dollars per gallon capacity for the freezer or freezers used; but in no case shall the tax be less than ten dollars ($10.00) per annum for any freezer or freezers used; provided that the commissioner shall have the right to check the correctness or accuracy of any such manufacturer's rating herein referred to and to levy the tax herein authorized on the basis of such determined capacity; and provided, further that where no standard freezer equipment with manufacturer's ca-

pacity rating is used, a tax of fifty dollars ($50.00) shall apply; and provided, further that the license tax herein shall not apply to any farmer who manufactures and sells only the products of his own cows.

Each truck, automobile or other vehicle coming into this state from another state and selling and/or delivering ice cream on which the tax has not been paid under the provisions of this section shall pay an annual license tax for the privilege of doing business in this state in the sum of one hundred dollars ($100.00) per truck, automobile or vehicle. The license secured from the state under this section shall be posted in the cab of the truck, automobile or other vehicle.

(b) For the purpose of this section the words "ice cream" shall apply to ice cream, frozen custards, sherbets, water ices, and/or similar frozen products.

(c) Every retail dealer selling at retail ice cream purchased from a manufacturer other than a manufacturer who has paid the tax imposed in subsection (a) of this section or a manufacturer using counter freezer equipment and selling ice cream at retail only shall pay an annual license tax for the privilege of doing business in this state of ten dollars ($10.00).

(d) Counties shall not levy a license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one-fourth of the above. (1939, c. 158, s. 161; 1945, c. 708, s. 2.)

Editor's Note.—The 1945 amendment, effective June 1, 1945, rewrote subsection (a) and made subsection (c) applicable to a manufacturer using counter freezer equipment and selling ice cream at retail only.

§ 105-98. Branch or chain stores.—Every person, firm, or corporation engaged in the business of operating or maintaining in this state, under the same general management, supervision, or ownership, two or more stores, or mercantile establishments where goods, wares, and/or merchandise are sold or offered for sale, or from which such goods, wares, and/or merchandise are sold and/or distributed at wholesale or retail, or who or which controls by lease, either as lessor or lessee, or by contract, the manner in which any such store or stores are operated, or the kinds, character, or brands of merchandise which are sold therein, shall be deemed a branch or chain store operator, and shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business of a branch or chain store operator, and shall pay for such license a tax according to the following schedule:

On each and every such store operated in this state in excess of one, sixty-five dollars ($65.00). (1945, c. 708, s. 2; 1949, c. 392, s. 1.)

Editor's Note.—The 1945 amendment, effective June 1, 1945, substituted "privilege" for "purpose" in line sixteen of the first paragraph. The 1949 amendment rewrote the second paragraph setting out the tax schedule. As the rest of the section was not affected by the amendments it is not set out.

For a brief comment on the 1949 amendment, see 27 N. C. Law Rev. 481.

§ 105-102. Junk dealers.—Every person, firm, or corporation engaged in the business of buying and/or selling or dealing in what is commonly known as junk, including scrap metals, glass, waste paper, waste burlap, waste cloth, and cordage of every nature, kind and description, shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business in this state and shall pay for such license an annual tax for each location where such business is carried on, according to the following schedule:

In unincorporated communities and in cities or towns of less than 2,500 population	$ 25.00
In cities or towns of 2,500 and less than 5,000 population	30.00
In cities or towns of 5,000 and less than 10,000 population	50.00
In cities or towns of 10,000 and less than 20,000 population	75.00
In cities or towns of 20,000 and less than 30,000 population	100.00
In cities or towns of 30,000 population or more	125.00

Provided, that if any person, firm, or corporation shall engage in the business enumerated in this section within a radius of two miles of the corporate limits of any city or town in this state, he or it shall pay a tax based on the population of such city or town according to the schedule above set out: Provided further, that any person, firm or corporation engaged in the business enumerated in this section who does not maintain an established place of business in this state and who buys and/or sells or disposes of junk and other waste materials purchased or collected in this state otherwise than to licensed junk dealers or manufacturers in this state shall be liable for the license tax herein imposed upon the same basis as if such person, firm or corporation maintained a place of business in each county and municipality where such activity is carried on. Counties, cities and towns may levy a license tax not in excess of one-half of that levied by the state; provided, however, that any person, firm or corporation dealing solely in waste paper shall not be liable for said tax; and provided further, the licenses levied herein shall not apply to persons engaged in the collection of scrap, who maintain no regular place of business, but sell only to licensed dealers or manufacturers in this state; and further that salvage committees operating, under state or federal sponsorship, community scrap yards where personal profit does not accrue, shall not be required to pay license under this section. (1939, c. 158, s. 168; 1943, c. 400, s. 2; 1949, c. 580, ss. 1, 2.)

Editor's Note.—The 1949 amendment inserted the second proviso following the schedule, and substituted the words "in this state" for the words "using scrap engaged in shipment in interstate commerce" at the end of the second proviso to the last sentence.

Administrative Provisions of Schedule B.

§ 105-113.1. Privilege taxes payable in advance; reduction.

This section shall be in effect until June first, one thousand nine hundred and forty-seven. (1943, c. 400, s. 2; 1945, c. 708, s. 2.)

Editor's Note.—The 1945 amendment, effective June 1, 1945, extended the effective duration of this section from 1945 to 1947. As only the last paragraph was affected by the amendment the rest of the section is not set out.

Art. 3. Schedule C. Franchise Tax.

§ 105-114. Nature of taxes; definitions. — The taxes levied in this article upon persons and partnerships are for the privilege of engaging in business or doing the act named. The taxes levied in this article upon corporations are privilege or excise taxes levied upon: (1) Corporations organized under the laws of this state for the existence of the corporate rights and privileges granted by their charters, and the enjoyment, under the protection of the laws of this state, of the powers, rights, privileges and immunities derived from the state by the form of such existence; and (2) corporations not organized under the laws of this state for doing business in this state and for the benefit and protection which such corporations receive from the government and laws of this state in doing business in this state.

The term "corporation" as used in this article shall, unless the context clearly requires another interpretation, mean and include not only corporations but also associations or joint stock companies and every other form of organization for pecuniary gain, having capital stock represented by shares, whether with or without par value, and having privileges not possessed by individuals or partnerships; and whether organized under, or without, statutory authority.

When the term "doing business" is used in this article, it shall mean and include each and every act, power or privilege exercised or enjoyed in this state, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organization whether the form of existence be corporate, associate, joint stock company or common law trust.

If the corporation is organized under the laws of this state, the payment of the taxes levied by this article shall be a condition precedent to the right to continue in such form of organization; and if the corporation is not organized under the laws of this state, payment of said taxes shall be a condition precedent to the right to continue to engage in doing business in this state. The taxes levied in this article or schedule shall be for the fiscal year of the state in which said taxes become due. (1939, c. 158, s. 201; 1943, c. 400, s. 3; 1945, c. 708, s. 3.)

Editor's Note.—
The 1945 amendment, effective January 1, 1945, rewrote this section.

Cited in Standard Fertilizer Co. v. Gill, 225 N. C. 426, 429, 35 S. E. (2d) 275; Duke Power Co. v. Bowles, 229 N. C. 143, 48 S. E. (2d) 287.

§ 105-115. Franchise or privilege tax on railroads.

(g) In determining the franchise tax of any railroad company now leasing its properties, there shall be excluded from the value of its properties or railroad properties being operated by any lessee company upon which valuation the franchise tax is required to be paid by the operating company. (1939, c. 158, s. 202; 1945, c. 708, s. 3.)

Editor's Note.—The 1945 amendment, effective January 1, 1945, added subsection (g). As the rest of the section was not affected by the amendment it is not set out.

§ 105-116. Franchise or privilege tax on electric light, power, street railway, gas, water, sewerage, and other similar public-service companies not otherwise taxed.

(6) Companies taxed under this section shall not be required to pay the franchise tax imposed by § 105-122 or § 105-123 unless the tax levied by § 105-122 or § 105-123 exceeds the tax levied in this section, and no county shall impose a franchise, license or privilege tax upon the business taxed under this section.

(7) The commissioner of revenue shall ascertain the total gross receipts derived from the sale within any municipality of the commodities or services described in this section, except water and sewerage services, and out of the tax of six per cent (6%) of gross receipts levied by this section, an amount equal to a tax of ¾ of 1% of the gross receipts from sales within any municipality shall be distributed to such municipality: Provided, that out of the tax of four per cent (4%) of the first $25,000.00 of gross receipts of gas companies an amount equal to a tax of ¾ of 1% of the gross receipts from sales within any municipality, and out of the tax of six per cent (6%) of gross receipts of gas companies in excess of $25,000.00 an amount equal to a tax of ¾ of 1% of the gross receipts from sales within any municipality, shall be distributed to such municipality. If the gross receipts of any gas company from sales within and without any municipality exceed $25,000.00, receipts from sales without the municipality shall be allocated to the first $25,000.00 of total gross receipts.

Not later than fifteen days after the date on which each quarterly payment of taxes is due under this section, the commissioner of revenue shall report to the state board of assessment the amount collected under this section on account of receipts from the sale within each municipality of the commodities or services, other than water and sewerage services, described in this section. The state board of assessment shall examine such reports and, if found to be correct, shall certify a copy of the same to the state auditor and state treasurer. Upon certification by the state board of assessment, as herein provided, it shall be the duty of the state auditor to issue warrant on the state treasurer to the treasurer, or other officer authorized to receive public funds, of each municipality in the amount to be distributed to each such municipality as herein provided.

So long as there is a distribution to municipalities of the amount herein provided from the tax imposed by this section, no municipality shall impose or collect any greater franchise, privilege or license taxes, in the aggregate, on the businesses taxed under this section, than was imposed and collected on or before January 1, 1947. If any municipality shall have collected any privilege, license or franchise tax between January 1, 1947, and April 1, 1949, in excess of the tax collected by it prior to January 1, 1947, then upon distribution of the taxes imposed by this section to municipalities, the amount distributable to any municipality shall be credited with such excess payment. (1939, c. 158, s. 203; 1949, c. 392, s. 2.)

Editor's Note.—The 1949 amendment, effective April 1, 1949, rewrote subsection (6) and added subsection (7). As subsections (1) through (5) were not changed they are not set out.

For brief comment on the 1949 amendment, see 27 N. C. Law Rev. 482.

For the history of subsection (6) of this section, see Duke Power Co. v. Bowles, 229 N. C. 143, 48 S. E. (2d) 287.

"Privilege or License Tax" Does Not Include Franchise Taxes.—The term "privilege or license tax," as used in

subsection (6) of this section, does not include franchise taxes, it being apparent that the legislature would have used the term "franchise" eo nomine if it had intended to include franchise taxes within the limitation upon taxes to be imposed by cities or towns. Duke Power Co. v. Bowles, 229 N. C. 143, 48 S. E. (2d) 287.

§ 105-117. Franchise or privilege tax on Pullman, sleeping, chair, and dining cars.

Quoted in Duke Power Co. v. Bowles, 229 N. C. 143, 48 S. E. (2d) 287.

§ 105-119. Franchise or privilege tax on telegraph companies.

Quoted in Duke Power Co. v. Bowles, 229 N. C. 143, 48 S. E. (2d) 287.

§ 105-120. Franchise or privilege tax on telephone companies.

(4) The commissioner of revenue shall ascertain the total gross receipts derived from local business conducted within each municipality in this state by persons, firms or corporations taxed under this section, and out of the tax levied by this section, an amount equal to a tax of ¾ of 1% of the gross receipts from local business conducted within any municipality shall be distributed to such municipality. When a person, firm or corporation taxed under this section properly receives a credit on said taxes under the proviso in subsection (2) because of payments made to a municipality, such municipality's distributive share of the taxes levied by this section shall be reduced by the amount of the credit properly received by said person, firm or corporation. If the credit received under the proviso is greater than the municipality's distributive share of the taxes levied under this section, no distribution to such municipality shall be made.

Not later than fifteen days after the date on which each quarterly payment of taxes is due under this section, the commissioner of revenue shall report to the state board of assessment the amount collected under this section on account of receipts from local business conducted within each municipality. The state board of assessment shall examine such reports and, if found to be correct, shall certify a copy of the same to the state auditor and state treasurer. Upon certification by the state board of assessment, as herein provided, it shall be the duty of the state auditor to issue warrant on the state treasurer to the treasurer, or other officer authorized to receive public funds, of each municipality in the amount to be distributed to each such municipality as herein provided.

In determining what constitutes local business conducted within a municipality for the purposes of this subsection, all business originating within a municipality, except long-distance calls, shall be construed as local business.

The department of revenue is hereby authorized and empowered to require any and all persons, firms or corporations taxed under this section to file additional reports disclosing the gross receipts derived from local business as herein defined and the gross receipts from long-distance business.

If the records of the corporation taxed under this section do not readily disclose allocation to municipalities of revenues from local business as above defined, the commissioner of revenue shall prescribe some practicable method of allocating such local revenues.

(5) Nothing in this section shall be construed to authorize the imposition of any tax upon interstate commerce.

(6) Counties, cities and towns shall not levy any franchise, license, or privilege tax on the business taxed under this section. (1939, c. 158, s. 207; 1949, c. 392, s. 2.)

Editor's Note.—The 1949 amendment, effective April 1, 1949, inserted new subsection (4), and renumbered old subsections (4) and (5) as (5) and (6), respectively. As subsections (1), (2) and (3) were not affected by the amendment they are not set out.

For brief comment on the 1949 amendment, see 27 N. C. Law Rev. 482.

Cited in Wood v. Carolina Tel., etc., Co., 228 N. C. 605, 46 S. E. (2d) 717, 3 A. L. R. (2d) 1.

§ 105-121: Repealed by Session Laws 1945, c. 752, s. 1.

§ 105-122. Franchise or privilege tax on domestic and foreign corporations.

Every corporation doing business in this state which is a parent, subsidiary or affiliate of another corporation shall add to its capital stock surplus and undivided profits all indebtedness owed to or endorsed or guaranteed by a parent, subsidiary or affiliated corporation as a part of its capital used in its business and as a part of the base for franchise tax under this section. The term "indebtedness" as used in this paragraph shall include all loans, credits, goods, supplies or other capital of whatsoever nature furnished by a parent, subsidiary, or affiliated corporation. The terms "parent," "subsidiary," and "affiliate" as used in this paragraph shall have the meaning specified in § 105-143. If any part of the capital of the creditor corporation is capital borrowed from a source other than a parent, subsidiary or affiliate, the debtor corporation, which is required under this paragraph to include in its tax base the amount of debt by reason of being a parent, subsidiary, or affiliate of the said creditor corporation, may deduct from the debt thus included a proportionate part determined on the basis of the ratio of such borrowed capital as above specified of the creditor corporation to the total assets of the said creditor corporation. Further, in case the creditor corporation s above specified is also taxable under the provisions of this section, such creditor corporation shall be allowed to deduct from the total of its capital, surplus and undivided profits the amount of any debt owed to it by a parent, subsidiary or affiliated corporation to the extent that such debt has been included in the tax base of said parent, subsidiary or affiliated debtor corporation reporting for taxation under the provisions of this section.

(4) After determining the proportion of its total capital stock, surplus and undivided profits as set out in subsection three of this section, which amount so determined shall in no case be less than the total assessed value (including total gross valuation returned for taxation of intangible personal property) of all the real and personal property in this state of each such corporation for the year in which report is due nor less than its total actual investment in tangible property in this state, every corporation taxed under this section shall annually pay to the commissioner of revenue, at the time the report and statement are due, a franchise or privilege tax, which is hereby levied, at the rate of one dollar and fifty cents ($1.50) per one thousand dollars ($1,000.00) of the total amount of

capital stock, surplus and undivided profits as herein provided. The tax imposed in this section shall in no case be less than ten dollars ($10.00) and shall be for the privilege of carrying on, doing business, and/or the continuance of articles of incorporation or domestication of each such corporation in this state: Provided, that the basis for the franchise tax on all corporations, eighty per cent (80%) of whose outstanding capital stock is owned by persons or corporations to whom or to which such stock was issued prior to January first, one thousand nine hundred thirty-five, in part payment or settlement of their respective deposits in any closed bank of the state of North Carolina, shall be the total assessed value of the real and tangible personal property of such corporation in this state for the year in which report and statement is due under the provisions of this section. The term "total actual investment in tangible property" as used in this section shall be construed to mean the total original purchase price or consideration to the reporting taxpayer of its tangible properties, including real estate, in this state plus additions and improvements thereto less reserve for depreciation as permitted for income tax purposes, and also less any indebtedness incurred and existing by virtue of the purchase of any real estate and any permanent improvements made thereon.

In determining the total tax payable by any corporation under this section and under § 105-115 there shall be allowed as a credit on such tax the amount of intangibles tax paid during the preceding franchise tax year on bank deposits under the provisions of § 105-199, except that the minimum tax herein provided shall not be less than the ten dollars ($10.00) elsewhere specified.

(1945, c. 708, s. 3; 1947, c. 501, s. 3.)

Editor's Note.—
The 1945 amendment rewrote the second paragraph of subsection (2) which appears as the first paragraph above, and added the second paragraph of subsection (4). The 1947 amendment changed the amount in line fifteen of subsection (4) from $1.75 to $1.50. As the rest of the section was not affected by the amendment it is not set out.

Quoted in Duke Power Co. v. Bowles, 229 N. C. 143, 48 S. E. (2d) 287.

§ 105-123. New corporations.

In the case of a corporation organized or domesticated within the state within the taxable year, which shall acquire the entire assets within the state of a corporation previously operating therein which shall have paid prior to the disposal of said assets the franchise tax for the taxable year, the newly organized or domesticated corporation shall be allowed to deduct that portion of the capital stock, surplus, and undivided profits, or other alternative tax base as provided in § 105-122 (4), of the prior corporation previously reported and taxed in the taxable year in determining the tax for the balance of the year upon such newly organized or domesticated corporation.

(1945, c. 708, s. 3.)

Editor's Note.—The 1945 amendment, effective January 1, 1945, added the above paragraph at the end of subsection (1). As the rest of the section was not affected by the amendment it is not set out.

Art. 4. Schedule D. Income Tax.

§ 105-130. Short title.

Editor's Note.—For a discussion of changes in the income tax law made by the 1947 General Assembly, see 25 N. C. Law Rev. 467.

For a summary and discussion of the changes made in this article by the Session Laws of 1949, see 27 N. C. Law Rev. 482.

Imposition of Income Tax.

§ 105-134. Corporations.

Editor's Note.—
The 1945 amendment struck out paragraph (f) of subdivision 2 of subsection II, relating to foreign insurance companies. As this was the only change made by the amendment the section is not set out.

§ 105-136. Railroads and public-service corporations.

In any case when the state of North Carolina jointly with the federal government has made any advances or has made any loans to a nonoperating railroad in which the state of North Carolina owns more than a majority of the capital stock, which advances or loans are made for the purpose of rehabilitating the properties of such railroad and are to be repaid by the operating railroad in the form of special and additional rents, such special or additional rents so paid shall be deducted from operating revenues in determining the net taxable income of such operating railroad. This deduction shall be allowable for the taxable years beginning with the year ending December thirty-first, one thousand nine hundred and forty-four, and subsequent years. (1939, c. 158, s. 312; 1941, c. 50, s. 5; 1945, c. 708, s. 4.)

Editor's Note.—
The 1945 amendment added the above paragraph at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

§ 105-138. Conditional and other exemptions.

9. Mutual associations formed under §§ 54-111 to 54-128, formed to conduct agricultural business on the mutual plan; or to marketing associations organized under §§ 54-129 to 54-158.

Nothing in this subsection shall be construed to exempt any cooperative, mutual association or other organization from an income tax on net income (gross income minus operating expenses, including interest paid on capital stock) which has not been allocated to patrons on a patronage basis and distributed either in cash, stock, certificates, or in some other manner that discloses to each patron the amount of his patronage refund; provided, that no stabilization or marketing organization, which handles agricultural products for sale for producers on a pool basis, shall be deemed to have realized any net income or profit in the disposition of a pool or any part of a pool until all of the products in that pool shall have been sold and the pool shall have been closed; provided, further, that a pool shall not be deemed closed until the expiration of at least 90 days after the sale of the last remaining product in that pool. Such cooperatives and other organizations shall file an annual informational return with the state department of revenue on forms to be furnished by the commissioner and shall include therein the names and addresses of all persons, patrons and/or shareholders, whose patronage refunds or interest on stock amount to $50.00 or more.

10. Pension, profit sharing, stock bonus and annuity trusts, or combinations thereof, established by employers for the purpose of distributing both the principal and income thereof exclusively to eligible employees, or the beneficiaries of such employees, and so constituted that no part of the corpus or income may be used for, or diverted to,

any purpose other than for the exclusive benefit of the employees or their beneficiaries; provided, there is no discrimination, as to eligibility requirements, contributions or benefits, in favor of officers, shareholders, supervisors, or highly paid employees; provided further, that the interest of individual employees participating therein shall be irrevocable and nonforfeitable to the extent of any contributions made thereto by such employees; and provided further, the commissioner of revenue shall be empowered to promulgate rules and regulations regarding the qualification of such trusts for exemption under this subsection. The exemption of any trust under the provisions of the federal income tax law shall be a prima facie basis for exemption of said trust under this paragraph. This subdivision shall be effective from and after January first, one thousand nine hundred and forty-four.

11. Insurance companies paying the tax on gross premiums as specified in § 105-228.5. (1939, c. 158, s. 314; 1945, c. 708, s. 4; c. 752, s. 3; 1949, c. 392, s. 3.)

Editor's Note.—The first 1945 amendment added subsection 10, and the second 1945 amendment added subsection 11. The 1949 amendment, effective January 1, 1949, added that part of subsection 9 beginning with the second sentence. As the rest of the section was not affected by the amendments, it is not set out.

§ 105-141. Gross income defined.

The commissioner of revenue is hereby authorized, in his discretion, to adopt rules and regulations providing that recoveries of bad debts or similar items which have been charged off by banks or other businesses under the regulations and supervision of a state agency, where such charge-offs were required to be made by said supervising state agency, shall be includible in gross income to the same extent as such recoveries are includible in gross income under the federal income tax laws in effect at the time of the issuance of said rules and regulations, or to adopt such other rules and regulations regarding such recoveries as may be deemed just, reasonable and proper. These rules and regulations may be made applicable to charge-offs made prior to January first, one thousand nine hundred and forty-five, but not recovered until after January first, one thousand nine hundred and forty-five.

(f) The rental value of any dwelling and the appurtenances thereof furnished to a minister of the gospel as a part of his compensation; also the rental value of any homes and quarters and the appurtenances thereof furnished the officers and employees of orphanages, whose duties require them to live on the premises and in buildings owned by such institutions, as a part of their compensation. (1939, c. 158, s. 317; 1941, c. 50, s. 5; c. 283; 1943, c. 400, s. 4; 1945, c. 708, s. 4; c. 752, s. 3.)

Editor's Note.—

The first 1945 amendment, effective Jan. 1, 1945, directed that the first paragraph above be inserted at the end of subsection 1 and added present paragraph (f) to appear at the end of subsection 2. The second 1945 amendment struck out former paragraph (f). As the rest of the section was not affected by the amendments it is not set out.

A gain resulting from the involuntary conversion of a capital asset by fire was taxable under the state law as income, notwithstanding that the proceeds of the fire insurance plus additional cash were necessary for and used in the restoration of the building, under this section and § 105-142, prior to the passage of § 105-144.1. State v. Speizman, 230 N. C. 459, 53 S. E. (2d) 533.

§ 105-142. Basis of return of net income.

5. In the case of trusts which qualify for exemption under § 105-138 (10), employees or their beneficiaries shall include in their gross incomes only the amounts actually received or made available to them within the income year; provided, that if such employees have made contributions to such trusts, and the benefits are received as periodical payments, the amounts annually received shall be taxed as an annuity to the extent of three per cent (3%) of the amount of such contributions, until the excess of receipts over and above the portion thus taxable as an annuity shall equal the total contributions, at which time all receipts thereafter received shall be annually taxable; provided further, that if such employees have made contributions to such trusts and the benefits are received in lump sum payments, only that portion of such receipts in excess of contributions shall be taxable. This subdivision shall be effective from and after January first, one thousand nine hundred and forty-four.

6. An individual, who patronizes or owns stock or has membership in a farmers' marketing or purchasing cooperative or mutual, organized under subchapter 4 or subchapter 5 of chapter 54 of the General Statutes of North Carolina, shall include in his gross income for the year in which the allocation is made his distributive share of any savings or interest on stock, whether distributed in cash or credit, allocated by the cooperative or mutual association for each income year. (1939, c. 158, s. 318; 1943, c. 400, s. 4; 1945, c. 708, s. 4; 1949, c. 392, s. 3.)

Editor's Note.—

The 1945 amendment added subsection 5. The 1949 amendment, effective January 1, 1949, added subsection 6. As the rest of the section was not affected by the amendments it is not set out.

A gain resulting from the involuntary conversion of a capital asset by fire was taxable under the state law as income, notwithstanding that the proceeds of the fire insurance plus additional cash were necessary for and used in the restoration of the building, under this section and § 105-141, prior to the passage of § 105-144.1. State v. Speizman, 230 N. C. 459, 53 S. E. (2d) 533.

Effect of Requirement That Commissioner Follow Federal Practice.—Subsection 1 of this section, stipulating that the commissioner of revenue shall follow the federal practice as nearly as practicable in instances where the method of accounting of the taxpayer does not clearly reflect the income of the taxpayer, does not require the commissioner to apply the provisions of sec. 112(f), 26 U. S. C. A. 95, in computing the income of a taxpayer from involuntary conversion of a capital asset. State v. Speizman, 230 N. C. 459, 53 S. E. (2d) 533. See § 105-144.1 and notes.

§ 105-143. Subsidiary and affiliated corporations.—The net income of a corporation doing business in this state which is a subsidiary or affiliate of another corporation shall be determined by eliminating all payments to or charges by the parent corporation or other subsidiaries or affiliates of the parent corporation in excess of fair compensation for all services performed for or commodities or property sold, transferred, leased, or licensed to the parent or to its other subsidiary or affiliated corporations by the corporation doing business in this state. If the commissioner of revenue shall find as a fact that a report by such subsidiary or affiliated corporation does not disclose the true earnings of such corporation on its business carried on in this state, the commissioner may require

that such subsidiary or affiliated corporation file a consolidated return of the entire operations of such parent corporation and of its subsidiaries and affiliates, including its own operations and income, and may determine the true amount of net income earned by such subsidiary or affiliated corporation in this state by taking the factor of investment in real estate and tangible personal property in this state and volume of business in this state and by relating these factors to the total investment of the parent corporation and its subsidiaries and affiliated corporations in real estate and tangible personal property in and out of this state and their total volume of business in and out of this state. The authority hereby given to require consolidated returns as aforesaid and to ascertain the true amount of income earned in this state on the basis herein prescribed may also be used by the commissioner as the basis of ascertaining the true net income earned in this state during the calendar year one thousand nine hundred and forty and for the three calendar years prior thereto. For the purposes of this section, a corporation shall be deemed a subsidiary of another corporation hereby designated the parent corporation, when, directly or indirectly, it is subject to control by such other corporation by stock ownership, interlocking directors, or by any other means whatsoever exercised by the same or associated financial interests, whether such control is direct or through one or more subsidiary, affiliated, or controlled corporations, and a corporation shall be deemed an affiliate of another corporation when both are directly or indirectly controlled by the same parent corporation or by the same or associated financial interests by stock ownership, interlocking directors, or by any other means whatsoever, whether such control be direct or through one or more subsidiary, affiliated or controlled corporations. Upon such finding by the commissioner, the consolidated returns authorized by this section may be required whether the parent or controlling corporation or interest or its subsidiaries or affiliates are or are not doing business in this state. The provisions of this paragraph do not apply to corporations subject to regulation by a regulatory body of this state which are required to maintain accounts in such manner as to reflect separately the business done in this state and file a report thereof with such regulatory body. This paragraph shall not apply unless the commissioner further finds that the business in this state is handled or effected in such manner as to distort or not reflect the true income earned in this state and finds in addition either or both of the following facts: (a) that the several corporations are owned or controlled by the same financial interests or (b) that they are members of a group of corporations associated together in carrying on a unitary business or are branches or parts of a unitary business or are engaged in different phases of the same general business or industry. If such consolidated return is required and is not filed within sixty days after demand, said subsidiary or affiliated corporation shall be subject to the penalty provided in this act for failure to file returns and in addition shall be subject to the penalty provided in § 105-230, and in such event the provisions of subsection 5 of § 105-161 shall apply.

Every subsidiary of a parent corporation doing business in this state shall not be allowed to deduct interest on indebtedness owed to or endorsed or guaranteed by the parent corporation and used by the subsidiary in carrying on its business in this state. The term "indebtedness" used in this paragraph shall include all loans, credits, goods, supplies or other capital of whatsoever nature furnished by the parent corporation, or by any subsidiary of the parent corporation. The term "parent corporation" shall include any subsidiary of the parent corporation. If any part of the capital used by the parent corporation is borrowed capital, the subsidiary may deduct from its gross income interest paid to the parent corporation in such proportion as the borrowed capital of the parent corporation is to the total assets of such parent corporation. The term "borrowed capital" used in this paragraph shall include all loans and credits obtained by the parent corporation and also all goods, supplies or other capital of whatever nature borrowed by the parent corporation.

(1945, c. 708, s. 4.)

Editor's Note.—

The 1945 amendment, effective January 1, 1945, inserted in the fourth sentence of the first paragraph the words "hereby designated the parent corporation," and substituted in the sixth and seventh sentences the word "paragraph" for the word "section." The amendment also struck out the former third sentence of paragraph two which read: "The term 'subsidiary corporation' as used in this paragraph shall mean any corporation, a majority of stock in which is owned by a parent corporation." As the third and fourth paragraphs were not affected by the amendment they are not set out.

§ 105-144.1. Involuntary conversions; recognition of gain or loss; replacement fund and surety bond.—If property (as a result of its destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation, or the threat or imminence thereof) is compulsorily or involuntarily converted into property similar or related in service or use to the property so converted, or into money which is forthwith in good faith, under regulations which the commissioner may, in his discretion, prescribe, expended in the acquisition of other property similar or related in service or use to the property so converted, or in the acquisition of control of a corporation owning such other property, or in the establishment of a replacement fund, no gain shall be recognized, but loss shall be recognized if such loss would be recognized under this article if such conversion had been voluntary. If any part of the money is not so expended, the gain, if any, shall be recognized to the extent of the money which is not so expended (regardless of whether such money is received in one or more taxable years). In the event a replacement fund is established, the commissioner may require the taxpayer to deposit with him a surety bond or a bond secured by sufficient collateral, in double the amount of the tax which would be assessable if the funds or any part thereof were not used in the replacement of the property compulsorily or involuntarily converted, which bond shall be conditioned upon using such replacement fund in replacing such property within a reasonable time, not to exceed one year after the receipt of the funds by the taxpayer, to be determined by the commissioner, which time may be extended by the commissioner from time to time not to ex-

ceed a total time of three years within which the replacement fund may be so used or expended, and such bond shall further be conditioned upon the payment of the tax which would have been assessable if the property had been voluntarily converted if the taxpayer fails to use the fund for the replacement of the involuntarily converted property within the time allowed by the commissioner.

The establishment of a replacement fund and the giving of bond as herein provided shall be deemed a waiver by the taxpayer of any statute limiting the time within which the commissioner may make an assessment against the taxpayer on account of any taxable gain which may have been realized from such involuntary conversion, and the commissioner may make such assessment at any time within three years after the expiration of the time or extended time within which the taxpayer shall have been permitted to expend the replacement fund in the replacement of the property involuntarily converted. If an assessment is made, such assessment shall be for the year or years in which the gain would have been taxable if no replacement fund had been established, and to such tax so assessed there shall be added all penalties and interest applicable to such year or years.

As used in this section, the term "control" means the ownership of stock possessing at least eighty per centum (80%) of the total combined voting power of all classes of stock entitled to vote, and at least eighty per centum (80%) of the total number of shares of all other classes of stock of the corporation.

In the administration of this section, the commissioner may, in his discretion, apply the federal rules and regulations, rulings, and federal court decisions pertinent to the administration and construction of § 112 (f) of the Federal Internal Revenue Code, but the commissioner shall not be bound by such rules and regulations, rulings and decisions. (1949, c. 1171.)

Federal Regulations and Rulings Adopted by Commissioner.—On 5 May, 1949, the commissioner of revenue of North Carolina promulgated a regulation for the purpose of administering this section, in which he adopted the federal rules and regulations, rulings and federal court decisions pertinent to the administration and construction of section 112(f) of the Internal Revenue Code. State v. Speizman, 230 N. C. 459, 53 S. E. (2d) 533.

Pending Litigation.—The mere statement in the act from which this section was codified that it is to affect pending litigation, will not be construed as sufficient authority to authorize the commissioner of revenue to refund to a taxpayer a tax legally assessed and collected prior to the enactment of the act. State v. Speizman, 230 N. C. 459, 53 S. E. (2d) 533.

Section Does Not Authorize Refund of Tax Previously Collected.—This section adopting the federal rule for determining income tax upon the involuntary conversion of a capital asset, does not authorize the commissioner of revenue to refund income tax legally assessed and collected upon such capital gain prior to the enactment of this section, even though the tax was paid under protest. State v. Speizman, 230 N. C. 459, 53 S. E. (2d) 533.

§ 105-147. Deductions.

1½. In the case of an individual, all the ordinary and necessary expenses paid or incurred during the income year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income.

1¾. All the ordinary and necessary expenses paid during the income year by any teacher, principal or superintendent of the public schools of the state for the purpose of attending summer school in any accredited college or university. Ordinary and necessary expenses shall be construed to include tuition, matriculation fees, registration fees, amounts paid for books and necessary classroom supplies, subsistence and individual athletic supplies. The deductions authorized under this subsection shall be allowed only upon the presentation to the commissioner of revenue, or his authorized agent, receipts showing the expenditures made hereunder; provided, said sums shall not exceed the sum of two hundred and fifty dollars ($250.00) for any one year.

5. Dividends from stock in any corporation, the income of which shall have been assessed, and the tax on such income paid by the corporation under the provisions of this article: Provided, that when only part of the income of any corporation shall have been assessed under this article, whether paid directly to the taxpayer or paid to the taxpayer by a trustee of a distributable trust, only a corresponding part of the dividends received therefrom shall be deducted. In the case of insurance companies taxed under the provisions of § 105-228.5 the dividends from stock in domestic insurance corporations shall be deductible and a proportionate part of any dividends received from stock in foreign insurance corporations shall be deductible, such part to be determined on the basis of the ratio of premiums reported for taxation in this state to total premiums collected both in and out of the state.

6. Losses of such nature as designated below:

(a) Losses of capital or property used in trade or business actually sustained during the income year except that: No deduction shall be allowed for losses arising from personal loans, endorsements or other transactions of a personal nature not entered into for profit; and losses of such character as specified in subdivision (c) below shall be deductible only to the extent therein provided.

(b) Losses of property not connected with a trade or business sustained in the income year if arising from fire, storm, shipwreck or other casualties or theft to the extent such losses are not compensated for by insurance or otherwise.

(c) Losses incurred in the income year from the sale of corporate shares or bonds of corporations or governments owned less than one year, or from transactions in commodity futures contracts where the transactions are of such nature that no title to actual commodities passes, provided that the amount of loss deductible in any year shall be limited to the extent of gains from similar sources in the same year. In determining the amount of loss deductible in any year any losses arising from sales or transactions as specified in this subdivision may be offset against any gains arising from any sales or transactions as specified in this subdivision. Losses incurred from trading in commodity contracts shall be deductible without respect to gains from any sources specified herein in cases where the loss claimed shall arise from hedging operations carried on in connection with an established business or in connection with market operations regularly conducted which involve the purchase and sale of tangible commodities.

(d) Losses in the nature of net economic losses sustained in either or both of the two preceding income years arising from business transactions or to capital or property as specified in (a) and (b) above subject to the following limitations:

First, the purpose in allowing the deduction of net economic loss of a prior year or years is that of granting some measure of relief to taxpayers who have incurred economic misfortune or who are otherwise materially affected by strict adherence to the annual accounting rule in the determination of taxable income, and the deduction herein specified does not authorize the carrying forward of any particular items or category of loss except to the extent that such loss or losses shall result in the impairment of the net economic situation of the taxpayer such as to result in a net economic loss as hereinafter defined.

Second, the net economic loss for any year shall mean the amount by which allowable deductions for the year other than contributions, personal exemptions, prior year losses, taxes on property held for personal use, and interest on debts incurred for personal rather than business purposes shall exceed income from all sources in the year including any income not taxable under this article.

Third, any net economic loss of a prior year or years brought forward and claimed as a deduction in any income year may be deducted from taxable income of the year only to the extent that such carry-over loss from the prior year or years shall exceed any income not taxable under this article received in the same year in which the deduction is claimed, except that in the case of foreign corporations, and of domestic corporations or resident individuals eligible for the deduction of a part of net income under the provisions of subsection ten of this section by reason of having net income earned and taxed in another state, only such proportionate part of the net economic loss of a prior year or years shall be deductible from the income taxable in this state as would be determined by the ratio of net income allocable to this state as compared to all net income received both within and without the state. For such corporations and resident individuals as specified herein any income properly allocable without the state shall be disregarded in offsetting income not taxable under this article against the amount of any prior year loss to determine the amount of prior year loss deductible from taxable income in any year.

Fourth, a net economic loss carried forward from any year shall first be applied to, or offset by, any income taxable or nontaxable of the next succeeding year before any portion of such loss may be carried forward to a second succeeding year. If there is any income taxable or nontaxable in the first succeeding year not otherwise offset only the balance of any carry-over loss may be carried forward to a second year.

Fifth, the amount of any loss arising from sales or transactions as specified in subdivision (c) above and not allowed as a deduction for the year in which such loss occurred may be carried forward for deduction in either or both of the succeeding years but only to the extent that such loss when added to other deductions permitted in the second limitation above shall result in a net economic loss as defined in the said second limitation. Further, any portion of such loss from sales or transactions specified in subdivision (c) above which is carried forward to one or both of the two succeeding years may be deducted from taxable income in either year only to the extent of gain not otherwise offset from similar sales or transactions in the year in which such deduction is claimed, but not to exceed such amount as would be permitted as a deduction under the other limitations above.

Sixth, no loss shall either directly or indirectly be carried forward more than two years.

7. Debts ascertained to be worthless and actually charged off within the income year, if connected with business and, if the amount has previously been included in gross income in a return under this article; or, in the discretion of the commissioner, a reasonable addition to a reserve for bad debts.

7½. Amounts expended by an individual during the year for medical care and insurance against illness or accident for himself, or herself, and dependents, and for funeral expenses for dependents leaving no net estate, to the extent that the total of such expenditures not compensated for by insurance or otherwise shall exceed five per centum of net income computed without the benefit of the deduction authorized in this subdivision. The deduction authorized in this subdivision shall apply only to amounts that were actually paid in the income year, and the total allowable deduction in any tax year shall not exceed twenty-five hundred dollars. ($2,500.00).

9. Contributions or gifts made by individuals, firms, partnerships and corporations within the income year to corporations, trusts, community chests, funds, foundations or associations organized and operated exclusively for religious, charitable, literary, scientific, or educational purposes or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or contributions or gifts made by individuals, firms, partnerships and corporations within the income tax year to posts or organizations of war veterans, or auxiliary units or societies of any such posts or organizations, if such posts, organizations, units, or societies are organized in the United States or any of its possessions, and if no part of their net earnings inures to the benefit of any private shareholder or individual: Provided, that in the case of such contributions or gifts by corporations and partnerships, the amount allowed as a deduction hereunder shall be limited to an amount not in excess of five (5%) per centum of the corporation's or partnership's net income, as computed without the benefit of this subdivision; and provided that in the case of such contributions or gifts by individuals, the amount allowed as a deduction shall be limited to an amount not in excess of ten (10%) per centum of the individual's net income, as computed without the benefit of this subsection.

9½. Amounts actually expended by an individual, other than a married woman having a separate and independent income, who is not entitled to a personal exemption of two thousand dollars ($2,000.00) under the provisions of subdivisions (a), (b), (c), and (d) of subsection one of § 105-

149 in maintaining one or more dependent relatives in an institution for the care of mental or physical defectives irrespective of whether such dependent relatives be above or below the age of eighteen: Provided, that the deduction authorized in this section shall apply only to actual expenditures in excess of the amounts allowed as personal exemption for dependents under the provisions of subdivision (e) of subsection one of § 105-149, and the maximum amount that may be deducted by an individual under the authorization herein stated shall not exceed eight hundred dollars ($800.00).

9¾. Contributions by persons and corporations to the state of North Carolina, any of its institutions, instrumentalities, or agencies, any county of this state, its institutions, instrumentalities, or agencies, any municipality of this state, its institutions, instrumentalities, or agencies.

10. Income earned in another state, nation, territory or possession (hereinafter referred to as "state") by resident individuals and domestic corporations to the extent hereinafter provided.

(a) Domestic corporations having an established business in another state, or investment in property in another state, may deduct the net income from such business or property if the said net income is taxed under an income tax levied by the state or states in which the business or property is located. The deduction herein authorized shall not include income received from stocks, bonds, notes, mortgages, securities, or bank or other deposits or credits, except to the extent that it may be shown that such securities or credits or the income therefrom are a part of an established business in another state and that the income therefrom has been taxed by such other state or states in connection with the established business therein. In case a deduction is claimed under the provisions herein stated for income earned and taxed in another state, the amount allocated to another state or other states and claimed as a deduction shall not exceed such an amount as would be determined to be allocable to such other state or states by the application of the same allocation ratio as is specified in Part II of § 105-134 for the allocation of the net income of a foreign corporation operating a similar type of business in this state, unless any domestic corporation claiming the deduction of a portion of net income in excess of an amount determined by the application of said ratio shall submit sufficient evidence to prove to the satisfaction of the commissioner of revenue that the portion claimed as a deduction is properly allocable to another state or other states. In determining the maximum amount of net income properly allocable to another state or other states the respective allocation fraction shall apply to net income only after the subtraction of any net income from stocks, bonds, or other securities or credits excluded above from the deduction herein authorized. In all cases a domestic corporation which has an established business or investment in property in another state which does not levy an income tax shall treat any income or loss from such business or investment as though it occurred from a business or investment in North Carolina.

The provision above stated for the deduction of income that is earned and taxed in another state as net income shall be construed to include income that is earned and taxed in another state even though the tax thereon may be levied in such other states as a franchise or excise tax. The deduction of income earned and taxed in another state shall depend upon whether the tax is in fact a tax upon net income irrespective of what name may be given thereto.

(b) Resident individuals having an established business or an investment in real or tangible property in another state or other states may deduct the net income from such business or property but only to the extent that such income is in fact reported for taxation in such other state or states which levies or levy a net income tax. The deduction herein authorized shall not apply to income for personal services or income from any other source than an established business or real and/or tangible property owned in another state except to the extent provided in § 105-151. Resident individuals who have an established business or investment in property in another state which does not levy an income tax on the income therefrom shall treat any income or loss from such business or investment as though it occurred from a business or investment in North Carolina.

(c) The deductions authorized in this section for income earned and taxed in another state by domestic corporations and resident individuals shall not include income earned in another state from the lease or rental of movable personal property unless such property shall be regularly located in such other state in connection with an established business therein. For purposes of this section no business shall be deemed to be an established business in another state unless an office or plant at some fixed place of business is maintained in connection therewith.

12. In computing net income no deduction shall be allowed under this section relating to salaries, wages, or other expenses, rentals or other similar payments, interest or taxes, if (1) the same are not actually paid within the taxable year or within two and one-half (2½) months after the close thereof; and (2) if, by reason of the method of accounting of the person or corporation to whom the payment is to be made, the amount thereof is not, unless actually paid, includible in the gross income of such person or corporation for the taxable year in which or with which the taxable year of the taxpayer ends. In the case of taxpayers who keep their accounts and report for income tax purposes on a cash basis, items of expenditure of such nature as specified above in this subsection shall not be allowed as a deduction unless such were actually paid within the income year for which a report is made.

13. Reasonable amounts paid by employers within the income year to trusts which qualify for exemption under subsection ten of § 105-138; provided, that amounts which are deductible for federal income tax purposes shall be prima facie allowable as deductions hereunder; provided further, that, in the case of taxpayers on the accrual basis, they shall be deemed to have made payments on the last day of the year of accrual if actual payments are made within sixty days after the close of such year. This subsection shall be effective from and after January first, one thousand nine hundred and forty-two.

14. Payments made by a divorced or estranged spouse to his or her spouse who is living separate and apart from the spouse making such payments for the separate support and maintenance of such spouse, whether made pursuant to an order of court or under the terms of an agreement, oral or written, between the parties. The deduction authorized by this subsection shall in no case exceed the amount actually paid or one thousand dollars ($1,000.00), whichever is smaller. In case a spouse is making payments to more than one divorced or estranged spouse living separate and apart from the spouse making the payments for their separate support and maintenance, payments made under the conditions outlined above may be deducted by the spouse making the payments up to the payments made to each such spouse or one thousand dollars ($1,000.00) each, whichever is smaller. Any individual who reports his income to the state of North Carolina for income tax purposes on an accrual basis may claim the deductions authorized by this subsection if the payments claimed as a deduction are actually made within seventy-five (75) days after the close of the taxpayer's fiscal or calendar year, whichever is used. No deduction shall be allowed under this subsection for payments made for the support of dependents, whether made directly to the dependents or to the spouse for the support of such dependents. When a sum is to be paid under the conditions outlined above to a spouse living separate and apart from the spouse making the payments for the support of said spouse and a dependent or dependents of the spouse making the payments, only the amount paid for the support of the spouse (not to exceed $1,000.00) shall be claimed as a deduction under this subsection.

When a legal obligation to support a divorced or estranged spouse living separate and apart from his or her spouse is satisfied by the payment of a lump sum or a transfer of property, the amount of such lump sum payment or the market value of such property at the time of the conveyance thereof, or one thousand dollars ($1,000.00), whichever is smaller, may be claimed as a deduction under this subsection. The deduction claimed under this paragraph must be claimed for the income year in which the payment is made or the transfer of property is effected and no deduction on account thereof may be claimed in any subsequent year: Provided, that when a taxpayer reports income for income tax purposes on the accrual basis, the deduction authorized by this paragraph may be claimed on that basis and no subsequent deduction shall be allowed under this paragraph. (1939, c. 158, s. 322; 1941, c. 50, s. 5; 1943, c. 400, s. 4; 1943, c. 668; 1945, c. 708, s. 4; c. 752, s. 3; 1947, c. 501, s. 4; c. 894; 1949, c. 392, s. 3.)

Editor's Note.—

The first 1945 amendment, effective January 1, 1945, rewrote subsections 6 and 10, added subsections 7¼, 9¼ and 13, changed the last word of subsection 9 from "section" to "subsection," and added the second sentence of subsection 12. The second 1945 amendment added the second sentence of subsection 5.

The first 1947 amendment, effective Jan. 1, 1947, added subsections 1½ and 1¾, added the part of subsection 7 appearing after the semicolon, added the second sentence of subsection 7½ and substituted "forty-two" for "forty-four" in the last line of subsection 13. The second 1947 amendment, effective Jan. 1, 1947, inserted in subsection 9 the provision as to contributions to organizations of war veterans, etc.

The 1949 amendment, effective January 1, 1949, added subsections 9¾ and 14.

Only the subsections affected by the amendments are set out.

For a discussion of the provisions of this and other sections of the North Carolina income tax law designed to guard against excessive duplicate taxation, see 27 N. C. Law Rev. 582.

Income from Business Situated in Another State.—In order for a resident taxpayer to be entitled to deduct income derived from a business situated in another state from his income taxable by this state, the taxpayer must show that he has a business or investment in such other state, that the income therefrom is taxable in that state, and that the questioned income is derived from such business or investment. Sabine v. Gill, 229 N. C. 599, 51 S. E. (2d) 1.

Where the taxpayer was entitled to a portion of the income from a business carried on in another state by trustees, the state of the situs of the business taxed the income therefrom, and the profit from the business was paid to a trustee in this state, which distributed the income, the taxpayer did not "have" a business in such other state so as to bring her within the purview of subsection 10 of this section. Sabine v. Gill, 229 N. C. 599, 51 S. E. (2d) 1.

§ 105-149. Exemptions. — 1. There shall be deducted from the net income the following exemptions:

(a) In the case of a single individual, a personal exemption of one thousand dollars ($1,000.00).

(b) In the case of a married man with a wife living with him, two thousand dollars ($2,000.00), or in the case of a person who is the head of a household and maintains the same and therein supports one or more dependent relatives, under eighteen years of age, or, if over eighteen years of age, incapable of self-support because mentally or physically defective, two thousand dollars ($2,000.00).

(c) A married woman having a separate and independent income, one thousand dollars ($1,000.00).

(d) In the case of a widow or widower having minor child or children, natural or adopted, two thousand dollars ($2,000.00).

(e) Three hundred dollars ($300.00) for each individual (other than husband and wife) dependent upon and receiving his chief support from the taxpayer, if such dependent individual is under eighteen years of age or is incapable of self-support because mentally or physically defective or is regularly enrolled for fulltime study in a school, college, or other institution of learning. Exemptions for the children of taxpayers shall be allowed under this subsection only to the person entitled to the $2,000.00 exemption provided in subsection (b) of this subdivision.

(f) In the case of a fiduciary filing a return for that part of the net income of estates or trusts which has not become distributable during the income year one thousand dollars ($1,000.00). Provided, that in cases where two or more trusts have been established for the benefit of the same individual or beneficiaries the exemption allowed each of such trusts shall be such amount as would be determined by dividing one thousand dollars ($1,000.00) ratably among such trusts in proportion to the corpus of each.

In the case of a fiduciary filing a return for the net income received during the income year of a deceased resident or nonresident individual who has died during the tax year or income year without having made a return, two thousand dollars ($2,000.00) if the individual was a married man.

and one thousand dollars ($1,000.00) if the individual was single or a married woman not qualifying as "head of a household."

In the case of a fiduciary filing a return for an insolvent or incompetent individual resident or non-resident where the fiduciary has complete charge of such net income the same exemption to which the beneficiary would be entitled.

(g) In the case of a divorced person having the sole custody of a minor child or children and receiving no alimony for the support of himself, herself, child, or children two thousand dollars ($2,000.00.)

(h) In the case of any person who is totally blind, such person shall be entitled to an additional exemption of one thousand dollars ($1,000.00) in addition to all other exemptions allowed by law. Provided, such person shall submit to the department of revenue a certificate from a physician certifying that such condition exists.

2. The exemptions allowable under this section shall be denied to an individual having income both within and without this state unless the entire income of such individual is shown in his or her return to this state; and if the entire income of such individual is shown in his or her return, the exemptions allowable under this section shall be denied in the proportion that the income earned ouside of this state bears to the total income both within and without this state; provided, that when an individual includes in his or her gross income taxable in this state income earned in another state and no deduction is claimed under this article because said income is earned outside of this state, such individual shall be allowed the same exemption under this section as a person earning all of his or her income in this state.

3. The status on the last day of the income year shall determine the right to the exemptions provided in this section: Provided, that a taxpayer shall be entitled to such exemption for husband or wife or dependents who have died during the income year. (1939, c. 158, s. 324; 1941, c. 50, s. 5; 1943, c. 400, s. 4; 1945, c. 708, s. 4; 1947, c. 501, s. 4; 1949, c. 392, s. 3; c. 1173.)

Editor's Note.—
The 1945 amendment, effective January 1, 1945, added at the end of the first sentence of subdivision (e) of subsection 1 the words "or is regularly enrolled for fulltime study in a school, college, or other institution of learning." It also added the proviso to the first paragraph of subdivision (f) and added subdivision (g).

The 1947 amendment, effective Jan. 1, 1947, rewrote subsection 2.

The first 1949 amendment, effective January 1, 1949, increased the amount in line one of subdivision (e) of subsection 1 from two hundred to three hundred dollars. The second 1949 amendment, which added paragraph (h) of subsection 1, provides that it shall not apply to taxes collectible on or before April 22, 1949.

§ 105-150. Exemption as to insurance or other compensation received by veterans.

The benefits of this section are hereby extended to and include those coming within the provisions of said section serving at any time between December seventh, one thousand nine hundred and forty-one and the termination of World War II. (1929, c. 184; 1945, c. 968, s. 1.)

Editor's Note.—The 1945 amendment added the above sentence at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

§ 105-151. Exemption of compensation for personal services of residents taxed elsewhere; credit allowed nonresident taxpayer.

Editor's Note.—For a discussion of the provisions of this and other sections of the North Carolina income tax law designed to guard against excessive duplicate taxation, see 27 N. C. Law Rev. 582.

§ 105-152. Returns.

3. The return of a corporation shall be signed by the president, vice president, or other principal officer, and by the treasurer or assistant treasurer. There shall be annexed to the return the affirmation of the officers signing the same, which shall be in the form prescribed in § 105-155 of this article, and the same penalties prescribed in § 105-155 shall apply to any person making willful misstatements in said returns.

(1945, c. 708, s. 4.)

Editor's Note.—
The 1945 amendment, effective January 1, 1945, rewrote subsection 3. As the rest of the section was not affected by the amendment it is not set out.

Cited in Garrou Knitting Mills v. Gill, 228 N. C. 764, 47 S. E. (2d) 240.

§ 105-154. Information at the source.

2. Every partnership having a place of business in the state shall make a return, stating specifically the items of its gross income and the deductions allowed by this article, and shall include in the return the names and addresses of the individuals who would be entitled to share in the net income if distributable, and the amount of the distributive share of each individual, together with the distributive shares of corporation dividends. The return shall be signed by one of the partners under affirmation in the form prescribed in § 105-155 of this article, and the same penalties prescribed in § 105-155 shall apply in the event of a willful misstatement.

(1945, c. 708, s. 4.)

Editor's Note.—The 1945 amendment, effective January 1, 1945, rewrote the second sentence of subsection 2. As the rest of the section was not affected by the amendment it is not set out.

Collection and Enforcement of Income Tax.

§ 105-157. Time and place of payment of tax.—

(1) The full amount of the tax payable, as shown on the face of the return, shall be paid to the commissioner of revenue at the office where the return is filed at the time fixed by law for filing the return. If the amount of the tax exceeds fifty dollars ($50.00), payment may be made in two equal installments: one-half on the date the return is filed, and one-half on or before September 15th, with interest on the deferred payment at the rate of four per cent (4%) per annum from March 15th until paid; provided, that if the deferred payment is not made when due, interest at the rate of six per cent (6%) per annum shall be added to such deferred payment from March 15th until paid. This provision for deferred payment shall become effective as of January 1st, 1948. If the amount of the tax exceeds four hundred dollars ($400.00), payment may be made in four equal installments, one-fourth at the time of filing the report, one-fourth on or before June 15th, one-fourth on or before September 15th, and one-fourth on or before December 15th, with interest on the deferred payments at the rate of four per cent (4%) per annum from March 15th until paid; provided, that if any deferred payment is not made when due, the entire unpaid balance of the tax shall become immediately

due and payable, and interest at the rate of six per cent (6%) per annum shall be added to such balance from March 15th until paid. This provision for deferred payments shall become effective as of January 1st, 1948.

(1947, c. 501, s. 4.)

Editor's Note.—The 1947 amendment rewrote subsection (1). As the rest of the section was not affected by the amendment it is not set out.

§ 105-158. Examination of returns.

Cited in Garrou Knitting Mills v. Gill, 228 N. C. 764, 47 S. E. (2d) 240.

§ 105-159. Corrections and changes. — If the amount of the net income for any year of any taxpayer under this article, as returned to the United States treasury department, is changed and corrected by the commissioner of internal revenue or other officer of the United States of competent authority, such taxpayer, within two years after receipt of internal revenue agent's report or supplemental report reflecting the corrected net income, shall make return under oath or affirmation to the commissioner of revenue of such corrected net income. If the taxpayer fails to notify the commissioner of revenue of assessment of additional tax by the commissioner of internal revenue, the statute of limitations shall not apply. The commissioner of revenue shall thereupon proceed to determine, from such evidence as he may have brought to his attention or shall otherwise acquire, the correct net income of such taxpayer for the fiscal or calendar year, and if there shall be any additional tax due from such taxpayer the same shall be assessed and collected; and if there shall have been an over-payment of the tax the said commissioner shall, within thirty days after the final determination of the net income of such taxpayer, refund the amount of such excess: Provided, that any taxpayer who fails to comply with this section as to making report of such change as made by the federal government within the time specified shall be subject to all penalties as provided in § 105-161, in case of additional tax due, and shall forfeit his rights to any refund due by reason of such change.

If a refund of taxes paid is made under this section, interest thereon at six per cent (6%) per annum computed from ninety (90) days after the overpayment was made shall be added to such refund. If an assessment is made under this section, interest thereon at six per cent (6%) per annum computed from the due date of the original return shall be added.

When the taxpayer makes the return reflecting the corrected net income as required by this section, the commissioner of revenue shall make assessments or refunds based thereon within three (3) years from the date the return required by this section is filed and not thereafter. When the taxpayer does not make the return reflecting the corrected net income as required by this section but the department of revenue receives from the United States government or one of its agents a report reflecting such corrected net income, the commissioner of revenue shall make assessments for taxes due based on such corrected net income within five (5) years from the date the report from the United States government or its agent is actually received and not thereafter. (1939, c. 158, s. 334; 1947, c. 501, s. 4; 1949, c. 392, s. 3.)

Editor's Note.—The 1947 amendment substituted "two years" for "thirty days" in line seven and struck out the second sentence. The 1949 amendment, effective January 1, 1949, restored the said sentence and added the second and third paragraphs.

This section imposes on the taxpayer a positive duty with respect to his income tax liability beyond that required by § 105-152, respecting his original return; it is his duty not only to report the change made by the federal department but to file another return under oath reflecting it. And the fact that three years had already elapsed after the filing of the original return before the taxpayer received notice of the change made by the federal department did not bring into operation the statute of limitations in § 105-160, as it stood prior to the amendments of 1947 and 1949, so as to relieve the taxpayer of this duty. Garrou Knitting Mills v. Gill, 228 N. C. 764, 47 S. E. (2d) 240.

§ 105-160. Additional taxes.

Upon failure to file returns and in the absence of fraud the limitation shall be five years. (1939, c. 158, s. 335; 1947, c. 501, s. 4; 1949, c. 392, s. 3.)

Editor's Note.—The 1947 amendment inserted after the word "returns" in the last sentence the following phrase "(including the notice or return required by G. S. sec. 105-159 with respect to federal correction of net income)." The 1949 amendment, effective January 1, 1949, struck out the quoted phrase.

Former Law.—The three year limitation from the time of filing original income tax returns during which the commissioner of revenue might review returns and make additional assessments, under this section as it stood before the 1947 and 1949 amendments, was not strictly a statute of limitations and did not affect the right to additional tax but applied solely to administrative procedure by which the tax is assessed. Garrou Knitting Mills v. Gill, 228 N. C. 764, 47 S. E. (2d) 240.

Failure to File Additional Return under § 105-159.—This section, considered in pari materia with the other pertinent provisions of the Revenue Act prior to the amendment of c. 501, s. 4, Session Laws of 1947, did not preclude the commissioner of revenue from making additional assessments or refunds of income taxes after the expiration of three years from the filing of the original returns, where the taxpayer had been required to make changes in his federal income tax return and pay an additional assessment of federal income taxes, and had failed to notify the commissioner of revenue of such changes and to file an additional return under oath as required by § 105-159, notwithstanding that three years had already elapsed after the filing of the original return before the taxpayer received notice of the change made by the federal department. Garrou Knitting Mills v. Gill, 228 N. C. 764, 47 S. E. (2d) 240.

Art. 5. Schedule E. Sales Tax.

§ 105-167. Definitions.

8. The word "sale" or "selling" shall mean any transfer of title or possession, or both, exchange, or barter of tangible personal property, conditional or otherwise, however effected and by whatever name called, for a consideration paid or to be paid, in installments or otherwise, and shall include any of said transactions whereby title or ownership is ultimately to pass notwithstanding the retention of title or possession, or both, for security or other purposes, and shall further mean and include any bailment, loan, lease, rental or license to use or consume tangible personal property for a consideration paid or to be paid, in installments or otherwise, in which possession of said property passes to the bailee, borrower, lessee, or licensee: Provided, the provisions of this subsection shall not apply to the lease or rental of motion picture films used for exhibition purposes and for which a license tax is imposed under the provisions of § 105-37.

(1945, c. 708, s. 5.)

Editor's Note.—

The 1945 amendment inserted immediately before the proviso in subsection 8 the words "in which possession of said property passes to the bailee, borrower, lessee, or licensee."

It substituted the latter part of the proviso for the words "tax of three per cent is paid on the total admissions for such exhibitions." As the rest of the section was not affected by the amendment it is not set out.

Construction of Article.—As to the incidence of the tax where it is imposed upon a general class, as for instance retail merchants, the law is construed more strictly against the agency imposing the tax, and in favor of the taxpayer. Henderson v. Gill, 229 N. C. 313, 49 S. E. (2d) 754.

§ 105-168. Licenses; wholesale and retail sales tax rates; use tax on motor vehicles.

(c) Motor Vehicles.—In addition to the taxes levied in this article or in any other law, there is hereby levied and imposed upon every person, for the privilege of using the streets and highways of this state, a tax of three per cent (3%) of the sales or purchase price of any new or used motor vehicle purchased or acquired for use on the streets and highways of this state requiring registration thereof under the Motor Vehicle Laws of this state, which said amount shall not exceed fifteen dollars ($15.00), and shall be paid to the commissioner of revenue at the time of applying for certificate of title or registration of such motor vehicle. No certificate of title or registration plate shall be issued for same unless and until said tax has been paid: Provided, however, if such person so applying for certificate of title or registration and license plate for such motor vehicle shall furnish to the commissioner of revenue a certificate from a motor vehicle dealer licensed to do business in this state, upon a form furnished by the commissioner, certifying that such person has paid the tax thereon levied in this article, the tax herein levied shall be remitted to such person to avoid in effect double taxation on said motor vehicle under this article. The term "motor vehicle" as used in this section shall include trailers. It is declared to have been the purpose of this subsection that whenever a motor vehicle chassis is or has been purchased separately from the body which is thereafter installed thereon, the maximum tax herein levied shall be imposed only on the sale of the chassis and no additional tax shall be imposed upon the body mounted upon the same. It is not the intention of this section to impose any tax upon a body mounted upon the chassis of a motor vehicle which temporarily enters the state for the purpose of having such body mounted thereon by the manufacturer thereof. The commissioner of revenue is authorized to cancel any taxes assessed contrary to the provisions hereof.

The tax levied under this subsection shall not apply to the owner of a motor vehicle who purchases or acquires said motor vehicle from some person, firm or corporation who or which is not a dealer in new and/or used motor vehicles if the tax levied under this subsection, this article, or article 8 has been paid with respect to said motor vehicle. (1939, c. 158, s. 405; 1943, c. 400, s. 5; 1947, c. 501, s. 5.)

The 1947 amendment added the second paragraph of subsection (c). As the rest of the section was not affected by the amendment it is not set out.

Merchants are statutory agents for the collection of the tax on sales, which is definitely imposed upon the consumer, and their responsibility arises on the assumption that they must so collect. Henderson v. Gill, 229 N. C. 313, 49 S. E. (2d) 754.

The state is not estopped to collect the retail sales tax levied by this section by the action of an agent of the department of revenue in erroneously advising the merchant that certain sales were not subject to the tax, notwithstanding that the merchant was thereby deprived of the opportunity to collect the tax from his customers. Henderson v. Gill, 229 N. C. 313, 49 S. E. (2d) 754.

§ 105-169. Exemptions.

(b) Sales of gasoline or other motor fuel on which the tax levied in § 105-434 and/or § 105-435 is due and has been paid, and the fact that a refund of the tax levied by either of said sections is made pursuant to the provisions of subchapter V of chapter 105 shall not make the sale or the seller of such fuels subject to the tax levied by this article.

(b1) Sales of fuels to farmers to be used by them for any farm purpose other than preparing food, heating dwellings, and other household purposes.

(c1) Sales of semen to be used in the artificial insemination of animals.

(k) Sales of medicines sold on prescriptions of physicians, or medicines compounded, processed or blended by the druggist offering the same for sale at retail or sales of drugs or medical supplies to physicians or hospitals or by physicians and hospitals to patients in connection with medical treatments.

(q) Sales of tangible personal property to hospitals not operated for profit, churches, orphanages, and other charitable or religious institutions or organizations not operated for profit, and educational institutions not operated for profit, when such tangible personal property is purchased for use in carrying on the work of such institutions or organizations. Sales of building materials to contractors to be used in construction and repair work for the institutions and agencies described in this subsection shall be construed as sales to said institutions or agencies for the purposes of this subsection.

(s) Sales of seeds, feeds for livestock and poultry, and insecticides for livestock, poultry and agriculture.

(t) Sales of lubricants, repair parts and accessories for motor vehicles and airplanes, when made to the owner and operator of fleets of five or more motor vehicles or airplanes to be used in or upon such motor vehicles or airplanes, shall be classified as wholesale sales, and, therefore, only subject to the wholesale rate of tax. (1939, c. 158, s. 406; 1941, c. 50, s. 6; 1943, c. 400, s. 5; 1945, c. 708, s. 5; 1947, c. 501, s. 5; 1949, c. 392, s. 4; c. 1271.)

Editor's Note.—The 1945 amendment made subsection (k) applicable to sales of drugs or medical supplies to physicians, etc., and added subsections (s) and (t). The 1947 amendment rewrote subsections (b) and (t) and substituted in subsection (q) the words "not operated for profit" for the words "principally supported by the state of North Carolina." The first 1949 amendment rewrote subsection (b), inserted subsection (b1) and added the second sentence of subsection (q). The second 1949 amendment inserted subsection (c1). Only the subsections added or affected by the amendments are set out.

For a brief comment on the 1949 amendments, see 27 N. C. Law Rev. 484.

Burden of Proof.—Where the tax coverage is challenged by virtue of an exemption or exception, the burden is upon the challenger to bring himself within the exemption or exception. Henderson v. Gill, 229 N. C. 313, 49 S. E. (2d) 754.

Flowers grown upon the vendors' own land are farm products within the meaning of the exemption of such products from the sales tax. Henderson v. Gill, 229 N. C. 313, 49 S. E. (2d) 754.

Sale by Florist of Flowers Grown on Own Land. — Plaintiffs operated a florist shop and sold therein flowers grown by themselves on their own land and also flowers purchased from wholesalers. It was held that the sale of flowers grown by them on their own land was not ex-

empt from the sales tax, since even though such flowers are regarded as farm products, such sales were made by plaintiffs in their character and capacity of florists and not as farmers or producers. Henderson v. Gill, 229 N. C. 313, 49 S. E. (2d) 754.

§ 105-170. Taxes payable; failure to make return; duty and power of commissioner.

(c) Not to Issue Certificate of Title or License.—As an additional means of enforcement of the payment of the tax herein levied the department of motor vehicles shall not issue a certificate of title or a license plate for any new or used motor vehicle sold by any merchant or dealer licensed to do business in this state until the tax levied for the sale of same in this article has been paid, or a certificate, duly signed by a dealer licensed to do business in this state, is filed at the time the application for title or license plate is made for such motor vehicle; such certificate to be on such form as may be prescribed by the commissioner of motor vehicles, and such certificate shall show that the said licensed dealer has assumed the responsibility for the payment of the tax levied under this article and agrees to report and remit the tax in his next regular monthly sales tax report required to be filed under this article. (1939, c. 158, s. 407; 1943, c. 400, s. 5; 1947, c. 501, s. 5.)

The 1947 amendment substituted "motor vehicles" for "revenue" in lines four and fourteen of subsection (c). As the rest of the section was not affected by the amendment it is not set out.

§ 105-174. Commissioner to correct error.

(b) If any part of the deficiency is due to negligence or intentional disregard of authorized rules and regulations, with knowledge thereof, but without intent to defraud, there shall be added as damages ten per centum of the total amount of the deficiency in the tax, and interest in such a case shall be collected at the rate of one per centum per month of the amount of such deficiency in the tax from the time it was due, which interest and damages shall become due and payable upon notice and demand by the commissioner; provided, however, in the absence of fraud, no assessment authorized by this article shall extend to sales made more than three (3) years prior to the date of assessment; and in cases where an audit shall have been made under the direction of the commissioner of revenue any assessment in respect to such audit shall be made within one year after the completion of the audit: Provided, further, that when the returns required under this article have not been filed, the commissioner of revenue shall proceed to determine the total amount of the tax due because of sales made not more than five (5) years prior to such determination, and any assessment made as a result of such determination shall extend to and include sales made within such period.

(1947, c. 501, s. 5.)

The 1947 amendment added the proviso at the end of subsection (b). As the rest of the section was not affected by the amendment it is not set out.

§ 105-187. Tax on building materials.—There is hereby levied and there shall be collected from every person, firm, or corporation, an excise tax of three per cent of the purchase price of all tangible personal property purchased or used subsequent to June 30, 1939, which shall enter into or become a part of any building or any other kind of structure in this state, including all materials, supplies, fixtures and equipment of every kind and description which shall be annexed thereto or in any manner become a part thereof, except rough and dressed lumber (but not millwork), brick or hollow tile, cement blocks, cinder blocks, clinker blocks, sand, gravel, crushed stone, rock, and granite.

(1949, c. 392, s. 4.)

Editor's Note.—The 1949 amendment rewrote the first paragraph. As the rest of the section was not affected by the amendment it is not set out.

For a brief comment on the 1949 amendment, see 27 N. C. Law Rev. 485.

Art. 6. Schedule G. Gift Taxes.

§ 105-188. Gift taxes; classification of beneficiaries; exemptions; rates of tax.—State gift taxes, as hereinafter prescribed, are hereby levied upon the shares of the respective beneficiaries in all property within the jurisdiction of this state, real, personal and mixed, and any interest therein which shall in any one calendar year pass by gift made after March 24, 1939.

The taxes shall apply whether the gift is in trust or otherwise and whether the gift is direct or indirect. In the case of a gift made by a nonresident, the taxes shall apply only if the property is within the jurisdiction of this state. The taxes shall not apply to gifts made prior to March 24, 1939.

The tax shall not apply to the passage of property in trust where the power to revest in the donor title to such property is vested in the donor, either alone or in conjunction with any person not having substantial adverse interest in the disposition of such property or the income therefrom, but the relinquishment or termination of such power (other than by the donor's death) shall be considered to be a passage from the donor by gift of the property subject to such power, and any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a passage by donor of such income by gift.

Gifts to any one donee not exceeding a total value of one thousand dollars ($1,000.00) in any one calendar year shall not be considered gifts taxable under this article, and where gifts are made to any one donee in any one calendar year in excess of one thousand dollars ($1,000.00), only that portion of said gifts exceeding one thousand dollars ($1,000.00) in value shall be subject to the tax levied by this article.

The tax shall be based on the aggregate sum of the net gifts made by the donor to the same donee, and shall be computed as follows:

1. Determine the aggregate sum of the net gifts to the donee for the calendar year and the net gifts to the same donee for each of the preceding calendar years since January 1st, 1948.

2. Compute the tax upon said aggregate sum by applying the rates hereinafter set out.

3. From the tax thus computed, deduct the total gift tax, if any, paid with respect to gifts to the same donee in any prior year or years since January 1st, 1948. The sum thus ascertained shall be the gift tax due.

The term "net gifts" shall mean the sum of the gifts made by a donor to the same donee during any stated period of time in excess of the annual exclusion and the applicable specific exemption.

The rates of tax, which are based on the relationship between the donor and the donee, shall be as follows:

(a) Where the donee is lineal issue, or lineal ancestor, or husband, or wife of the donor, or child adopted by the donor in conformity with the laws of this state, or of any of the United States, or of any foreign kingdom or nation, or stepchild of the donor, (for each one hundred dollars ($100.00) or fraction thereof):

First $	10,000	above exemption	...	1 per cent
Over $	10,000	and to $ 25,000	...	2 per cent
Over $	25,000	and to $ 50,000	...	3 per cent
Over $	50,000	and to $ 100,000	...	4 per cent
Over $	100,000	and to $ 200,000	...	5 per cent
Over $	200,000	and to $ 500,000	...	6 per cent
Over $	500,000	and to $1,000,000	...	7 per cent
Over $1,000,000		and to $1,500,000	...	8 per cent
Over $1,500,000		and to $2,000,000	...	9 per cent
Over $2,000,000		and to $2,500,000	...	10 per cent
Over $2,500,000		and to $3,000,000	...	11 per cent
Over $3,000,000			.....	12 per cent

(b) Where the donee is the brother or sister, or descendant of the brother or sister, or is the uncle or aunt by blood of the donor (for each one hundred dollars ($100.00) or fraction thereof):

First $	5,000		.....	4 per cent
Over $	5,000	and to $ 10,000	...	5 per cent
Over $	10,000	and to $ 25,000	...	6 per cent
Over $	25,000	and to $ 50,000	...	7 per cent
Over $	50,000	and to $ 100,000	...	8 per cent
Over $	100,000	and to $ 250,000	...	10 per cent
Over $	250,000	and to $ 500,000	...	11 per cent
Over $	500,000	and to $1,000,000	...	12 per cent
Over $1,000,000		and to $1,500,000	...	13 per cent
Over $1,500,000		and to $2,000,000	...	14 per cent
Over $2,000,000		and to $3,000,000	...	15 per cent
Over $3,000,000			.....	16 per cent

(c) Where the donee is in any other degree of relationship than is hereinbefore stated, or shall be a stranger in blood to the donor, or shall be a body politic or corporate (for each one hundred dollars ($100.00) or fraction thereof):

First $	10,000		.....	8 per cent
Over $	10,000	and to $ 25,000	...	9 per cent
Over $	25,000	and to $ 50,000	...	10 per cent
Over $	50,000	and to $ 100,000	...	11 per cent
Over $	100,000	and to $ 250,000	...	12 per cent
Over $	250,000	and to $ 500,000	...	13 per cent
Over $	500,000	and to $1,000,000	...	14 per cent
Over $1,000,000		and to $1,500,000	...	15 per cent
Over $1,500,000		and to $2,500,000	...	16 per cent
Over $2,500,000			.....	17 per cent

A donor shall be entitled to a total exemption of twenty-five thousand dollars ($25,000.00) to be deducted from gifts made to donees named in subsection (a) of this section, less the sum of amounts claimed and allowed as an exemption in prior calendar years. The exemption, at the option of the donor, may be taken in its entirety in a single year, or may be spread over a period of years. When this exemption has been exhausted, no further exemption is allowable. When the exemption or any portion thereof is applied to gifts to more than one donee in any one calendar year, said exemption shall be apportioned against said gifts in the same ratio as the gross value of the gifts to each donee is to the total value of said gifts in the calendar year in which said gifts are made. No exemption shall be allowed to a donor for gifts made to donees named in subsections (b) and (c) of this section.

It is expressly provided, however, that the tax levied in this article shall not apply to so much of said property as shall so pass exclusively: (1) for state, county or municipal purposes within this state; (2) to or for the exclusive benefit of charitable, educational, or religious organizations located within this state, no part of the net earnings of which inures to the benefit of any private shareholder or individual; (3) to or for the exclusive benefit of charitable, religious and educational corporations, foundations and trusts, not conducted for profit, incorporated or created or administered under the laws of any other state, when such other state levies no gift taxes upon property similarly passing from residents of such state to charitable, educational or religious corporations, foundations and trusts incorporated or created or administered under the laws of this state, or when such corporation, foundation or trust receives and disburses funds donated in this state for religious, charitable and educational purposes. (1939, c. 158, s. 600; 1943, c. 400, s. 7; 1945, c. 708, s. 7; 1947, c. 501, s. 6.)

Editor's Note.—

The 1945 amendment made changes in the last paragraph of subsection (c). The 1947 amendment, effective January 1, 1948, struck out the former fifth paragraph and inserted in lieu thereof the portions of this section beginning with the present fifth paragraph and going down to subsection (a).

For comment on the 1947 amendment, see 25 N. C. Law Rev. 467.

For a leading article on planning for North Carolina death and gift taxes, see 27 N. C. Law Rev. 114.

§ 105-192. Penalties and interest.

If any tax, or any assessment of tax, penalties and interest, or any part thereof, be not paid when due, it shall bear interest at six per centum (6%) per annum from the date same is due until paid. (1939, c. 158, s. 604; 1947, c. 501, s. 6.)

Editor's Note.—The 1947 amendment, effective January 1, 1948, substituted at the end of the second paragraph the words "same is due until paid" for the words "of assessment until paid." As the first paragraph was not affected by the amendment it is not set out.

§ 105-194. Period of limitation upon assessment; assessment upon failure or refusal to file proper return.

In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed at any time. Where a donor dies within three years after filing a return, taxes may be assessed at any time within said three years, or the date of final settlement of state inheritance taxes.

(1947, c. 501, s. 6.)

The 1947 amendment, effective January 1, 1948, added the second sentence to the second paragraph. As the first and third paragraphs were not affected by the amendment they are not set out.

Art. 7. Schedule H. Intangible Personal Property.

§ 105-199. Money on deposit. — All money on deposit (including certificates of deposit and postal savings) with any bank or other corporation, firm or person doing a banking business, whether such money be actually in or out of this state, having a business, commercial or taxable situs in this state, shall be subject to an annual tax, which is

hereby levied, of ten cents (10c) on every one hundred dollars ($100.00) of the total amount of such deposit without deduction for any indebtedness or liabilities of the taxpayer.

For the purpose of determining the amount of deposits subject to this tax every such bank or other corporation, firm or person doing a banking business shall set up the credit balance of each depositor on the fifteenth day of each February, May, August, and November in the calendar year next preceding the due date of tax return, and the average of such quarterly credit balances shall constitute the amount of deposit of each depositor subject to the tax herein levied; for the purposes of this section accounts having an average of quarterly balances for the year of less than three hundred dollars ($300.00) may be disregarded.

The tax levied in this section upon money on deposit shall be paid by the cashier, treasurer or other officer or officers of every such bank or other corporation, firm or person doing a banking business in this state by report and payment to the commissioner of revenue on or before March fifteenth of each year; any taxes so paid as agent for the depositor shall be recovered from the owners thereof by the bank or other corporation, firm or person doing a banking business in this state by deduction from the account of the depositor on November sixteenth of each year or on such date thereafter as in the ordinary course of business it becomes convenient to make such charge. The bank may immediately report and pay the tax due on any account closed out during any quarter in which the bank has withheld the amount of the tax. The tax on deposits represented by time certificates shall be chargeable to the original depositor unless such depositor has given notice to the depository bank of transfer of such certificate of deposit. Accounts that have been closed during the year, leaving no credit balance against which the tax can be charged, may be reported separately to the commissioner of revenue and the tax due on such accounts shall become a charge directly against the depositor, and such tax may be collected by the commissioner of revenue from the depositor in the same manner as other taxes levied in this act; the bank or other corporation, firm or person doing a banking business in this state shall not be held liable for the payment of the tax due on accounts so reported. None of the provisions of this section shall be construed to relieve any taxpayer of liability for a full and complete return of postal savings and of all money on deposit outside this state having business, commercial or taxable situs in this state.

The tax levied in this section shall not apply to deposits by one bank in another bank, nor to deposits of the United States, state of North Carolina, political subdivisions of this state or agencies of such governmental units. Deposits representing the actual payment of benefits to World War veterans by the federal government, when not reinvested, shall not be subject to the tax levied in this section. Further, deposits in North Carolina banks by nonresident individuals and foreign corporations, when such deposits are not related to business activities in this state, shall not be subject to the tax levied in this section. The tax levied in this section shall not apply to deposits of foreign and alien insurance companies which pay the two and one-half per cent (2½%) gross premium tax levied by § 105-228.5. (1939, c. 158, s. 701; 1945, c. 708, s. 8; 1947, c. 501, s. 7; 1949, c. 392, s. 5.)

Editor's Note.—The 1945 amendment substituted in the second paragraph "February, May, August and November" for "March, June, September and December," inserted the second sentence of paragraph three and added the next to the last sentence of the section.

The 1947 amendment increased the amount of the quarterly balances mentioned in the second paragraph from $100 to $300. It also substituted "November" for "December" in line twelve of the third paragraph.

The 1949 amendment, effective March 18, 1949, added the last sentence.

For a brief comment on the 1949 amendment, see 27 N. C. Law Rev. 485.

§ 105-202. Bonds, notes, and other evidences of debt.—All bonds, notes, demands, claims and other evidences of debt however evidenced, whether secured by mortgage, deed of trust, judgment or otherwise, or not so secured, having a business, commercial or taxable situs in this state on December thirty-first of each year shall be subject to annual tax, which is hereby levied, of twenty-five cents (25c) on every one hundred dollars ($100.00) of the actual value thereof: Provided, that from the actual value of such bonds, notes, demands, claims and other evidences of debt there may be deducted like evidences of debt owed by the taxpayer on December thirty-first of the same year.

(1947, c. 501, s. 7.)

Editor's Note.—The 1947 amendment decreased the tax mentioned in the first sentence from 50 to 25 cents. As the rest of the section was not affected by the amendment it is not set out.

§ 105-203. Shares of stock.—All shares of stock owned by residents of this state or having business, commercial or taxable situs in this state on December thirty-first of each year, with the exceptions hereinafter provided, shall be subject to an annual tax, which is hereby levied, of twenty-five cents (25c) on every one hundred dollars ($100.00) of the total fair market value thereof.

The tax herein levied shall not apply to shares of stock in banks, banking associations, trust companies or domestic insurance companies which are otherwise taxed in this state, nor to shares of stock in building and loan associations which pay a tax as levied under § 105-73; nor shall the tax apply to shares of stock in corporations which pay to this state a franchise tax on their entire capital stocks, surplus and undivided profits or entire gross receipts as provided under Schedule C, §§ 105-114 to 105-129, together with the tax upon all of the net income, if any, of such corporations as provided under §§ 105-130 to 105-163. With respect to corporations which pay to this state a franchise tax on a part of their capital stock, surplus and undivided profits or part of their gross receipts as provided in Schedule C, §§ 105-114 to 105-129, and a tax upon a part of the net income of such corporations as provided under §§ 105-130 to 105-163, when such income is earned, there shall be exempt so much of the fair market value of such shares of stock as is represented by the percentage of net income on which tax is paid to this state. In the case of corporations having the same allocation ratios for income and franchise taxes paid to this state the allocation percentages reported on the franchise returns due in July of

each year and received in the year, may be used to determine the portion of the value of the shares of stock of such corporations taxable under this section. In the case of foreign insurance corporations paying tax on gross premiums under the provisions of § 105-228.5 there shall be exempt that proportion of the fair market value of the shares of stock as is represented by the percentage of total gross premiums of such corporations taxed in this state.

(1945, c. 708, s. 8; c. 752, s. 4; 1947, c. 501, s. 7.)

Editor's Note.—
The first 1945 amendment inserted the next to the last sentence of the second paragraph. The second 1945 amendment inserted in line three thereof the word "domestic" and struck out the words "not exempted from an income tax under subsection 2(f) of § 105-134," formerly appearing after the word "companies" in the same line. It also added the last sentence of the paragraph. The 1947 amendment decreased the tax mentioned in the first paragraph from 30 to 25 cents. As the third paragraph was not affected by the amendments it is not set out.

§ 105-204. Beneficial interest in foreign trusts.—The beneficial or equitable interest on December thirty-first of each year of any resident of this state, or of a nonresident having a business, commercial or taxable situs in this state, in any trust, trust fund or trust account (including custodian accounts) held by a foreign fiduciary, shall be subject to an annual tax, which is hereby levied, of twenty-five cents (25c) on every one hundred dollars ($100.00) of the total actual value thereof. (1939, c. 158, s. 706; 1941, c. 50, s. 8; 1947, c. 501, s. 7.)

The 1947 amendment decreased the tax rate from 30 to 25 cents.

§ 105-205. Funds on deposit with insurance companies.—All funds on deposit with insurance companies on December thirty-first of each year, belonging to or held in trust for a resident of this state or having acquired a taxable situs in this state, shall be subject to an annual tax, which is hereby levied, of ten cents (10c) on every one hundred dollars ($100.00) thereof.

(1947, c. 501, s. 7.)

The 1947 amendment decreased the tax rate mentioned in the first sentence from 25 to 10 cents. As the rest of the section was not affected by the amendment it is not set out.

§ 105-210. Moneyed capital coming into competition with the business of banks.—On all moneyed capital coming into competition with the business of banks, whether state or national, there is hereby annually levied a tax at the same rate as is assessed upon the shares of stock of such banks located in this state at the place of residence of such banks, less deduction of real estate otherwise taxed in this state, to the same extent and under the same corresponding conditions as this deduction is allowed in the assessment of such shares of stock of banks located in this state: Provided, that bonds, notes or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business shall not be deemed moneyed capital within the meaning of this section.

In cases where the commissioner of revenue shall find moneyed capital, as specified in the preceding paragraph, to be in competition with banks, such moneyed capital shall be assessed by the same methods as applicable to the shares of banks, and shall be taxed at the same rates as are applicable to the shares of banks in the same locality where such moneyed capital is found to be in competition with banks. The rates of tax thus applied shall be in lieu of the rates of tax specified in this article. (1939, c. 158, s. 712; 1945, c. 708, s. 8.)

Editor's Note.—The 1945 amendment made this section applicable to state as well as national banks and added the second paragraph.

§ 105-211. Conversion of intangible personal property to evade taxation not to defeat assessment and collection of proper taxes; taxpayer's protection.—Any taxpayer who shall, for the purpose of evading taxation under the provisions of this article or schedule, within thirty days prior to December thirty-first of any year or other taxable dates, namely February fifteenth, May fifteenth, August fifteenth, and November fifteenth, either directly or indirectly, convert any intangible personal property taxable under the provisions of this article or schedule, or with like intent shall, either directly or indirectly, convert such intangible personal property into a class of property which is taxable in this state at a lower rate than the intangible personal property so converted, shall be taxable on such intangible personal property as if such conversion had not taken place; the fact that such taxpayer within thirty days after December thirty-first of any year, either directly or indirectly, converts such property non-taxable in this state or taxable at the lower rate in this state into intangible personal property taxable at the higher rate shall be prima facie evidence of intent to evade taxation by this state, and the burden of proof shall be upon such taxpayer to show that the first conversion was for a bona fide purpose of investment and not for the purpose of evading taxation by this state.

Taxpayers making a complete return on or before March fifteenth of each year of all their holdings of intangible personal property as provided by this article or schedule (or by similar provisions of prior Revenue Act) shall not thereafter be held liable for failure to list such intangible personal property with the local taxing units of this state in previous years; the taxes levied in this article or schedule shall be in lieu of all other property taxes in this state on such intangible personal property. (1939, c. 158, s. 713; 1945, c. 708, s. 8.)

Editor's Note.—The 1945 amendment inserted after the word "year" in line four the words "or other taxable dates, namely February fifteenth, May fifteenth, August fifteenth, and November fifteenth."

§ 105-212. Institutions exempted; conditional and other exemptions. — None of the taxes levied in this article or schedule shall apply to religious, educational, charitable or benevolent organizations not conducted for profit, nor to any funds held irrevocably in trust exclusively for the maintenance and care of places of burial; nor, on or after January first, one thousand nine hundred and forty-two, to any funds, evidences of debt, or securities held irrevocably in pension, profit sharing, stock bonus, or annuity trusts, or combinations thereof, established by employers for the purpose of distributing both the principal and income

thereof exclusively to eligible employees, or the beneficiaries of such employees, if such trusts qualify for exemption from income tax under the provisions of § 105-138, subsection 10; insurance companies reporting premiums to the insurance commissioner of this state and paying a tax thereon under the provisions of Article 8B, Schedule I-B shall not be subject to the provisions of §§ 105-201, 105-202 and 105-203; building and loan associations paying a tax under the provisions of § 105-73 shall not be subject to the provisions of §§ 105-201, 105-202 and 105-203; state credit unions organized pursuant to the provisions of subchapter III, chapter fifty-four, paying the supervisory fees required by law, shall not be subject to any of the taxes levied in this article or schedule; banks, banking associations and trust companies shall not be subject to the tax levied in this article or schedule on evidences of debt held by them when said evidences of debt represent investment of funds on deposit with such banks, banking associations and trust companies; Provided, that each such institution must, upon request by the commissioner of revenue, establish in writing its claim for exemption as herein provided. The exemptions in this section shall apply only to those institutions, and only to the extent, specifically mentioned, and no other.

If any intangible personal property held or controlled by a fiduciary domiciled in this state is so held or controlled for the benefit of a nonresident or nonresidents, or for the benefit of any organization exempt under this section from the tax imposed by this article, such intangible personal property shall be partially or wholly exempt from taxation under the provisions of this article in the ratio which the net income distributed or distributable to such nonresident, nonresidents or organization, derived from such intangible personal property during the calendar year for which the taxes levied by this article are imposed, bears to the entire net income derived from such intangible personal property during such calendar year. "Net income" shall be deemed to have the same meaning that it has in the income tax article. Where the intangible personal property for which this exemption is claimed is held or controlled with other property as a unit, allocation of appropriate deductions from gross income shall be made to that part of the entire gross income which is derived from the intangible personal property by direct method to the extent practicable; and otherwise by such other method as the commissioner of revenue shall find to be reasonable: provided, that each fiduciary claiming the exemption provided in this paragraph shall, upon the request of the commissioner of revenue, establish in writing its claim to such exemption. No provision of law shall be construed as exempting trust funds or trust property from the taxes levied by this article except in the specific cases covered by this section.

A clerk of any court of this state may, upon written application therefor, obtain from the commissioner of revenue a certificate relieving the depository bank of such clerk from the duty of collecting the tax levied in this article or schedule from deposits of said clerk: Provided, that such clerk of court shall be liable under his official bond for the full and proper remittance to the commissioner of revenue under the provisions of this article or schedule of taxes due on any deposits so handled. (1939, c. 158, s. 714; 1943, c. 400, s. 8; 1945, c. 708, s. 8; 1947, c. 501, s. 7.)

Editor's Note.—

The 1945 amendment, effective as of January 1, 1944, inserted the words appearing between the first and second semi-colons in the first paragraph.

The 1947 amendment substituted "forty-two" for "forty-four" in line eight of the first paragraph and substituted "Article 8B, Schedule I-B" for "§ 105-121" formerly appearing in line nineteen. It also inserted the second paragraph.

For discussion of the 1947 amendment, see 25 N. C. Law Rev. 473.

§ 105-213. Separate records by counties; disposition and distribution of taxes collected; purpose of tax.—The commissioner of revenue shall keep a separate record by counties of tax collected under the provisions of this article or schedule, and shall not later than the twentieth day of July of each year submit to the state board of assessment an accurate account of such taxes collected during the fiscal year ending June thirtieth next preceding, showing separately by sections the total collections less refunds in each county of the state. The state board of assessment shall examine such reports and, if found to be correct, shall certify a copy of same to the state auditor and state treasurer. Twenty per cent (20%) of the total amount of such revenue shall be retained by the state for use in the maintenance and operation of the public school system of the state, and eighty per cent (80%) of such revenue shall be distributed to the counties and municipalities of the state on the following basis:

(1947, c. 501, s. 7.)

Editor's Note.—

The 1947 amendment substituted "Twenty per cent (20%)" for "Twenty-five per cent (25%)" and "Eighty per cent (80%)" for "Seventy-five per cent (75%)" in the first paragraph. As the rest of the section was not affected by the amendment it is not set out.

§ 105-214: Repealed by Session Laws 1947, c. 501, s. 7.

Art. 8. Schedule I. Compensating Use Tax.

§ 105-219. Definitions.

(c) The word "sale" or "selling" shall mean any transfer of title or possession, or both, exchange, or barter of tangible personal property, conditional or otherwise, however affected and by whatever name called, for a consideration paid or to be paid, in installments or otherwise, and shall include any of said transactions whereby title or ownership is ultimately to pass notwithstanding the retention of title or possession, or both, for security or other purposes, and shall further mean and include any bailment, loan, lease, rental or license to use or consume tangible personal property for a consideration paid or to be paid, in installments or otherwise, in which possession of said property passes to the bailee, borrower, lessee, or licensee: Provided, the provisions of this subsection shall not apply to the lease or rental of motion picture films used for exhibition purposes and for which a license tax is imposed under the provisions of § 105-37.

(1945, c. 708, s. 9.)

Editor's Note.—The 1945 amendment inserted immediately before the proviso of subsection (c) the words "in which possession of said property passes to the bailee, borrower, lessee, or licensee." It also substituted the latter part of the proviso for the words "license tax is imposed under the

provisions of § 105-37." As the rest of the section was not affected by the amendment it is not set out.

Cited in Johnston v. Gill, 224 N. C. 638, 32 S. E. (2d) 30.

§ 105-220. Taxes levied.

The tax is not a sales tax. Its chief function is to prevent the evasion of the sales tax by persons purchasing tangible personal property outside of North Carolina for storage, use, consumption within the state. Thus it prevents unfair competition on the part of out-of-state merchants. It and our sales tax law, G. S., ch. 105, art. 5, taken and applied together, provide a uniform tax upon either the sale or use of all tangible personal property irrespective of where it may be purchased. That is, the sales tax and the use tax are complementary and functional parts of one system of taxation. Johnston v. Gill, 224 N. C. 638, 643, 32 S. E. (2d) 30.

§ 105-223. Retailer to collect tax from purchaser.—Every retailer engaged in the business of selling, or delivering or taking orders for the sale or delivery of tangible personal property for storage, use, or consumption in this state shall at the time of selling or delivering or taking an order for the sale or delivery of said tangible personal property or collecting the sales price thereof, or any part thereof, add to the sales price of such tangible personal property the amount of the tax on the sale thereof, and when so added said tax shall constitute a part of such price, shall be a debt from the purchaser to the retailer until paid, and shall be recoverable at law in the same manner as other debts.

(1945, c. 708, s. 9.)

Editor's Note.—

The 1945 amendment made the first sentence applicable to taking orders for sale or delivery. As only this sentence was affected by the amendment the rest of the section is not set out.

Soliciting Orders.—Where one is engaged within this state in a regular business of soliciting orders for tailor-made clothing on commission, part of which he collects at the time the order is taken, and the clothes are shipped by the maker, who collects the balance of the price, directly from the purchaser, such transaction is subject to the use tax and the solicitor is a retailer and an agent for collecting the use tax, for which he is liable on his failure to do so. Johnston v. Gill, 224 N. C. 638, 32 S. E. (2d) 30.

§ 105-227. Provisions of other articles applicable.

Statute of Limitations.—The collection of a use or excise tax being subject to the same statute of limitations, which applies to the collection of the sales tax, a use or excise tax which accrued in the year 1937 is barred by the three-year statute of limitations when assessed in 1942. Standard Fertilizer Co. v. Gill, 225 N. C. 426, 35 S. E. (2d) 275.

Art. 8A. Schedule I-A. Gross Earnings Taxes in Lieu of Ad Valorem Taxes.

§ 105-228.1. Defining taxes levied and assessed in this article.

For comment on this enactment, see 21 N. C. Law Rev. 364.

Art. 8B. Schedule I-B. Taxes Upon Insurance Companies.

§ 105-228.3. To whom this article shall apply.—The provisions of this article shall apply to every person, firm, corporation, association, society, or order operating in this state, hereinafter to be referred to as insurance company, which contracts or offers on his, their, or its account to issue any policy or contract for annuities or insurance as defined in § 58-3, or to exchange or issue reciprocal or inter-insurance contracts, or to function as a rate making bureau or association, or to serve as an underwriters agency. Said provisions shall likewise apply to any person, firm or corporation who or which shall be a broker, organizer, manager, or agent, whether local, special or general, of any insurance company, and to self-insurers under the provisions of the Workmen's Compensation Act. (1945, c. 752, s. 2.)

Editor's Note.—The act inserting this article and making other changes in the chapter provides that, unless otherwise expressly provided, its provisions shall be in effect as to all fees and taxes affected hereby which shall become due and payable after March 15, 1945. The provisions of the Revenue Act of 1939, as amended, in effect December 31, 1944, shall govern with respect to reports and taxes on premiums received by insurance companies through December 31, 1944, and on income received in the calendar year 1944.

§ 105-228.4. Annual registration fees for insurance companies.—Each and every insurance company shall, as a condition precedent for doing business in this state, between March sixteenth and the first day of April in one thousand nine hundred and forty-five and on or before April first of each year thereafter apply for and obtain from the commissioner of insurance a certificate of registration, or license, and shall pay for such certificate the following annual fees except as hereinafter provided in subdivisions (a) and (b):

For each domestic farmer's mutual assessment fire insurance company or association, and each branch thereof.	$10.00
For each fraternal order	25.00
For each of all other insurance companies, except mutual burial associations taxed under § 105-121.1	300.00

The fees levied above shall be in addition to those specified in § 58-63.

(a) When the paid in capital stock and/or surplus of an insurance company other than a farmer's mutual assessment company or a fraternal order does not exceed one hundred thousand dollars ($100,000.00), the fee levied in this section shall be one-half the amount above specified.

(b) Upon payment of the fee specified above and the fees and taxes elsewhere specified each insurance company, exchange, bureau, or agency, shall be entitled to do the types of business specified in chapter fifty-eight, of the General Statutes of North Carolina as amended, to the extent authorized therein, except that: Insurance companies authorized to do either the types of business specified for (A) life insurance companies, or (B) for fire and marine companies, or (C) for casualty and fidelity and surety companies, in § 58-77, which shall also do the types of business authorized in one or both of the other of the above classifications shall in addition to the fees above specified pay one hundred dollars ($100.00) for each such additional classification of business done.

(c) Any rating bureau established by action of the general assembly of North Carolina shall be exempt from the fees above levied. (1945, c. 752, s. 2; 1947, c. 501, s. 2.)

Cross Reference.—As to subsequent provision affecting this section, see § 105-228.7.

Editor's Note.—The 1947 amendment inserted "domestic" in the first line following the preliminary paragraph, and substituted in the third line the words "and each branch thereof" for the words "operating in not more than five counties". The amendment was made effective as of January 1, 1945, except as to branches of said associations.

§ 105-228.5. Taxes measured by gross premi-

ums.—Each and every insurance company shall annually pay to the Commissioner of Insurance at the time and at the rates hereinafter specified, a tax measured by gross premiums as hereinafter defined from business done in this state during the preceding calendar year.

Gross premiums from business done in this state in the case of life insurance and annuity contracts, including any supplemental contracts thereto providing for disability benefits, accidental death benefits, or other special benefits, shall for the purposes of the taxes levied in this section mean any and all premiums collected in the calendar year (other than for contracts for reinsurance) for policies the premiums on which are paid by or credited to persons, firms or corporations resident in this state, or in the case of group policies for any contracts of insurance covering persons resident within this state, with no deduction for considerations paid for annuity contracts which are subsequently returned except as below specified, and with no other deduction whatsoever except for premiums returned under one or more of the following conditions: premiums refunded on policies rescinded for fraud or other breach of contract; premiums which were paid in advance on life insurance contracts and subsequently refunded to the insured, premium payer, beneficiary or estate; and in the case of group annuity contracts the premiums returned by reason of a change in the composition of the group covered. Said gross premiums shall be deemed to have been collected for the amounts as provided in the policy contracts for the time in force during the year, whether satisfied by cash payment, notes, loans, automatic premium loans, applied dividend or in any other manner whatsoever, except in the case of premiums waived by any of said companies pursuant to a contract for waiver of premium in case of disability.

Gross premiums from business done in this state in the case of contracts for fire insurance, casualty insurance, and any other type of insurance except life and annuity contracts as above specified, including contracts of insurance required to be carried by the Workmen's Compensation Act, shall for the purposes of the taxes levied in this section mean any and all premiums written during the calendar year, or the equivalent thereof in the case of self-insurers under the Workmen's Compensation Act, for contracts covering property or risks in this state, other than for contracts of reinsurance, whether such premiums are designated as premiums, deposits, premium deposits, policy fees, membership fees, or assessments. Gross premiums shall be deemed to have been written for the amounts as provided in the policy contracts, new and renewal, becoming effective during the year irrespective of the time or method of making payment or settlement for such premiums, and with no deduction for dividends whether returned in cash or allowed in payment or reduction of premiums or for additional insurance, and without any other deduction except for return of premiums, deposits, fees or assessments for adjustment of policy rates or for cancellation or surrender of policies.

In determining the amount of gross premiums from business in this state all gross premiums received in this state, or credited to policies written or procured in this state, or derived from business written in this state shall be deemed to be for contracts covering persons, property or risks resident or located in this state except for such premiums as are properly reported and properly allocated as being received from business done in some other nation, territory, state or states, and except for premiums from policies written in federal areas for persons in military service who pay premiums by assignment of service pay.

On the basis of the gross amount of premiums, as above defined, each company or self-insurer shall pay as to:

The amounts collected on contracts applicable to liabilities under the Workmen's Compensation Act, or the equivalent thereof in the case of self-insurers, a tax of four per cent (4%).

The amounts collected on annuities and all other contracts of insurance a tax at the rate of one per cent (1%) in the case of domestic companies and at the rate of two and one-half per cent (2½%) in the case of foreign and alien companies.

The taxes levied herein measured by premiums shall be in lieu of all other taxes upon insurance companies except: fees and licenses under this article, or as specified in chapter 58 of the General Statutes of North Carolina as amended; taxes imposed by chapter 118 of the General Statutes of North Carolina; and ad valorem taxes upon real property and personal property owned in this state.

For the tax above levied as measured by gross premiums the president, secretary, or other executive officer of each insurance company doing business in this state shall within the first fifteen days of March in 1946 and in each year thereafter file with the Commissioner of Insurance a full and accurate report of the total gross premiums as above defined collected in this state during the preceding calendar year. The report shall be in such form and contain such information as the Commissioner of Insurance may specify, and the report shall be verified by the oath of the company official transmitting the same or by some principal officer at the home or head office of the company or association in this country. At the time of making such report the taxes above levied with respect to the gross premiums shall be paid to the Commissioner of Insurance. The provisions above shall likewise apply as to reports and taxes for any firm, corporation, or association exchanging reciprocal or inter-insurance contracts, and said reports and taxes shall be transmitted by their attorneys-in-fact.

The provisions as to reports and taxes as measured by gross premiums shall not apply to farmers' mutual assessment fire insurance companies above specified or to fraternal orders or societies that do not operate for a profit and do not issue policies on any person except members.

With respect to the taxes levied in this section on the equivalent of premiums of self-insurers under the provisions of the Workmen's Compensation Act, the reports required herein shall be transmitted to and the taxes collected by the North Carolina industrial commission as provided in subdivision (j) of section 97-100 of the General Statutes of North Carolina. (1945, c. 752, s. 2; 1947, c. 501, s. 8.)

Editor's Note.—The 1947 amendment struck out the former first paragraph and inserted in lieu thereof the first

four paragraphs. It also added the last paragraph. It further struck out of the seventh paragraph the words "of two per cent (2%)" and inserted in lieu thereof the present provision as to rates. As to the last mentioned change, the amendatory act provided (1) that it should apply only to gross premiums collected in the state during 1947 and succeeding calendar years; and (2) that if such change be judicially declared invalid the provisions of law existing immediately prior to such change shall have the same force and effect as if such change had not been enacted.

For discussion of the 1947 amendment, see 25 N. C. Law Rev. 471.

§ 105-228.6. Taxes in case of withdrawal from state.—Any insurance company which for any cause withdraws from this state or ceases to register and transact new business in this state shall be liable for the taxes specified in § 105-228.5 with respect to gross premiums collected in the calendar year in which such withdrawal may occur. In case any company which was formerly licensed or registered in this state and which subsequently ceased to do business therein, may apply to reenter this state, application for reentry or renewal of registration shall be denied unless and until said company shall have paid all taxes, together with any penalties and interest, due as to premiums collected in the year of withdrawal and also taxes as specified in § 105-228.5 for gross premiums collected in the calendar year next preceding the year in which such application for renewal of registration is made. (1945, c. 752, s. 2.)

§ 105-228.7. Registration fees for agents, brokers and others.—Each and every manager, organizer, independent adjuster, adjuster, broker or agent of whatever kind representing in this state any company referred to in this article, shall on or before the first day of April of each year apply for and obtain from the commissioner of insurance an annual certificate of registration, or license, and shall pay for said certificate an annual fee at the following rates, with no additional fee for affixing of seal to the certificate:

Insurance agent (local), for each company represented	$ 2.50
General agent or manager, for each company represented	6.00
Special agent or organizer, for each company represented	5.00
Insurance adjuster, for each company represented	3.00
Insurance broker	2.50
Independent adjuster	100.00
Nonresident broker	10.00

The above fees shall be in lieu of any and all other license fees.

In cases where temporary license may be issued pursuant to law the fee for a temporary certificate shall be at the same rates as above specified, and any amounts so paid for temporary license may be credited against the fees required for issuance of the annual license or certificate.

Any person not registered who is required by law to pass examination as a condition for securing of license shall upon application for registration pay to the commissioner of insurance an examination fee of ten dollars ($10.00), and in case more than two examinations in any one kind of insurance are requested, an additional fee of ten dollars ($10.00) shall be paid for each added examination above two for the same kind of insurance. The requirement for examination and examination fee shall not apply to agents for domestic farmers' mutual assessment fire insurance companies or associations specified in section 105-228.4.

In the event a certificate issued under this section is lost or destroyed the Commissioner of Insurance, for a fee of fifty cents ($0.50) may certify to its issuance, giving number, date, and form, which may be used by the original party named thereon in lieu of the annual certificate. There shall be no charge for the seal attached to such certification. (1945, c. 752, s. 2; 1947, c. 1023, s. 2; 1949, c. 958, s. 2.)

Editor's Note.—The 1947 amendment rewrote all of this section except the last paragraph. The 1949 amendment inserted "independent adjuster" near the beginning of the section, struck out the words "for each company represented in the state" formerly appearing after the words "annual fee" near the end of the first paragraph, made changes in the list of fees and added the provision that such fees "shall be in lieu of any and all other license fees."

For act relating to licenses of insurance adjusters for the current year and to chapter 958 of the Session Laws of 1949, see Session Laws 1949, c. 1244.

§ 105-228.8. Uniformity of taxes.—No fees or taxes imposed in this article shall be increased on account of any retaliatory law now in effect in this or any other state, but such fees and taxes shall apply to all insurance companies alike, as specified in this article, without regard to state, territory or country of domicile or location of home office, and without regard to any fees or taxes which may be levied by any jurisdiction in which any company may be domiciled or have its home office. (1945, c. 752, s. 2.)

§ 105-228.9. Powers of the commissioner of insurance.—All provisions of this chapter, not inconsistent with this article, relating to administration, auditing and making returns, promulgation of rules and regulations, the imposition and collection of tax, and the lien thereof, assessments, refunds and penalties, shall be applicable to the fees and taxes imposed in this article; and with respect thereto, the commissioner of insurance is hereby given the same power and authority as is given to the commissioner of revenue under the provision of this chapter. (1945, c. 752, s. 2.)

§ 105-228.10. No additional local taxes. — No county, city, or town shall be allowed to impose any additional tax, license, or fee, other than ad valorem taxes, upon any insurance company or association paying the fees and taxes levied in this article. (1945, c. 752, s. 2.)

Art. 9. Schedule J. General Administration—Penalties and Remedies.

§ 105-232. Corporate rights restored. —Any corporation whose articles of incorporation or certificate of authority to do business in this state has been suspended by the secretary of state, as provided in § 105-230, or similar provisions of prior Revenue Acts, upon the filing, within five years after such suspension or cancellation under previous acts, with the secretary of state, of a certificate from the commissioner of revenue that it has complied with all the requirements of this subchapter and paid all state taxes, fees, or penalties due from it (which total amount due may be computed, for years prior and subsequent to said suspension or cancellation, in the same manner as if said suspension or cancellation had not taken

place), shall be entitled to exercise again its rights, privileges, and franchises in this state; and the secretary of state shall cancel the entry made by him under the provisions of § 105-230 or similar provisions of prior Revenue Acts, and shall issue his certificate entitling such corporation to exercise again its rights, privileges, and franchises, and certify such reinstatement to the clerk of superior court in the county in which the principal office or place of business of such corporation is located with instructions to said clerk, and it shall be his duty to cancel from his records the entry showing suspension of corporate privileges. (1939, c. 158, s. 903; 1939, c. 370, s. 1; 1943, c. 400, s. 9; 1947, c. 501, s. 9.)

Editor's Note.—The 1947 amendment substituted "five" for "ten" in lines six and struck out the words and figures "and upon payment to the commissioner of revenue, to be transferred to the secretary of state, of an additional penalty of ten dollars ($10.00) to cover the cost of reinstatement", which formerly appeared following the parenthesis in line sixteen.

§ 105-241. Taxes payable in national currency; for what period, and when a lien; priorities.

Provided, however, that the lien of state taxes shall not be enforceable as against bona fide purchasers for value, and as against duly recorded mortgages, deeds of trust and other recorded specific liens, as to real estate, except upon docketing of a certificate of tax liability or a judgment in the office of the clerk of the superior court of the county wherein the real estate is situated, and as to personalty, except upon a levy upon such property under an execution or a tax warrant, and the priority of the state's tax lien against property in the hands of bona fide purchasers for value, and as against duly recorded mortgages, deeds of trust and other recorded specific liens, shall be determined by reference to the date and time of the docketing of judgment or certificate of tax liability or the levy under execution or tax warrant. Provided further, that in the event any taxpayer shall execute an assignment for the benefit of creditors, or if receivership, a creditor's bill or other insolvency proceedings are instituted against any taxpayer indebted to the state on account of any taxes levied by the state, the lien of state taxes shall attach to any and all property of such taxpayer or of such insolvent's estate as of the date and time of the execution of the assignment for the benefit of creditors or of the institution of proceedings herein mentioned and shall be subject only to prior recorded specific liens and reasonable costs of administration. Notwithstanding the provisions of this paragraph, the provisions contained in § 105-174 and § 105-176 shall remain in full force and effect with respect to the lien of sales taxes.

(1949, c. 392, s. 6.)

Editor's Note.—The 1949 amendment, effective March 18, 1949, rewrote the second paragraph. As the rest of the section was not affected by the amendment it is not set out.

For a brief comment on the 1949 amendment, see 27 N. C. Law Rev. 485.

§ 105-241.1. Additional taxes; assessment procedure.—If the commissioner of revenue discovers from the examination of any return or otherwise that any tax or additional tax is due from any taxpayer, he may, at any time within three years of the date the tax or additional tax was due to be paid, where a proper application for a license or a return has been filed, or within five years where no proper application for a license or no return has been filed, notify the taxpayer in writing by mail the kind and amount of tax which is being assessed against him, and thereupon such tax or additional tax shall become due and collectible as in the case of other taxes due the state, together with any interest and penalties applicable to such tax.

If the commissioner is unable to obtain from the taxpayer information deemed by him to be adequate and reliable upon which to base such assessment, the assessment may be made upon the basis of the best information available and, subject to the provisions hereinafter made, such assessment shall be deemed correct.

Any taxpayer feeling aggrieved by such assessment shall be entitled to a hearing before the commissioner of revenue upon making application therefor in writing within thirty days after the receipt of notice of the assessment. Such application shall set out in detail the taxpayer's objections to the assessment. If no application for a hearing is made within thirty days after notice of assessment is given, the assessment shall be final and conclusive. If application for a hearing is made in due time, the commissioner shall set a time and place for such hearing and after considering the taxpayer's objections shall give written notice of his decision to the taxpayer. The amount of the assessment as finally determined by the commissioner shall become immediately due and collectible.

The provisions of §§ 105-162 and 105-163 of the General Statutes shall be applicable to the tax so assessed, or the taxpayer may, at his option, pay the tax so assessed under protest and institute a suit to recover such tax in accordance with the provisions of § 105-267 of the General Statutes.

This section is in addition to and not in substitution of any other provision of this article relative to the assessment and collection of taxes, and shall not be construed as repealing any other provision of this article. (1949, c. 392, s. 6.)

Editor's Note.—This section became effective March 18, 1949.

§ 105-242. Warrant for the collection of taxes; certificate or judgment for taxes.

A certificate or judgment in favor of the state or the commissioner of revenue for taxes payable to the department of revenue, whether docketed before or after the effective date of this paragraph, shall be valid and enforceable for a period of ten years from the date of docketing. When any such certificate or judgment, whether docketed before or after the effective date of this paragraph, remains unsatisfied for ten years from the date of its docketing, the same shall be unenforceable and the tax represented thereby shall abate. Upon the expiration of said ten-year period, the commissioner of revenue or his duly authorized deputy shall cancel of record said certificate or judgment. Any such certificate or judgment now on record which has been docketed for more than ten years shall, upon the request of any interested party, be cancelled of record by the commissioner of revenue or his duly authorized deputy.

(1949, c. 392, s. 6.)

Editor's Note.—The 1949 amendment, effective March 18, 1949, added the second paragraph to subsection 3. As the rest of the section was not affected by the amendment only this paragraph is set out.

For a brief comment on the 1949 amendment, see 27 N. C. Law Rev. 485.

Garnishee Held Liable for Costs.—Where the commissioner of revenue has garnisheed a bank deposit for taxes due by the depositor, and the garnishee bank, in refusing to comply with the order, asserts no defense or set-off against the taxpayer, the bank, in the commissioner's action to compel compliance, will be held liable also for the costs. Gill v. Bank of French Broad, 230 N. C. 118, 52 S. E. (2d) 4.

§ 105-244.1. Cancellation of certain assessments.—The commissioner of revenue is hereby authorized, empowered and directed to cancel and abate all assessments made after October 16, 1940, for or on account of any tax owing to the state of North Carolina and which is payable to the department of revenue against any person who was killed while a member of the armed forces or who has a service connected disability as a result of which the United States is paying him disability compensation. This provision shall apply only to assessments made after October 16, 1940, for taxes which were due prior to the time the taxpayer was inducted into the armed forces. If any such assessment is or has been paid, the commissioner of revenue may refund the amount paid but shall not add thereto any interest. (1949, c. 392, s. 6.)

Editor's Note.—This section became effective March 18, 1949.

§ 105-250.1. Distributors of coin operated machines required to make quarterly reports.—Every person, firm or corporation who or which owns and places on location other than on his or its own premises, under any lease or rental agreement, loan or otherwise, or which sells coin operated machines or vending machines of any type whatsoever upon which a tax is levied under §§ 105-65 and 105-65.1 of the General Statutes (or upon which a tax shall hereafter be levied), hereinafter referred to as a distributor, shall file a quarterly informational report with the commissioner of revenue, in duplicate, as of the first day of March, June, September and December of each year, setting out the following information:

1. The name and address of the distributor making the report.

2. A description of the principal business of such distributor.

3. A list giving the location of each machine placed or remaining on location under any lease or rental agreement, loan or other arrangement whatsoever, other than by sale, together with the type of each such machine and its serial or other identifying number.

4. A list giving the location of each machine theretofore sold by the distributor, (whether such sale was for cash, on open account, or under a conditional sale or other title retention contract), together with the type of each such machine and its serial or other identifying number. Provided, that machines sold by the distributor but known by him to be no longer in service need not be reported.

5. A list giving the location of each machine, other than those described in Items 3 and 4 above, for the sale or use by, for or in which the distributor sells, leases, services or in any manner furnishes any goods, wares, merchandise, records, equipment, accessories, supplies, parts or any services whatsoever, together with the type of each such machine and its serial or other identifying number.

Provided, that the report required to be made as of June 1, 1949, (or the first report made by any distributor) shall contain a complete and true list of all of the machines described in Items 3, 4 and 5 above, together with the information required by said items, but the quarterly reports required to be made as of the first day of March, June, September and December thereafter need show only those machines placed on location or sold by the distributor or for which the distributor has begun furnishing supplies, equipment and other services since the date as of which the next preceding quarterly report was made.

As used herein, "location" shall include the name and address of the owner or operator of the place of business where the machine is located, or the address of the premises on which the machine is located and the name of the person principally responsible for the operation of the machine.

Each quarterly report required by this section shall be made to the license tax division of the department of revenue not later than twenty days after the date as of which each report is required to be made.

The commissioner of revenue is hereby authorized and empowered to prescribe forms to be used in making the reports required by this section.

Any distributor who shall fail to comply with the provisions of this section and who shall fail, without showing good cause therefor, to make timely, full and accurate reports shall be liable to a penalty equal to the amount of the tax on all the machines described in Items 3 and 4, whether or not the distributor would otherwise be liable for the tax on such machines: Provided, that this shall not be construed as relieving the owner and/or operator of such machines of liability for any tax which may be due thereon. (1949, c. 392, s. 6.)

Editor's Note.—This section became effective June 1, 1949.

§ 105-264. Construction of the subchapter; population.

Authority of Commissioner to Construe.—This section gives the Commissioner of Revenue the power to construe the act and such construction will be given due consideration by the courts, although it is not controlling. Valentine v. Gill, 223 N. C. 396, 27 S. E. (2d) 2.

§ 105-266. Overpayment of taxes to be refunded with interest.—If the commissioner of revenue discovers from the examination of any return, or otherwise, that any taxpayer has overpaid the correct amount of tax (including penalties, interests and costs, if any), such overpayment shall be refunded to the taxpayer within sixty days after it is ascertained together with interest thereon at the rate of six per cent (6%) per annum: Provided, that interest on any such refund shall be computed from a date ninety (90) days after date tax was originally paid by the taxpayer: Provided, further, that demand for such refund is made by the taxpayer within three years from the date of such overpayment or the due date of the return, whichever is later.

Provided, further, that irrespective of any demand for refund, such overpayment may be credited upon any taxes against the same taxpayer which shall have become due prior to January 1st, 1947, if such taxpayer shall request such credit prior to paying the taxes against which the credit may be made. (1939, c. 158, s. 937; 1941, c. 50, s. 10; 1947, c. 501, s. 9; 1949, c. 392, s. 6.)

Editor's Note.—The 1947 amendment added the last proviso. The 1949 amendment, effective March 18, 1949, added to the second proviso the words "or the due date of the return, whichever is later."

§ 105-267. Taxes to be paid; suits for recovery of taxes.

Cross References.—

The reference in the original to § 105-406 should be disregarded.

Demand Where Tax Collector Is Also Treasurer.—Where the tax collector is also treasurer of the county, a written demand for the return of taxes paid to him under protest addressed to him in his capacity as tax collector without the appellation "treasurer" is a reasonable compliance with this section, and will support an action for the recovery of the taxes. Southern Ry. Co. v. Polk County, 227 N. C. 697, 44 S. E. (2d) 76.

Applied in Sabine v. Gill, 229 N. C. 599, 51 S. E. (2d) 1.

Art. 10. Liability for Failure to Levy Taxes.

§ 105-270. Repeal of laws imposing liability upon governing bodies of local units.

Editor's Note.—The annotation under this section in original should be ignored.

SUBCHAPTER II. ASSESSMENT, LISTING AND COLLECTION OF TAXES.

Art. 11. Short Title and Definitions.

§ 105-271. Official title.

Editor's Note.—For provision relating to official compilation of Machinery Act of 1939, as amended, see Session Laws 1945, c. 818.

Art. 12. State Board of Assessment.

§ 105-273. Creation; officers.—The director of the department of tax research, the commissioner of revenue, the chairman of the public utilities commission, the attorney general, and the director of local government are hereby created the state board of assessment with all the powers and duties prescribed in the subchapter. The commissioner of revenue shall be the chairman of the said board, and shall, in addition to presiding at the meetings of the board, exercise the functions, duties, and powers of the board when not in session. The board may employ an executive secretary, whose entire time may be given to the work of the said board, and is authorized to employ such clerical assistance as may be needed for the performance of its duties; all expenses of said board shall be paid out of funds appropriated out of the general fund to the credit of the department of revenue of the state. (1939, c. 310, s. 200; 1941, c. 327, s. 6; 1947, c. 184.)

The 1947 amendment substituted "commissioner of revenue" for "director of the department of tax research" in the second sentence.

§ 105-276. Powers of the board.

(6) The board shall make available personally to the tax supervisors or county board of commissioners any information contained in any report to said state board, or in any report to the department of revenue or other state department to which said state board may have access, or any other information which said state board may have in its possession which may assist said supervisors or commissioners in securing an adequate listing of property for taxation or in assessing taxable property.

(1945, c. 955.)

Editor's Note.—The 1945 amendment rewrote the first paragraph of subsection (6). As the rest of the section was not affected by the amendment only this paragraph is set out.

Art. 13. Quadrennial and Annual Assessment.

§ 105-278. Listing and assessing in quadrennial years.

Provided, further, that the boards of commissioners of the various counties of the state may, in their discretion, defer or postpone revaluation and reassessment of real property for the years one thousand nine hundred and forty-five and one thousand nine hundred and forty-six; Provided, further, that the boards of commissioners of the various counties of the state may, in their discretion, defer or postpone revaluation and reassessment of real property for the years 1947 and 1948; Provided, further, that the boards of commissioners of the various counties of the state may, in their discretion, defer or postpone revaluation and reassessment of real property for the years 1949 and 1950. Whenever revaluation is had, the same may be by horizontal increase or reduction or by actual appraisal thereof, or both. (1939, c. 310, s. 300; 1941, c. 282, ss. 1, 1½; 1943, c. 634, s. 1; 1945, c. 5; 1947, c. 50; 1949, c. 109.)

Local Modification.—New Hanover (temporary): 1949, c. 535.

Editor's Note.—

The 1945 amendment added, at the end of this section, the first proviso above and the 1947 amendment added the second proviso and the last sentence. The 1949 amendment inserted the third proviso and re-enacted the last sentence. Only the part of the section added by the amendments is set out.

For comment on the 1947 amendment, see 25 N. C. Law Rev. 463.

§ 105-280. Date of which assessment is to be made.—All property, real and personal, shall be listed or listed and assessed, as the case may be, in accordance with ownership and value as of the first day of April, one thousand nine hundred thirty-nine, and thereafter all property shall be listed, or listed and assessed in accordance with ownership and value as of the first day of January each year.

Whenever any real property is acquired after January first, and prior to July first, which property was not required to be listed for taxation on the first day of January on account of the nontaxable character of the ownership of the same, such property shall be listed for taxation by the purchaser as of the time of purchase and shall be taxed for the fiscal year of the taxing unit beginning on July first of the year in which such real property is acquired.

Such property shall be assessed for taxation by the county tax supervisor after ten days notice sent by registered mail to the person in whose name such property is listed. The person in whose name such property is listed for taxation shall have the right to appeal to the board of county commissioners as to the valuation of said property in the event he is dissatisfied with the

valuation placed thereon by the county tax supervisor within ten days after notice by mail of same, and the county board of commissioners shall have the authority given to it as a county board of equalization and, in determining and fixing the valuation of said property, the right of appeal therefrom by the taxpayer of the county shall be the same as provided for listings made on the regular date.

In the event such property is acquired from any governmental unit which by contract is paying to the taxing unit payments in lieu of taxes for the fiscal period ending on the thirtieth day of June of the year in which such property is acquired, the tax on such property so acquired shall be one-half of the amount of the tax on such property as it would have been if regularly listed for taxation as of ownership on the first day of January. (1939, c. 310, s. 302; 1945, c. 973.)

Editor's Note.—The 1945 amendment added the last three paragraphs.

Art. 15. Classification, Valuation and Taxation of Property.

§ 105-294.1. Agricultural products in storage.— If the board of county commissioners of any county shall determine as a fact that any agricultural product is held in said county by any manufacturer or processor for manufacturing or processing, which agricultural product is of such nature as customarily to require storage and processing for periods of more than one year in order to age or condition such product for manufacture, and if such determination is entered on the minutes of such board on or before March 31st in any year, such agricultural product shall be taxed in that year uniformly as a class at sixty per cent (60%) of the rate levied for all purposes upon real estate and other tangible personal property by or for said county and/or the city, town, or special district in which such agricultural products are listed for taxation. (1947, c. 1026.)

Editor's Note. — For discussion of this section, see 25 N. C. Law Rev. 463.

Art. 16. Exemptions and Deductions.

§ 105-296. Real property exempt.

(6) Buildings, with the land actually occupied, belonging to the American Legion or Post of the American Legion, of any other veterans' organization chartered by congress or organized and operating on a state-wide or nation-wide basis, or any post or other local organization thereof, or any benevolent, patriotic, historical, or charitable association used exclusively for lodge purposes by said societies or associations, together with such additional adjacent land as may be necessary for the convenient use of the buildings thereon.

(1945, c. 995, s. 2.)

Editor's Note.—

The 1945 amendment inserted in subsection (6) the reference to other veterans' organizations. As the rest of the section was not affected by the amendment it is not set out.

For comment on the 1943 amendment, see 21 N. C. Law Rev. 371.

§ 105-297. Personal property exempt.

(6) The furniture, furnishings, and other personal property belonging to the American Legion, or any post thereof, or any other veterans' organization chartered by congess or organized and operating on a nation-wide or state-wide basis, or any post or other local organization thereof, or any patriotic, historical, or any benevolent or charitable association, when used wholly for lodge or post purposes and meeting rooms by said association or when such personal property is used for charitable or benevolent purposes.

(13) Any vehicle given by the federal government to any veteran on account of any disability suffered during World War II, so long as such vehicle is owned by the original donee or other veteran entitled to receive such gift under Title 38, section 252, United States Code Annotated.

(14) All cotton, tobacco or other farm products held or stored for shipment to any foreign country in any seaport terminals in North Carolina or in any city or town in North Carolina in which is located any seaport or within ten miles of the corporate limits of such city or town. (1945, c. 995, s. 3; 1949, cc. 132, 1268.)

Local Modification.—Wayne: 1949, c. 1106.

Editor's Note.—

The 1945 amendment inserted the reference to other veterans' organizations in subsection (6) and made other changes therein.

The 1949 amendments added subsections (13) and (14). As the rest of the section was not affected by the amendments it is not set out.

For a discussion of the constitutionality of subsections (10) and (13) of this section, see 27 N. C. Law Rev. 486.

§ 105-298. Deductions and credits.

(c) For the purpose of ascertaining and fixing the tax value of any cotton, tobacco, or other farm products, held by or for any cooperative stabilization or marketing association or corporation, to whom the products have been delivered or conveyed or assigned by the original producer for the purpose of sale, there shall be deducted (by any person or corporation liable for the tax thereon) from the determined value of the commodity the amount of any unpaid loan or loans and/or advance or advances of any nature whatsoever made or granted thereon by the United States government or by any agency of the United States government or by any cooperative stabilization or marketing association or corporation. (1939, c. 310, s. 602; 1941, c. 125, s. 5; c. 221, s. 3; 1949, c. 723.)

Editor's Note.—The 1949 amendment added subsection (c) to this section. As subsections (a) and (b) were not changed they are not set out.

The amendatory act provides that subsection (c) shall amend all existing statutes, wherever found, which shall in any way be in conflict with or at variance with the provisions of this section, and shall apply to taxes to be listed as of January 1, 1949 and subsequent years.

Art. 18. Personal Property—Where and in Whose Name Listed.

§ 105-302. Place for listing tangible personal property.

(4) Subject to the provisions of subsection two of this section, tangible personal property shall be listed at the place where such property is situated, rather than at the residence of the owner, if the owner or person having control thereof hires or occupies a store, mill, dockyard, piling ground, place for the sale of property, shop, office, mine, farm, place for storage, manufactory or warehouse therein for use in connection with such property. Property stored in public warehouses and merchandise in the possession of a consignee or broker shall be regarded as falling within the provisions

of this subdivision. When tangible personal property, which may be used by the public generally or which is used to sell or vend merchandise to the public, is placed at or on a location outside of the county of the owner or lessor, such tangible personal property shall be listed for taxation in the county where located.

(1947, c. 836.)

Editor's Note.—The 1947 amendment added the last sentence of subsection (4). As the rest of the section was not affected by the amendment it is not set out.

§ 105-302.1. Inventories or lists of merchandise to be furnished.—At the time of listing tangible personal property, every person, firm, or corporation engaged in business in more than one county in this state and maintaining in more than one county in this state goods, wares, merchandise and other taxable personal property shall, upon request of the tax supervisor of any county, furnish to the tax listing authorities of such county, in addition to any other inventory, list or report required by article 18 of chapter 105 of the General Statutes, a certificate, subscribed and sworn to by a duly authorized agent having knowledge of the facts, containing a list of the counties in which goods, wares, merchandise or other taxable personal property held in connection with such business are located and the true value of such taxable personal property in each such county and the total value of such taxable personal property owned in this state. (1947, c. 892; 1949, c. 930.)

Editor's Note.—The 1949 amendment rewrote this section.

For comment on this section, see 25 N. C. Law Rev. 463.

Art. 21. Procedure Subsequent to the Close of the Tax Listing Period.

§ 105-327. County board of equalization and review.

Local Modification.—McDowell: 1949, c. 550.

§ 105-331. Discovery and assessment of property not listed during the regular listing period.

Local Modification.—Guilford: 1945, c. 914.

Art. 24. Levy of Taxes and Penalties for Failure to Pay Taxes.

§ 105-340. Date as of which lien attaches.

Cross Reference.—As to lien of assessment after confirmation thereof, see § 160-88.

§ 105-344. Exemption of pensions or compensations from taxation.

The benefits of this section are hereby extended to and include those coming within the provisions of said section serving at any time between December seventh, one thousand nine hundred and forty-one and the termination of World War II. (1923, c. 259; 1945, c. 968, s. 2; C. S. 5168 (aa).)

Editor's Note.—The 1945 amendment added the above sentence at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

§ 105-345. Penalties and discounts for nonpayment of taxes.

(3) After the first day of February and on or before the first day of March next after due and payable, there shall be added to the tax interest at the rate of one per cent (1%).

(4) After the first day of March and on or before the first day of April next after due and payable, there shall be added to the tax interest at the rate of two per cent (2%).

(5) On and after the second day of April the rate of interest shall be, in addition to said two per cent (2%), one-half of one per cent per month or fraction thereof until paid from said day on the principal amount of such taxes.

(7) Any member of the armed forces of the United States may be relieved of the payment of any charges in the form of interest or penalty on delinquent ad valorem taxes assessed against the property of said member by any county or municipality for any taxable year during service in the said armed forces; provided, this subsection shall not extend beyond the duration of World War II; and provided further that said member of armed services presents to proper tax collecting authorities a certificate of discharge from United States armed services in proof of membership therein.

(8) However, subsections (1), (2) and (6) hereof shall not apply to taxes levied by Mecklenburg county, and should any taxpayer of Mecklenburg county make payment of his taxes in the months of August through November following the levy thereof, he shall be entitled to the following discounts: If paid before or during the month of August, a deduction of two per cent (2%); if paid during the month of September, a deduction of one and one-half per cent (1½%); if paid during the month of October, a deduction of one per cent (1%); if paid during the month of November, a deduction of one-half of one per cent (½ of 1%). Taxes levied by Mecklenburg county shall be payable at par during the months of December and January next after same shall have become due and payable. (1939, c. 310, s. 1403; 1943, c. 667; 1945, c. 247, s. 3; c. 1041; 1947, c. 888, s. 1; 1949, c. 999.)

Local Modification.—Bladen (as to subsections (1) and (6): 1945, c. 335; Cumberland and city of Fayetteville: 1945, c. 108; Wayne, as to subsection (6): 1947, c. 163; city of Charlotte: 1949, c. 743; city of Greensboro: 1949, c. 746; city of Hendersonville, as to subsection (6): 1949, c. 114.

Editor's Note.—The first 1945 amendment struck out the latter part of subsection (5) as it formerly read. And the second 1945 amendment added subsection (7). The 1947 amendment substituted the words "interest at the rate" for the words "a penalty" in subsections (3) and (4). It also substituted "rate of interest" for "penalty" in line two of subsection (5). The 1949 amendment added paragraph (8). As the rest of the section was not affected by the amendments it is not set out.

For comment on the 1947 amendment, see 25 N. C. Law Rev. 460.

§ 105-345.1. Penalty deemed to be interest. — Wherever the words "penalty" or "penalties" are used in any statute to designate any charge imposed by law with respect to the late payment of county or municipal ad valorem taxes, the same shall be deemed to mean and be interest, but this shall not be construed to authorize the computation and imposition of any charge different from that which would be computed and imposed if this section had not been enacted, or if § 105-345 had not been amended by substituting the designation "interest" for the designation "penalty" in several instances therein. (1947, c. 888, s. 2.)

Art. 25. Banks, Banking Associations, Trust Companies and Building and Loan Associations.

§ 105-346. Banks, banking associations and trust companies.

(3) In addition to the deductions allowed in

item two of this section, there may be deducted from the items of surplus and undivided profits an amount not exceeding five per cent (5%) of the bills and notes receivable of such banking associations, institutions, or trust companies to cover bad or insolvent debts, investments in North Carolina state bonds, United States government bonds, joint-stock land bank bonds, and federal land bank bonds, at the actual cost of said bonds owned on and continuously for at least ninety days prior to the day as of which property is assessed in the current year. The value of such shares of capital stock of such banking associations, institutions, or trust companies shall be found by dividing the net amount ascertained above by the number of shares in the said banking associations, institutions or trust companies.

Any bank which had not actually begun business prior to the first day of January in any year may make the deductions provided for under this subsection acquired up to the last date authorized for making the report provided for in subsection (1) hereof. This provision shall be applicable to any bank which began business after the first day of January, 1945.

(1947, c. 72.)

Editor's Note.—The 1947 amendment added the last two sentences of subsection (3). As the rest of the section was not affected by the amendment it is not set out.

Art. 26. Public Service Companies.

§ 105-362. State board made appraisers for public utilities.

Where a railroad, under an order of the Interstate Commerce Commission, abandons its operations as a common carrier on a portion of its road, cancels its tariffs over same and thereafter does not operate over such portion of its line, except to haul away the scrap as the roadbed is dismantled and salvaged, it ceases to be vested with a character which would bring it within the jurisdiction of the state board of assessment for appraisal and taxation. Warren v. Maxwell, 223 N. C. 604, 27 S. E. (2d) 721.

§ 105-363. Returns to state board by railroads, etc., companies.

A road definitely abandoned and retired from the operative system, after a proper order respecting the convenience and necessity of its further operation as a carrying road has been granted for such abandonment, is no longer within the purview of this statute. Warren v. Maxwell, 223 N. C. 604, 610, 27 S. E. (2d) 721.

Art. 27. Collection and Foreclosure of Taxes.

§ 105-372. Definitions.

Local Modification.—Duplin: 1935, c. 189; 1939, c. 310, § 1725.

§ 105-382. Payment of taxes; notes and checks.

Stated in Miller v. McConnell, 226 N. C. 28, 36 S. E. (2d) 722, 725.

§ 105-385. Remedies against personal property.

A tax list in the hands of a tax collector is equivalent to an execution and the tax collector, in lieu of selling real estate for the collection of taxes due thereon, may seize personal property belonging to the taxpayer and sell same or so much thereof as may be necessary for the satisfaction of all taxes due by the taxpayer. Apex v. Templeton, 223 N. C. 645, 646, 27 S. E. (2d) 617.

Applied in Roach v. Pritchett, 228 N. C. 747, 47 S. E. (2d) 20.

§ 105-387. Sales of tax liens on real property for failure to pay taxes.

Local Modification.—Mecklenburg: 1945, c. 16, s. 5.

Cited in Duplin County v. Ezzell, 223 N. C. 531, 27 S. E. (2d) 448; Newton v. Chason, 225 N. C. 204, 34 S. E. (2d) 70.

§ 105-388. Certificates of sale. — (a) Issued to Private Purchasers. — As soon as possible after sale, but not earlier than payment of the purchase price, the collector shall issue to each successful bidder, other than taxing units, a certificate of sale, for the tax lien on real property of each delinquent, purchased by him, dated as of the day of sale. Property held jointly by two or more owners shall be construed as the property of one delinquent for this purpose. Said certificate shall be in substantially the following form:

"North Carolina, ... (taxing unit) .....

I, ... tax collector of ..... (taxing unit) ..... do hereby certify that the tax lien on the following described real property in said taxing unit, to wit: ..... (describing the same) ....., was, on the ..... day of ....., ..., duly sold by me in the manner provided by law, for the delinquent taxes of ..... for the year ....., amounting to $....., including penalties thereon and costs allowed by law, when and where ..... (name of purchaser) ..... purchased said lien on said real property at the price of $....., said amount being the highest and best bid for same. And I further certify that unless payment of said lien is made, within the time and in the manner provided by law, said ..... (name of purchaser) ....., his heirs or assigns, shall have the right to foreclose said real property by any proceeding allowed by law.

"In witness whereof, I have hereunto set my hand this ..... day of .....

Tax Collector."

A copy of each such certificate shall be retained by the collector in a special book or file designated "Certificates of Sale for Taxes for the Year .....". All payments made on any such certificate shall be made to the collector for the use of the owner of such certificate, and all such payments shall be credited by the collector on the copy of the certificate in his possession, and shall be remitted to the owner of the certificate upon proper receipt therefor. For failure to account for and pay over any such payments the collector shall be liable on his bond to the person entitled thereto. The copies of such certificates in the collector's office shall be the official records for the purpose of determining whether a lien exists in favor of any certificate owner other than a taxing unit. The owner of a certificate may assign it at any time, but said assignment shall not be effective until the collector shall have actually received written notice thereof from the assignor. Each such purchaser, his heirs or assignees, shall have a lien on the real property for the amount of the purchase price, plus interest thereon at the rate of six per centum per annum, of the same dignity as similar liens owned by taxing units, and shall have the right to foreclose said lien, by action in the nature of an action to foreclose a mortgage, in the manner hereinafter prescribed: Provided, that the six per cent per annum interest herein provided shall accrue only

on so much of the purchase price as represents the amount of the tax, penalties to the date of sale, and the costs of advertising and sale. Each such purchaser, his heirs and assignees, shall also have a lien for other taxes and assessments levied against said property, paid by him after acquisition of said certificate, whether such taxes or assessments were charged before or after such acquisition. Said lien shall be entitled to the same priorities as the original lien of the taxes and assessments so paid.

(b) Issued to Taxing Units.—The governing body of each taxing unit which becomes the purchaser at a tax sale, as hereinbefore provided, shall determine whether or not it is necessary to issue certificates to and in the name of such unit. If, in the opinion of said governing body, the issuance of such certificates is not necessary in order to provide adequate records of tax liens and tax collections, the said certificates may be dispensed with and the collector ordered to mark or stamp the original tax receipts or accounts "Sold to ..... (name of tax unit) .....". If issuance of certificates is deemed necessary, they shall be issued in substantially the form set forth in subsection (a) of this section, with stubs or duplicates on which shall be reflected all payments or assignments. In either case, the taxing unit shall have the right to foreclose the real property by any method authorized by law; and in either case interest at the rate of six per cent per annum shall accrue, on the amount bid by said unit, from the date of the sale.

(c) Prima Facie Case.—A certificate issued, or a tax receipt or account marked or stamped, in accordance with the provisions of subdivisions (a) or (b) of this section, shall be presumptive evidence of the regularity of all prior proceedings incident to the sale and of the due performance of all things essential to the validity thereof. (1939, c. 310, s. 1716; 1945, c. 247, ss. 1, 2.)

Local Modification.—Bladen: 1945, c. 267.

Editor's Note.—The 1945 amendment changed the rate of interest mentioned in subsections (a) and (b) from eight to six per cent. The amendatory act provided that it should not affect the interest rate on outstanding certificates issued prior to its ratification on Feb. 23, 1945.

§ 105-389. Assignment of liens by taxing unit after sale.

Cited in Duplin County v. Ezzell, 223 N. C. 531, 27 S. E. (2d) 448.

§ 105-390. Settlements.

(g) The county commissioners of the several counties of the state of North Carolina are hereby authorized and empowered in their discretion to relieve the tax collector, sheriff, or other officer charged with the collection of taxes of and from the charges of all insolvent taxes, five years or more delinquent, when it appears to the satisfaction of the board of commissioners of any county that said taxes are uncollectible. (1939, c. 910, s. 1718; 1949, c. 730.)

Local Modification.—Jackson: 1947, c. 17, s. 13; Mecklenburg: 1945, c. 16, s. 6.

Editor's Note.—The 1949 amendment added subsection (g). As the rest of the section was not affected by the amendment it is not set out.

§ 105-391. Foreclosure of tax liens by action in nature of action to foreclose a mortgage.

(e) Parties; Summons.—The listing taxpayer and spouse, if any, the current owner, all other taxing units having tax liens, all other lien-holders of record, and all persons who would be entitled to be made parties to a court action (in which no deficiency judgment is sought) to foreclose a mortgage on such property, shall be made parties and served with summons in the manner provided by § 1-89: Provided, that service by publication may be begun at any time within two years after the issuance of the original summons and that alias and pluries summonses may be issued as provided by § 1-95.

The fact that the listing taxpayer or any other defendant is a minor, is incompetent or is under any other disability shall not prevent or delay the collector's sale or the foreclosure of the tax lien; and all such defendants shall be made defendants and served with summons in the same manner as in other civil actions.

Persons who have disappeared or cannot be located and persons whose names and whereabouts are unknown, and all possible heirs or assignees of such persons may be served by publication; and such persons, their heirs and assignees may be designated by general description or by fictitious names in such action. It is hereby declared that service of summons by publication against such persons, in the manner provided by law, shall be as valid in all respects as such service against known persons who are non-residents of this state.

(q) Exceptions and Increased Bids.—At any time within ten days after the filing of said report of sale any person having an interest in the property may file exceptions to said report, and at any time within said period an increased bid may be filed in the amount specified by and subject to the provisions (other than provisions in conflict herewith) of § 45-28, or to the provisions (other than provisions in conflict herewith) of any law enacted in substitution for said section.

(r) Judgment of Confirmation.—At any time after the expiration of said ten days, if no exception or increased bid has been filed, the commissioner may apply for judgment of confirmation; and in like manner he may apply for such judgment after the court has passed upon any exceptions filed, or after any necessary resales have been held and reported and ten days have elapsed: Provided that the court may, in its discretion, order resale of the property, in the absence of exceptions or increased bids, whenever it deems such resale necessary for the best interests of the parties.

Said judgment of confirmation shall direct the commissioner to deliver the deed upon payment of the purchase price.

Said judgment may be rendered by the clerk of superior court, subject to appeal in the same manner as appeals are taken from other judgments of said clerk.

(1945, c. 635; 1947, c. 484, ss. 3, 4.)

Cross Reference.—For an apparent discrepancy in the time allowed to issue alias summonses under subsection (e) of this section, see § 1-95.

Editor's Note.—For article on summary procedure for foreclosure of taxes, see 22 N. C. Law Rev. 226.

The 1945 amendment added "summons" to the title of subsection (e) and rewrote the proviso appearing at the end of the first paragraph thereof.

The 1947 amendment substituted "ten" for "twenty" in line two of subsection (q) and in lines two and eight of subsection (r). Section 5 of the amendatory act excepted

from its provisions estates, proceedings and actions pending on June 30th, 1947.

As only subsections (e), (q) and (r) were changed by the amendments the rest of the section is not set out.

Effect of Failure to Allege Collection of Costs and Fees. —In an action by an ex-clerk of the superior court against a county for the recovery of fees allegedly due such clerk in tax foreclosure suits by the county, the complaint, alleging that all of the tax suits in question were prosecuted to judgment against the various defendants, without any allegation or admission that in any of the suits the costs or fees were collected and turned over to the county, is demurrable as not stating a cause of action, the county being under no obligation to pay costs and officer's fees in advance, or ever unless collected. Watson v. Lee County, 224 N. C. 508, 31 S. E. (2d) 535.

Applied in Hinson v. Morgan, 225 N. C. 740, 36 S. E. (2d) 266.

Cited in McIver Park, Inc. v. Brinn, 223 N. C. 502, 27 S. E. (2d) 548; Apex v. Templeton, 223 N. C. 645, 27 S. E. (2d) 617.

§ 105-392. Alternative method of foreclosure. —(a) Docketing Taxes as a Judgment. — In lieu of following the procedure set forth in § 105-391, the governing body of any taxing unit may order the collecting official to file, not less than six months or more than two years (four years as to taxes of the principal amount of five dollars or less) following the collector's sale of certificates, with the clerk of superior court a certificate showing the name of the taxpayer listing the real estate on which such taxes are a lien, together with the amount of taxes, interest, penalties and costs which are a lien thereon, the year for which such taxes are due, and a description of such real property sufficient to permit its identification by parol testimony. The clerk of superior court shall enter said certificate in a special book entitled "Tax Judgment Docket for Taxes for the Year ....." and shall index the same therein in the name of the listing taxpayer: Provided that the clerk of the superior court may enter said certificate in a special continuing book or books entitled "Tax Judgment Docket for taxes for the years beginning ————" and index the same in the general judgment index in the name of the listing taxpayer or taxpayers. Immediately upon said docketing and indexing, said taxes, interest, penalties and costs shall constitute a valid judgment against said property, with the priority hereinbefore provided for tax liens, which said judgment, except as herein expressly provided, shall have the same force and effect as a duly rendered judgment of the superior court directing sale of said property for the satisfaction of the tax lien, and which judgment shall bear interest at the rate of six per cent per annum. The clerk shall be allowed fifty cents per certificate for such docketing and indexing, payable when such taxes are collected or such property is sold, and shall account for said fees in the same manner as other fees of his office are accounted for: Provided, that the governing body of any county, if said clerk is on salary, or said clerk, if he is on fees or salary plus fees, may require such fees to be advanced by the taxing unit.

(1945, c. 646.)

Editor's Note.—The 1945 amendment inserted the proviso to the second sentence of subsection (a). As the rest of the section was not affected by the amendment, only the first paragraph of subsection (a) is set out.

For article on summary procedure for foreclosure of taxes, see 22 N. C. Law Rev. 226.

§ 105-393. Time for contesting validity of tax foreclosure title.

Cited in McIver Park, Inc. v. Brinn, 223 N. C. 502, 27 S. E. (2d) 548; Hinson v. Morgan, 225 N. C. 740, 36 S. E. (2d) 266.

§ 105-394. Facsimile signatures.

Authority to Render Judgments Not Delegable.—Clerks of the superior courts, under provisions of this section relating to the use and the authorization of the use of facsimile signatures in signing judgments or other papers in tax foreclosure proceedings, may not delegate to another the authority to render judgments in such proceedings. Eborn v. Ellis, 225 N. C. 386, 35 S. E. (2d) 238.

§ 105-395. Application of article.

Cited in McIver Park, Inc. v. Brinn, 223 N. C. 502, 27 S. E. (2d) 548.

SUBCHAPTER III. COLLECTION OF TAXES.

Art. 30. General Provisions.

§ 105-403. No taxes released.

Local Modification.—Guilford: 1945, c. 324; Mitchell: 1947, c. 855.

Cited in Middleton v. Wilmington, etc., R. Co., 224 N. C. 309, 30 S. E. (2d) 42.

§ 105-404. Uncollected inheritance taxes remitted after 20 years.—All inheritance taxes levied by the state which remain uncollected twenty years or more after the death of the person upon whose estate said taxes were levied shall be, and they are hereby remitted. The provisions of this section shall be retroactive from the date of its enactment. (1935, c. 483; 1949, c. 605.)

Editor's Note.—The 1949 amendment added the second sentence.

§ 105-405. Taxing authorities authorized to release or remit taxes.—The board of county commissioners or city council or board of aldermen or city commissioners, or any other governing body in any city or town, shall have power to release, discharge, remit or commute any portion of the taxes assessed and levied against any person or property within their respective jurisdictions when there has been destruction or partial destruction or any damage to the property assessed for valuation when such destruction, partial destruction or damage occurs between midnight of December thirty-first and midnight of March thirty-first of any year, and when said destruction or partial destruction or damage has been caused by tornado, cyclone, hurricane or other wind or windstorm: Provided, application for release, discharge, remission or commutation is made to the aforesaid governing body within one year of the date of said destruction, partial destruction or damage: Provided further, that in cases of applicants for such relief who have received, or may receive, reimbursements for such damage or destruction from insurance policy contracts or otherwise, or whose property has been restored or rehabilitated, wholly or partially, by the Red Cross or any public welfare agency or organization without full value having been paid therefor by the property owner, such applicant shall, as a condition precedent to the relief herein provided for, list for taxation for the year for which relief is asked the equivalent in value of such reimbursement or restoration or rehabilitation; and provided further, that such governing body shall apply this section

uniformly to all persons and property within its jurisdiction. This section shall be retroactive to and including April first, one thousand nine hundred and thirty-six. (1937, c. 15; 1945, c. 635.)

Local Modification.—Durham and city of Durham: 1947, cc. 96, 515; Montgomery and municipalities therein: 1947, c. 515.

Editor's Note.—The 1945 amendment substituted the words "December thirty-first and midnight of March thirty-first" for the words "April first and midnight of June thirtieth" formerly appearing in line twelve.

§ 105-406. Remedy of taxpayer for unauthorized tax.

Cross Reference.—

The reference appearing in original should be disregarded.

A compliance with this section is a prerequisite to a right of action for the recovery of taxes or any part thereof. Taxes paid voluntarily and without objection or compulsion cannot be recovered, even though the tax be levied unlawfully. Middleton v. Wilmington, etc., R. Co., 224 N. C. 309, 30 S. E. (2d) 42.

Applied in Duke Power Co. v. Bowles, 229 N. C. 143, 48 S. E. (2d) 287; Henderson v. Gill, 229 N. C. 313, 49 S. E. (2d) 754.

Cited in Newton v. Chason, 225 N. C. 204, 34 S. E. (2d) 70.

Art. 31. Rights of Parties Adjusted.

§ 105-408. Taxes paid in judical sales and sales under powers.

This section creates an alternative remedy in behalf of the taxing agency, and it may look to the trustee or mortgagee for the payment required by this section or it may waive that remedy and resort to a foreclosure of the tax lien. New Hanover County v. Sidbury, 225 N. C. 679, 36 S. E. (2d) 242, 243.

Art. 32. Tax Liens.

§ 105-414. Tax lien enforced by action to foreclose.

Cross Reference.—

For article on summary procedure for foreclosure of taxes, see 22 N. C. Law Rev. 226.

Consolidation of Tax Foreclosure Suits.—Where actions are pending in the same court, at the same time, between the same parties and involving substantially the same facts, they may be consolidated. This principle applies to tax foreclosure suits. McIver Park, Inc. v. Brinn, 223 N. C. 502, 27 S. E. (2d) 548.

Judgment in Foreclosure Suit Is a Lien in Rem.—In an action to foreclose a lien for delinquent taxes or special assessments, the judgment obtained in said action constitutes a lien in rem and the owner of the property is not personally liable for the payment thereof. Apex v. Templeton, 223 N. C. 645, 647, 27 S. E. (2d) 617.

Inadequacy of Price in Foreclosure Action.—In an action to foreclose a tax lien on land, the mere inadequacy of the price bid therefor is not sufficient to avoid the sale and cancel the deed to the purchaser, unless some element of fraud, suppression of bidding, or other unfairness in the sale appears. Duplin County v. Ezzell, 223 N. C. 531, 27 S. E. (2d) 448.

Order of Foreclosure Restricted to Land Described in Complaint.—In an action under this section, where complaint describes the real estate sought to be foreclosed to enforce the tax lien, the order of foreclosure is restricted to the described parcels, and so much of the judgment as authorizes the sale of other lands is in excess of the jurisdiction of the court. Miller v. McConnell, 226 N. C. 28, 36 S. E. (2d) 722.

Statute of Limitation.—

In accord with 3rd paragraph in original. See Raleigh v. Mechanics, etc., Bank, 223 N. C. 286, 26 S. E. (2d) 573.

In view of the fact that this section contains no limitation of action, the maxim that time does not bar the sovereign still subsists as the law in this state, at least in respect to collection of taxes. Miller v. McConnell, 226 N. C. 28, 36 S. E. (2d) 722, 726.

In a suit under this section, to foreclose a statutory lien on abutting property, given a city for street improvements, all installments of the amounts assessed therefor, which are ten years overdue when action is brought, are barred by the statute of limitations under § 160-93, and no part of the proceeds of sale can be applied to the payment of such installments. Raleigh v. Mechanics, etc., Bank, 223 N. C. 286, 26 S. E. (2d) 573.

Taxes Not Subject to Set-Off or Counterclaim.—

In a suit by a town against defendants to foreclose a tax lien under this section, where defendants set up defense by answer and also a counterclaim, motion to strike the counterclaim and order thereon was proper, but the other defenses were unaffected thereby. Apex v. Templeton, 223 N. C. 645, 27 S. E. (2d) 617.

Ample Opportunity Given to Redeem.—Where the judgment of foreclosure, in a tax suit authorized a sale, in default of payment of all taxes, etc., on or before sixty days from the date of the judgment, and the original sale was held within sixty days of such date and after two resales, the last of which was held more than three months after the date of the judgment, the sale was finally consummated, there was ample opportunity to redeem, and sale and confirmation were valid. McIver Park, Inc. v. Brinn, 223 N. C. 502, 27 S. E. (2d) 548.

Applied in Robeson County Drainage Dist. v. Bullard, 229 N. C. 633, 50 S. E. (2d) 742.

Art. 33A. Agreements with United States or Other States.

§ 105-417.1. Agreements to coordinate the administration and collection of taxes.

For comment on this enactment, see 21 N. C. Law Rev. 363.

Art. 34. Tax Sales.

Part 2. Refund of Tax Sales Certificates.

§ 105-422. Tax liens barred.—No action shall be maintained by any county or municipality to enforce any remedy provided by law for the collection of taxes or the enforcement of any tax liens held by counties and municipalities, whether such taxes or tax liens are evidenced by the original tax books or tax sales certificates or otherwise, unless such action shall be instituted within ten years from the time such taxes became due: Provided, that as to tax foreclosure actions which under existing laws are not and will not be barred prior to December 31st, 1948, foreclosure actions may be instituted thereon at any time prior to December 31st, 1948: Provided, further, that this article shall not be construed as applying to the liens for street and/or sidewalk improvements; and provided further, that this article shall not be applicable to any pending tax foreclosure actions. Provided that the provisions of this article shall not apply to Ashe, Buncombe, Burke, Carteret, Camden, Clay, Columbus, Cumberland, Currituck, Dare, Davie, Edgecombe, Franklin, Gates, Greene, Harnett, Hoke, Hyde, Iredell, Lee, Macon, Madison, Moore, Nash, Northhampton, Orange, Pender, Pamlico, Perquimans, Richmond, Scotland, Rockingham, Vance, Warren, Wayne and Wilson counties or any of the political subdivisions thereof. (1933, c. 181, s. 7; 1933, c. 399; 1947, c. 1065, s. 1; 1949, cc. 60, 735.)

Editor's Note.—The 1947 amendment rewrote this section. Section 2 of the amendatory act, in addition to repealing section 105-423, provided: "All public and public-local laws and clauses of laws in conflict with this act, or providing for different statute of limitations for tax foreclosure actions, are hereby repealed, the purpose hereof being to make this a state-wide act applicable to all the counties of the state; provided, that nothing herein shall bar or prevent the institution of suits to foreclose the lien of taxes for which certificates have been filed as judgments under the provisions of G. S. § 105-392, within the time and under the conditions set out in subsection (h) of said section."

The first 1949 amendment struck out "Yadkin" from the list of counties at the end of this section so as to make it applicable to Yadkin county. The second 1949 amendment, which struck out "Rowan" so as to make this sec-

tion applicable thereto, provides that as to tax foreclosure actions which, under existing laws, are not and will not be barred prior to June 30, 1950, foreclosure actions may be instituted thereon in Rowan county at any time prior to June 20, 1950.

For comment on the 1947 amendment, see 25 N. C. Law Rev. 461.

§ 105-423: Repealed by Session Laws 1947, c. 1065, s. 2.

§ 105-423.1. Tax liens, where foreclosure suit not instituted, barred in certain counties ten years after due date.—No action shall be maintained by any county or municipality to enforce any remedy provided by law for the collection of taxes or the enforcement of any tax liens held by counties and municipalities whether such taxes or tax liens are evidenced by original tax books or tax sales certificates unless such action shall be instituted, and a lis pendens shall have been filed in the office of the clerk of the superior court in the county where the tax was levied, within ten years from the time such taxes became due, or if payable in installments, ten years from the due date of each installment. This section shall apply only to the counties of Guilford, Mecklenburg, Durham, Jones and Onslow and municipalities therein; but this section shall apply to Harnett county from and after July 1, 1950. (1945, c. 832; 1949, c. 269.)

Editor's Note.—The act inserting this section, as amended by Session Laws 1947, c. 984, provides that it shall be in effect from October 1, 1946, except that as to Durham County it shall be in effect from October 1, 1949. Session Laws 1945, c. 1023, re-affirmed the effective date as to Mecklenburg county and municipalities therein.

The 1949 amendment made this section applicable to Harnett county.

SUBCHAPTER IV. LISTING OF AUTOMOBILES IN CERTAIN COUNTIES.

§ 105-429. Counties to which article applicable.—This article shall apply to the following counties: Alamance, Buncombe, Cabarrus, Camden, Caswell, Chowan, Clay, Currituck, Cleveland, Columbus, Durham, Gates, Guilford, Halifax, Harnett, Henderson, Hertford, Johnston, Iredell, Lee, Nash, Moore, McDowell, Orange, Pasquotank, Perquimans, Pitt, Polk, Rowan, Rutherford, Swain, Wayne and Watauga. (1931, c. 392, s. 5; 1949, c. 64.)

Editor's Note.—The 1949 amendment inserted "Clay" in the list of counties.

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

November 30, 1949

I, Harry McMullan, Attorney General of North Carolina, do hereby certify that the foregoing 1949 Cumulative Supplement to the General Statutes of North Carolina was prepared and published under the supervision of the Division of Legislative Drafting and Codification of Statutes of the Department of Justice of the State of North Carolina.

HARRY MCMULLAN,
Attorney General of North Carolina

THE GENERAL STATUTES OF NORTH CAROLINA OF 1943

1949 CUMULATIVE SUPPLEMENT

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

UNDER THE DIRECTION OF
A. HEWSON MICHIE, GEORGE P. SMITH, JR.
AND BEIRNE STEDMAN

Volume III

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United States Reports volumes 318-337.

Supreme Court Reporter volumes 63 (p. 862)-69.

North Carolina Law Review volumes 22 (p. 280)-27.

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Volume III

Chapter 106. Agriculture.

Sec.
106-578. Appropriation for enforcement of article.
106-579. Copy of analysis in evidence.

Art. 1. Department of Agriculture.

Part 1. Board of Agriculture.

§ 106-9.1. Investment of surplus in agriculture fund in interest bearing government securities.—The board of agriculture, with the approval of the governor and council of state, is hereby authorized and empowered whenever in their discretion there is a cash surplus in the agriculture fund in excess of the amount required to meet the current needs and demands of the department, to invest said surplus funds in bonds or certificates of indebtedness of the United States of America or bonds, notes or other obligations of any agency or instrumentality of the United States of America, when the payment of principal and interest thereof is fully guaranteed by the United States of America, or in bonds or notes of the state of North Carolina. The said funds shall be invested in such obligations as in the judgment of the board of agriculture, the governor, and the council of state may be readily converted into money. The interest and revenue received from such investment or profits realized from the sale thereof shall become a part of the agriculture fund and be likewise invested. (1945, c. 999.)

Part 2. Commissioner of Agriculture.

§ 106-11. Salary of commissioner of agriculture.

Editor's Note.—Session Laws 1947, c. 1041, increased the salary of the commissioner of agriculture to $7,500.00 per year. And Session Laws 1949, c. 1278, effective April 23, 1949, provides that the salary, from and after the expiration of the present term of office of said officer, shall be $9,000.00 per year, payable in equal monthly installments.

Part 5. Coöperation between Department and United States Department of Agriculture, and County Commissioners.

§ 106-25. Department to furnish report books or forms for procuring and tabulating information; duties of tax supervisors and list takers or other appointees; information confidential.—The said department shall annually provide and submit report books or forms to the person appointed by the board of county commissioners of the several counties of the state to collect and compile the statistical information required by §§ 106-24 to 106-26. In selecting the person to collect such information, the board of county commissioners in each county in the state may require such information to be collected by the tax supervisor or the list takers of each county, or they may appoint some other person for the specific purpose of supervising and collecting such information. The person so appointed shall serve at the will of the county commissioners and shall be paid such compensation for such services as may be deemed proper. Such report books or forms shall be furnished the person so appointed before he enters upon his duties. It shall be the duty of each person so appointed to fill out or cause to be filled out in the report books or forms, herein provided for and received by him, authentic information required to be tabulated therein, and, upon completion of such tabulation, he shall return and deliver the said books or forms to the board of county commissioners of his county, within ten days after the time prescribed by law for securing the tax lists of his county. The person so appointed shall carefully check said books or forms for the purpose of determining whether or not at least ninety per cent (90%) of the tracts of land of such county are acceptably reported on in such report books or forms. Upon the receipt of the report books or forms properly filled out in accordance with §§ 106-24 to 106-26, the board of county commissioners of each county in the state shall, within ten days after receipt thereof, inspect and transmit or deliver such report books or forms to the department of agriculture. The information required in §§ 106-24 to 106-26 shall be held confidential by all persons having any connection therewith and by the department of agriculture. No information shall be required hereunder on land tracts consisting of less than three acres. (1921, c. 201, s. 2; 1941, c. 343; 1947, c. 540; 1949, c. 1273, s. 1; C. S. 4689(b).)

Editor's Note.—The 1947 amendment made changes in the first sentence and the 1949 amendment rewrote the section.

§ 106-26. Compensation for making reports; examination of report books, etc., by department of agriculture.—In order to encourage maximum cooperation and efficiency, the department of agriculture shall pay to the county commissioners of the various counties of the state from appropriations made to the department of agriculture, the sum of ten cents (10c) per acceptable report received by the department of agriculture in accordance with the provisions of §§ 106-24 to 106-26: Provided, however, that no such payment shall be made for any report from any township which does not cover acceptably at least ninety per cent (90%) of the tracts of land within such townships. In all those cases where the report covers less than eighty per cent (80%) of the tracts of land in a township, the department of agriculture shall withhold from the amount due the county for furnishing such reports the sum of twenty cents (20c) for each farm report shortage, and shall further deduct therefrom the sum of two dollars ($2.00) for each unauthenticated report. Upon request, all report books or forms which are not complete in accordance with the provisions of §§ 106-24 to 106-26 shall be returned to the county board of commissioners or person charged with the duty of supervising or compiling the statistical survey information, in order that the same may be properly completed to comply with the provisions of this part. (1921, c. 201, s. 3; 1941, c. 343; 1949, c. 1273, s. 2; C. S. 4689(c).)

Editor's Note.—The 1949 amendment rewrote this section.

Art. 2. North Carolina Fertilizer Law of 1947.

§§ 106-27 to 106-50: Superseded by §§ 106-50.1 to 106-50.22.

See note under § 106-50.1.

§ 106-50.1. Title.—This article shall be known as the "North Carolina Fertilizer Law of 1947". (1947, c. 1086, s. 1.)

Session Laws 1947, c. 1086, effective July 1, 1947, which rewrote Article 2 of Chapter 106 of the General Statutes, as amended by Session Laws 1945, c. 287, has been codified as §§ 106-50.1 to 106-50.22. Section 25 of the act provides: "Any carry over fertilizer in distributors' ware-

houses on the date on which this act shall become effective may thereafter be sold in the usual course of business."

§ 106-50.2. Enforcing official.—This article shall be administered by the commissioner of agriculture of the state of North Carolina, hereinafter referred to as the "commissioner". (1947, c. 1086, s. 2.)

§ 106-50.3. Definitions.—When used in this article:

(a) The term "person" includes individuals, partnerships, associations, firms and corporations.

(b) Words importing the singular number may extend and be applied to several persons or things, and words importing the plural number may include the singular.

(c) The term "distributor" means any person who offers for sale, sells, barters, or otherwise supplies mixed fertilizers or fertilizer materials.

(d) The term "sell" or "sale" includes exchange.

(e) The term "fertilizer material" means any substance containing nitrogen, phosphoric acid, potash, or any other recognized plant food element or compound which is used primarily for its plant food content or for compounding mixed fertilizers except unmanipulated animal and vegetable manures.

(f) The term "mixed fertilizers" means any combination or mixture of fertilizer materials designed for use or claimed to have value in promoting plant growth.

(g) The term "commercial fertilizer" includes both mixed fertilizer and/or fertilizer materials.

(h) The term "grade" means the minimum percentage of total nitrogen, available phosphoric acid, and soluble or available potash stated in the order given in this paragraph and, when applied to mixed fertilizers, shall be in whole numbers only.

(i) The term "brand name" means the name under which any individual mixed fertilizer or fertilizer material is offered for sale and may include a number, trademark, or other designation.

(j) The term "official sample" means any sample of commercial fertilizer taken by the commissioner or his authorized agent according to the methods prescribed in paragraph (b) of § 106-50.7.

(k) The term "ton" means a net ton of two thousand pounds avoirdupois.

(l) The term "per cent" or "percentage" means the percentage by weight.

(m) The term "manufacturer" means a person engaged in the business of preparing, mixing, or manufacturing commercial fertilizers; and the term "manufacture" means preparing, mixing, or manufacturing.

(n) The term "specialty fertilizer" means any fertilizer distributed primarily for use on non-commercial crops such as garden, lawns, shrubs, and flowers; and may include fertilizers used for research or experimental purposes. (1947, c. 1086, s. 3.)

§ 106-50.4. Registration of brands.—

(a) Each brand of commercial fertilizer shall be registered before being offered for sale, sold, or distributed in this state. The application for registration shall be submitted in duplicate to the commissioner on forms furnished by the commissioner, and shall be accompanied by a remittance of $2.00 per brand and grade as a registration fee. Upon approval by the commissioner a copy of the registration shall be furnished to the applicant. All registrations expire on July 1st of each year. The application shall include the following information:

(1) The name and address of the person guaranteeing registration.

(2) The brand.

(3) The grade.

(4) The guaranteed analysis showing the minimum percentage of plant food in the following order and form:

A. In mixed fertilizers (other than those branded for tobacco):

Total nitrogen .....—— per cent
(Optional) water insoluble nitrogen —— per cent
Percentage of total in multiples of five
Available phosphoric acid .....—— per cent
Soluble or available potash .....—— per cent
Whether the fertilizer is acid-forming or non-acid forming. The potential basicity or acidity expressed as equivalent of calcium carbonate in multiples of five per cent (or one hundred pounds per ton) only.

B. In mixed fertilizers (branded for tobacco):

Total nitrogen .....—— per cent
(Optional) nitrogen in the form of nitrate, per cent of total in multiples of five.
Water insoluble nitrogen .....—— per cent
Percentage of total in multiples of five
Available phosphoric acid .....—— per cent
Soluble or available potash .....—— per cent
Maximum chlorine .....—— per cent
Total magnesium or total magnesium oxide .....—— per cent
All fertilizer branded for tobacco must contain a minimum of two per cent magnesium oxide or its equivalent in magnesium.
Whether the fertilizer is acid-forming or non-acid forming. The potential basicity or acidity expressed as equivalent of calcium carbonate in multiples of five per cent (or one hundred pounds per ton) only.

C. In fertilizer materials (if claimed):

Total nitrogen .....—— per cent
Available prosphoric acid .....—— per cent
In the case of bone, tankage, and other organic phosphate materials on which the chemist makes no determination of available phosphoric acid, the total phosphoric acid shall be guaranteed: Provided, that unacidulated mineral phosphatic materials and basic slag shall be guaranteed as to both total and available phosphoric acid and the degree of fineness.
Soluble or available potash .....—— per cent
Other recognized plant food .....—— per cent

(5) The sources from which the nitrogen, phosphoric acid, and potash are derived.

(6) Magnesium (Mg) or magnesium oxide (MgO), calcium (Ca) or calcium oxide (CaO), and sulfur (S) may be claimed as secondary plant foods in all mixed fertilizers, but when one or more of these is so claimed the minimum percentage of total magnesium (Mg) or total magnesium oxide (MgO), total calcium (Ca) or total calcium oxide (CaO), and total sulfur (S), as applicable, shall be guaranteed; excepting that the sulfur guarantee for fertilizers branded for tobac-

co shall be both the maximum and the minimum percentages.

(7) Borax may be claimed as an ingredient in mixed fertilizers. If claimed, it shall be guaranteed in terms of borax per 100 pounds of fertilizer in increments of ½, 1, and multiples of 1 pound per 100 pounds of fertilizer. The guarantee will be considered both a minimum and maximum guarantee. The analysis guarantee shall be on a separate tag as prescribed by the commissioner.

(8) Additional plant food elements, compounds, or classes of compounds, determinable by chemical control methods, may be guaranteed only by permission of the commissioner by and with the advice of the director of the experiment station. When any such additional plant food elements, compounds, or classes of compounds are included in the guarantee, they shall be subject to inspection and analysis in accordance with the methods and regulations that may be prescribed by the commissioner. The commissioner shall also fix penalties for failure to fulfill such guarantees.

(9) In no case, except in the case of unacidulated mineral phosphates and/or basic slag unmixed with other materials shall both the terms total phosphoric acid and available phosphoric acid be used in the same statement of analysis.

(b) The distributor of any brand and grade of commerical fertilizer shall not be required to register the same if it has already been registered under this article by a person entitled to do so and such registration is then outstanding.

(c) The grade of any brand of mixed fertilizer shall not be changed during the registration period, but the guaranteed analysis may be changed in other respects and the sources of materials may be changed: Provided, prompt notification of such change is given to the commissioner and the change is noted on the container of tag: Provided, further, that the guaranteed analysis shall not be changed if it, in any way, lowers the quality of the fertilizer: Provided, further, that if at a subsequent registration period, the registrant desires to make any change in the registration of a given brand and grade of fertilizer, said registrant shall notify the commissioner of such change 30 days in advance of such registration; that if the commissioner, after consultation with the director of the agricultural experiment station decides that such change materially lowers the crop producing value of the fertilizer, he shall notify the registrant of his conclusions, and if the registrant registers the brand and grade with the proposed changes, then the commissioner shall give due publicity to said changes through the Agricultural Review and/or by such other means as he may deem advisable. (1947, c. 1086, s. 4; 1949, c. 637, s. 1.)

Editor's Note.—The 1949 amendment inserted in subsection (a) (4) B the sentence "All fertilizer branded for tobacco must contain a minimum of two per cent magnesium oxide or its equivalent in magnesium."

§ 106-50.5. Labeling.—

(a) Any commercial fertilizer offered for sale, sold, or distributed in this state in bags, barrels, or other containers shall have placed on or affixed to the container the net weight and the data in written or printed form, required by paragraph (a), with the exception of item (5), of § 106-50.4 printed either (1) on tags to be affixed to the end of the package or (2) directly on the package. In case the brand name appears on the package, the grade shall also appear on the package, immediately preceding the guaranteed analysis or as a part of the brand name. The size of the type of numerals indicating the grade on the container shall not be less than 2 inches in height for containers of 100 pounds or more; not less than 1 inch for containers of 50 and 99 pounds; and not less than ½ inch for packages of less than 50 pounds. In case of fertilizers sold in containers on which the brand or other designations of the distributer do not appear, the grade must appear in a manner prescribed by the commissioner on tags attached to the container.

(b) If transported in bulk, the net weight and the data, in written or printed form, as required by paragraph (a), with the exception of item (5), of § 106-50.4. shall accompany delivery and be supplied to the purchaser.

(c) If mixed fertilizer is sold or intended to be sold in bags weighing more than 100 pounds, each bag must have a tag attached thereto, of a type approved by the commissioner, showing the grade of the fertilizer contained therein. Such tag must be attached between the ears of each bag, or in the case of a machine sewed bag, approximately at the center of the sewed end of the bag: provided, that in lieu of such tag the grade of the fertilizer may be printed on the end of the bag in readily legible numerals. (1947, c. 1086, s. 5; 1949, c. 637, s. 2.)

Editor's Note.—The 1949 amendment added subsection (c).

§ 106-50.6. Inspection fees. —

(a) For the purpose of defraying expenses of the inspection and of otherwise determining the value of commercial fertilizers in this state, there shall be paid to the department of agriculture a charge of twenty-five cents per ton or one cent for each individual package containing fifty pounds net or less and more than five pounds of such commercial fertilizers, which charge shall be paid before a delivery is made to agents, dealers, or consumers in this state. Each bag, barrel, or other container of commercial fertilizer shall have attached thereto a tag to be furnished by the department of agriculture stating that all charges specified in this section have been paid, and the commissioner, with the advice and consent of the board of agriculture is hereby empowered to prescribe a form for such tags, and to adopt such regulations as will insure the enforcement of this law. Whenever any manufacturer of commercial fertilizer shall have paid the charges required by this section his goods shall not be liable to further tax, whether by city, town, or county: Provided, this shall not exempt the commercial fertilizers from an ad valorem tax.

(b) The tax tags required under this section shall be issued each fiscal year (July 1st-June 30th) by the commissioner and be sold to persons applying for same at the rate provided in paragraph (a) of this section. Undetached tags left in the possession of persons registering commercial fertilizers at the end of any fiscal year (July 1st-June 30th) may be exchanged for tags of the succeeding year, on or before September first.

(c) If any distributor of fertilizer shall desire

to ship in bulk any commercial fertilizers, the said distributor of fertilizer shall send with the bill of lading sufficient cancelled tax tags to pay the tax on the amount of goods shipped, and the agent of the railroad or other transportation company shall deliver the tags to the consignee when the goods are delivered. If otherwise delivered, the distributor shall associate such tags or stamps to each lot or with some document relating thereto.

(d) On individual packages of five pounds or less, there shall be paid in lieu of the tonnage fee an annual registration fee of twenty-five dollars ($25.00) for each brand offered for sale, sold, or distributed.

(e) Any distributor of fertilizer may make application to the commissioner of agriculture for a permit to report the tonnage of fertilizer sold and pay the inspection fee of 25 cents per ton on the basis of the report, in lieu of affixing inspection tags or stamps.

(f) The commissioner may, in his discretion, grant such permit. The issuance of all permits will be conditional on the applicant's satisfying the commissioner that he has a good bookkeeping system and keeps such records as may be necessary to indicate accurately the tonnage of fertilizer sold in the state.

(g) In the event such permit is granted by the commissioner, the distributor must, as a further condition thereto, grant to the commissioner or his duly authorized representative permission to examine such records and verify the tonnage statement.

(h) The tonnage report shall be monthly and the inspection fee shall be due and payable monthly, on the tenth of each month, covering the tonnage and grade of fertilizer sold during the past month.

(i) The report shall be under oath and on forms furnished by the commissioner.

(j) If the report is not filed and the inspection fee paid by the tenth day following due date or if the report of tonnage be false, the commissioner may revoke the permit; and if the inspection fee be unpaid after a fifteen day grace period, the amount shall bear a penalty of ten per cent which shall be added to the inspection fee due and shall constitute a debt and become the basis of judgment against the securities or bonds which may be required.

(k) In order to guarantee faithful performance each distributor shall before being granted a permit to use the reporting system deposit with the commissioner cash in the amount of one thousand dollars ($1000.00) or securities acceptable to the commissioner of a value of at least one thousand dollars. ($1000.00) or shall post with the commissioner a surety bond in like amount, executed by some corporate surety company authorized to do business in North Carolina. (1947, c. 1086, s. 6; 1949, c. 637, s. 3.)

Editor's Note.—The 1949 amendment added subsections (e)-(k).

§ 106-50.7. Sampling, inspection and testing.—(a) It shall be the duty of the commissioner, who may act through his authorized agent, to sample, inspect, make analysis of, and test commercial fertilizers offered for sale, sold, or distributed within the state at such time and place and to such an extent as he may deem necessary to determine whether such commercial fertilizers are in compliance with the provisions of this article. The commissioner, individually or through his agent, is authorized to enter upon any public or private premises during regular business hours in order to have access to commercial fertilizers subject to the provisions of this article and the rules and regulations thereto.

(b) The methods of sampling shall be as follows:

(1) For the purposes of analysis by the commissioner or his duly authorized chemists and for comparison with the guarantee supplied to the commissioner in accordance with §§ 106-50.4. and 106-50.5, the commissioner, or any official inspector duly appointed by him, shall take an official sample of not less than one pound from containers of commercial fertilizer. No sample shall be taken from less than five containers. If the lot comprises five (5) or more containers, portions shall be taken from each one up to a total of ten (10) containers. If the lot comprises from ten (10) to one hundred (100) containers, portions shall be taken from ten (10) containers. Of lots comprising more than one hundred (100) containers, portions shall be taken from ten (10) per cent of the total number of containers.

(2) In sampling commercial fertilizers, in bulk, either in a factory or a car, at least ten portions shall be drawn and these from different places so as fairly to represent the pile or car lot.

(3) In sampling, a core sampler shall be used that removes a core from a bag or other package from top to bottom, and the cores taken shall be mixed on clean oil cloth or paper, and if necessary shall be reduced after thoroughly mixing, by quarting, to the quantity of sample required. The composite sample taken from any lot of commercial fertilizer under the provision of this paragraph shall be placed in a tight container and shall be forwarded to the commissioner with proper identification marks.

(4) The commissioner may modify the provisions of this section to bring them into conformity with any changes that may hereafter be made in the official methods of and recommendations for sampling commercial fertilizers which shall have been adopted by the Association of Official Agricultural Chemists or by the Association of American Fertilizer Control Officials. Thereafter, such methods and recommendations shall be used in all sampling done in connection with the administration of this article in lieu of those prescribed in items (1), (2), and (3) of this section.

(5) All samples taken under the provisions of this section shall be taken from original unbroken bags or containers, the contents of which have not been damaged by exposure, water or otherwise.

(6) The commissioner shall refuse to analyze all samples except such as are taken under the provisions of this section and no sample unless so taken shall be admitted as evidence in the trial of any suit or action wherein there is called into question the value or composition of any lot of commercial fertilizer distributed under the provisions of this article.

(7) In the trial of any suit or action wherein there is called in question the value or composition of any lot of commercial fertilizer, a certificate

signed by the fertilizer chemist and attested with the seal of the department of agriculture, setting forth the analysis made by the chemist of the department of agriculture, of any sample of said commercial fertilizer, drawn under the provisions of this section and analyzed by them under the provisions of the same, shall be prima facie proof that the lot of fertilizer represented by the sample was of the value and constituency shown by said analysis. And the said certificate of the chemist shall be admissible in evidence to the same extent as if it were his deposition taken in said action in the manner prescribed by law for the taking of depositions.

(c) The methods of analysis shall be those adopted as official by the board of agriculture and shall conform to the methods prescribed by the Association of Official Agricultural Chemists or by the Association of American Fertilizer Control Officials. In the absence of methods prescribed by either of these associations, the commissioner shall prescribe the method of analysis.

(d) The result of official analysis of any commercial fertilizer which has been found to be subject to penalty shall be forwarded by the commission to the registrant at least ten days before the report is submitted to the purchaser. If during that period no adequate evidence to the contrary is made available to the commissioner, the report shall become official. Upon request the commissioner shall furnish to the registrant a portion of any sample found subject to penalty.

(e) Any purchaser or consumer may take and have a sample of mixed fertilizer or fertilizer material analyzed if taken in accordance with the following rules and regulations:

(1) At least five days before taking a sample, the purchaser or consumer shall notify the manufacturer or seller of the brand in writing, at his permanent address, of his intention to take such a sample and shall request the manufacturer or seller to designate a representative to be present when the sample is taken.

(2) The sample shall be drawn in the presence of the manufacturer, seller, or a representative designated by either party together with two disinterested freeholders; or in case the manufacturer, seller, or representative of either refuses or is unable to witness the drawing of such a sample, a sample may be drawn in the presence of three disinterested freeholders: Provided, any such sample shall be taken with the same type of sampler as used by the inspector of the department of agriculture in taking samples and shall be drawn, mixed, and divided as directed in paragraphs (1), (2), (3), (4), and (5) of subsection (b) of this section, except that the sample shall be divided into two parts each to consist of at least one pound. Each of these is to be placed into a separate, tight container, securely sealed, properly labeled, and one sent to the commissioner for analysis and the other to the manufacturer. A certificate statement in a form which will be prescribed and supplied by the commissioner must be signed by the parties taking and witnessing the taking of the sample. Such certificate is to be made and signed in duplicate and one copy sent to the commissioner and the other to the manufacturer or seller of the brand sampled. The witnesses of the taking of any sample, as provided for in this section, shall be required to certify that such sample has been continuously under their observation from the taking of the sample up to and including the delivery of it to an express agency, a post office or to the office of the commissioner.

(3) Samples drawn in conformity with the requirements of this section shall have the same legal status in the courts of the state as those drawn by the commissioner or any official inspector appointed by him as provided for in subsection (b) of this section.

(4) No suit for damages claimed to result from the use of any lot of mixed fertilizer or fertilizer material may be brought unless it shall be shown by an analysis of a sample taken and analyzed in accordance with the provisions of this article, that the said lot of fertilizer as represented by a sample or samples taken in accordance with the provisions of this section do not conform to the provisions of this article with respect to the composition of the mixed fertilizer or fertilizer material, unless it shall appear to the commissioner that the manufacturer of the fertilizer in question has, in the manufacture of other goods offered in this state during such season, employed such ingredients as are outlawed by the provisions of this article, or unless it shall appear to the commissioner that the manufacturer of such fertilizer has offered for sale during that season any kind of dishonest or fraudulent goods. (1947, c. 1086, s. 7.)

§ 106-50.8. Plant food deficiency.—

(a) The commissioner in determining for administrative purposes whether any commercial fertilizer is deficient in plant food, shall be guided solely by the official sample as defined in paragraph (j) of § 106-50.3, and as provided for in paragraphs (b), (c), and (d) of § 106-50.7.

(b) If the analysis shall show that any commercial fertilizer falls short of the guaranteed analysis in any ingredient, a penalty shall be assessed in accordance with the following provisions:

(1) Total nitrogen: A penalty of three times the value of the deficiency, if such deficiency is in excess of 0.20 of one per cent on goods that are guaranteed two per cent; 0.25 of one per cent on goods that are guaranteed three per cent; 0.35 of one per cent on goods that are guaranteed four per cent; 0.40 of one per cent on goods that are guaranteed five per cent up to and including eight per cent; 0.50 of one per cent on goods guaranteed above eight per cent up to and including thirty per cent; and 0.75 of one per cent on goods guaranteed over thirty per cent.

(2) Available phosphoric acid: A penalty of three times the value of the deficiency, if such deficiency exceeds 0.40 of one per cent on goods that are guaranteed up to and including ten per cent; 0.50 of one per cent on goods that are guaranteed above ten per cent up to and including twenty-five per cent; 0.75 of one per cent on goods guaranteed over twenty-five per cent.

(3) Soluble or available potash: A penalty of three times the value of the deficiency, if such deficiency is in excess of 0.20 of one per cent on goods that are guaranteed two per cent; 0.30 of one per cent on goods that are guaranteed three per cent; 0.40 of one per cent on goods guar-

anteed four per cent; 0.50 of one per cent on goods guaranteed above four per cent guaranteed above eight per cent up to and including twenty per cent; and 1.00 per cent on goods guaranteed over twenty per cent.

(4) Should the basicity or acidity as equivalent of calcium carbonate of any sample of fertilizer be found upon analysis to differ more than five per cent (or one hundred pounds of calcium carbonate equivalent per ton) from the guarantee, then a penalty of fifty cents per ton for each fifty pounds calcium carbonate equivalent, or fraction thereof in excess of the one hundred pounds allowed, may be assessed and paid as under paragraph (c) of this section.

(5) Chlorine: If the chlorine content of any lot of fertilizer branded for tobacco shall exceed the maximum amount guaranteed by more than 0.5 of one per cent, a penalty shall be assessed equal to ten per cent of the value of the fertilizer for each additional 0.5 of one per cent of excess or fraction thereof.

(6) Water insoluble nitrogen: A penalty of three times the value of the deficiency shall be assessed, if such deficiency is in excess of 0.10 of one per cent on goods guaranteed up to and including fifty-hundredths per cent; 0.20 of one per cent on goods guaranteed from five-tenths per cent to one per cent; 0.30 of one per cent on goods guaranteed from one per cent to two per cent; 0.50 of one per cent on goods guaranteed above two per cent and up to and including five per cent; and 1.00 per cent on goods guaranteed over five per cent.

(7) Nitrate nitrogen: A penalty of three times the value of the deficiency shall be assessed if the deficiency shall exceed 0.10 of one per cent for goods guaranteed up to and including five-tenths per cent; 0.15 of one per cent for goods guaranteed from five-tenths to one per cent; 0.25 of one per cent for goods guaranteed from one to two per cent; and 0.35 of one per cent for goods guaranteed above two per cent.

(8) Total magnesium or total magnesium oxide: If the magnesium content found falls as much as 0.30 of one per cent below the minimum amount guaranteed, a penalty of fifty cents per ton shall be assessed for each 0.15 of one per cent additional deficiency or fraction thereof. If the magnesium oxide content found falls as much as 0.50 of one per cent below the minimum amount guaranteed, a penalty of fifty cents per ton shall be assessed for each 0.25 of one per cent additional deficiency or fraction thereof.

(9) Total calcium or total calcium oxide: If the calcium content found falls as much as 0.70 of one per cent below the minimum amount guaranteed, a penalty of fifty cents per ton shall be assessed for each 0.35 of one per cent additional deficiency or fraction thereof. If the calcium oxide content found falls as much as 1.00 per cent below the minimum amount guaranteed, a penalty of fifty cents per ton shall be assessed for each 0.50 of one per cent additional deficiency or fraction thereof.

(10) Sulfur: If the sulfur content is found to be as much as 1.50 per cent below the minimum amount guaranteed in the case of all mixed fertilizers, including mixed fertilizers branded for tobacco, a penalty of fifty cents per ton for each 0.50 of one per cent additional excess or fraction thereof, shall be assessed.

(11) Deficiencies or excesses in any other constituent or constituents covered under items (6) and (7), paragraph (a), § 106-50.4 which the registrant is required to or may guarantee shall be evaluated by the commissioner and penalties therefor shall be prescribed by the commissioner.

(c) All penalties assessed under this section shall be paid to the consumer of the lot of fertilizer represented by the sample analyzed within three months from the date of notice by the commissioner to the distributor, receipts taken therefor, and promptly forwarded to the commissioner: Provided, that in no case shall the total assessed penalties exceed the commercial value of the goods to which it applies. If said consumers cannot be found, the amount of the penalty assessed shall be paid to the commissioner who shall deposit the same in the department of agriculture fund, of which the state treasurer is custodian. Such sums as thereafter shall be found to be payable to consumers on lots of fertilizer against which said penalties were assessed shall be paid from said fund on order of the commissioner and may be used by the commissioner as he may see fit for the purpose of promoting the agricultural program of the state. (1947, c. 1086, s. 8.)

Editor's Note.—Paragraph (b) (3) of this section is printed just as it appears in the authenticated copy of the act. However, there seems to be something missing in line eight between "per cent" and "guaranteed."

§ 106-50.9. Determination and publication of commercial values.—

For the purpose of determining the commercial values to be applied under the provisions of § 106-50.8, the commissioner shall determine and publish annually the values per pound of nitrogen, phosphoric acid, and potash in commercial fertilizers in this state. The values so determined and published shall be used in determining and assessing penalties. (1947, c. 1086, s. 9.)

§ 106-50.10. Minimum plant food content; branding of low grade tobacco fertilizer.—

No superphosphate containing less than eighteen per cent available phosphoric acid nor any mixed fertilizer in which the sum of the guarantees for the nitrogen, available phosphoric acid, and soluble or available potash totals less than twenty per cent shall be offered for sale, sold, or distributed in this state except for complete fertilizers containing twenty-five per cent or more of their nitrogen in water insoluble form of plant or animal origin, in which case the total nitrogen, available phosphoric acid, and soluble or available potash need not total more than eighteen per cent: Provided, however, there may be one grade of tobacco plant bed fertilizer in which the sum of the guarantees for total nitrogen, available phosphoric acid, and soluble or available potash shall not total less than sixteen per cent; and, provided, further, that the water insoluble nitrogen guarantee in this tobacco plant bed fertilizer shall not be less than twenty-five per cent of the total; and provided, further, there may be one grade of regular tobacco fertilizer (3-8-5). The water insoluble nitrogen guarantee in this tobacco fertilizer shall not be less than twenty-five per cent of the total. This grade of regular tobacco fertilizer (3-8-5) shall be branded "low grade" and shall carry a red tag reading as follows:

THIS IS A LOW GRADE FERTILIZER. It costs too much per unit of plant food. You are paying too much for bagging, freight, labor, etc., on too much inert material. It is not recommended by your Experiment Station. (1947, c. 1086, s. 10.)

§ 106-50.11. Grade list. — The board of agriculture, after a public hearing open to all interested parties, and upon approval by the director of the agricultural experiment station, shall, prior to June 30th of each year or as early as practicable thereafter, promulgate a list of grades of mixed fertilizer adequate to meet the agricultural needs of the state. After this list of grades has been established, no other grades of mixed fertilizers shall be eligible for registration. The commissioner may revise this list of grades by conforming to the procedure prescribed in this section.

It is provided, however, that any distributor may be permitted to sell one but not exceeding one brand and grade of specialty fertilizer not on the current approved list. The commissioner may, in his discretion, require a sample label to be submitted before registering such fertilizer. (1947, c. 1086, s. 11.)

§ 106-50.12. False or misleading statements. — It shall be unlawful to make any false or misleading statement or representation in regard to any commercial fertilizer offered for sale, sold, or distributed in this state, or to use any misleading or deceptive trademark or brand name in connection therewith. The commissioner is hereby authorized to refuse the registration of any commercial fertilizer with respect to which this section is violated. (1947, c. 1086, s. 12.)

§ 106-50.13. Grade-tonnage reports. — Each person registering commercial fertilizers under this article shall furnish the commissioner with a confidential written statement of the tonnage of each grade of fertilizer sold by him in this state. Said statement shall include all sales for the periods of July first to and including December thirty-first and of January first to and including June thirtieth of each year. The commissioner may, in his discretion, cancel the registration of any person failing to comply with this section if the above statement is not made within thirty days from date of the close of each period. The commissioner, however, in his discretion, may grant a reasonable extension of time. No information furnished under this section shall be disclosed in such a way as to divulge the operations of any person. (1947, c. 1086, s. 13.)

§ 106-50.14. Publication of information concerning fertilizers. — The commissioner shall publish at least annually, in such forms as he may deem proper, complete information concerning the sales of commercial fertilizers, together with such data on their production and use as he may consider advisable, and a report of the results of the analyses based on official samples of commercial fertilizers sold within the state as compared with the analyses guaranteed under §§ 106-50.4 and 106-50.5: Provided, however, that the information concerning production and use of commercial fertilizers shall be shown separately for periods July first to December thirty-first and January first to June thirtieth of each year, and that no disclosure shall be made of the operations of any person. (1947, c. 1086, s. 14.)

§ 106-50.15. Rules, regulations and standards. — The board of agriculture is authorized, after public hearing, to prescribe such rules and regulations as may be found necessary for the enforcement of this article; and, upon recommendation of the director of the agricultural experiment station, to prescribe maximum chlorine for tobacco fertilizer. The board of agriculture is also authorized to regulate the weight of bags and/or packages in which fertilizer may be sold or offered for sale. (1947, c. 1086, s. 15; 1949, c. 637, s. 4.)

Editor's Note.—The 1949 amendment struck out the former second sentence relating to minimum of magnesium oxide required in tobacco fertilizer and inserted in lieu thereof the present second sentence. The stricken provision now appears in subsection (a) (4) B of § 106-50.4.

§ 106-50.16. Short weight. — If any commercial fertilizer in the possession of the consumer is found by the commissioner to be short in weight, the registrant of said commercial fertilizer shall within thirty days after official notice from the commissioner pay to the consumer a penalty equal to four times the value of the actual shortage. The commissioner may in his discretion allow reasonable tolerance for short weight due to loss through handling and transporting. (1947, c. 1086, s. 16.)

§ 106-50.17. Cancellation of registration. — The commissioner, upon approval of the board of agriculture, is authorized and empowered to cancel the registration of any brand of commercial fertilizer or to refuse to register any brand of commercial fertilizer as herein provided, upon satisfactory proof that the registrant has been guilty of fraudulent and deceptive practices in the evasions or attempted evasions of the provisions of this article or any rules and regulations promulgated thereunder: Provided, that no registration shall be revoked or refused until the registrant shall have been given a hearing by the commissioner. (1947, c. 1086, s. 17.)

§ 106-50.18. "Stop sale", etc., orders. — It shall be the duty of the commissioner to issue and enforce a written or printed "stop sale, use, or removal" order to the owner or custodian of any lot of commercial fertilizer and to hold at a designated place when the commissioner finds said commercial fertilizer is being offered or exposed for sale in violation of any of the provisions of this article until the law had been complied with and said commercial fertilizer is released in writing by the commissioner or said violation has been otherwise legally disposed of by written authority. The commissioner shall release the commercial fertilizer so withdrawn when the requirements of the provisions of this article have been complied with and upon payment of all costs and expenses incurred in connection with the withdrawal. (1947, c. 1086, s. 18.)

§ 106-50.19. Seizure, condemnation and sale. — Any lot of commercial fertilizer not in compliance with the provisions of this article shall be subject to seizure on complaint of the commissioner to a court of competent jurisdiction in the area in which said commercial fertilizer is located. In the event the court finds the said commercial fertilizer to be in violation of this article and

orders the condemnation of said commercial fertilizer, it shall be disposed of in any manner consistent with the quality of the commercial fertilizer and the laws of the state: Provided, that in no instance shall the disposition of said commercial fertilizer be ordered by the court without first giving the claimant an opportunity to apply to the court for the release of said commercial fertilizer or for permission to process or relabel said commercial fertilizer to bring it into compliance with this article. (1947, c. 1086, s. 19.)

§ 106-50.20. Punishment for violations. — Each of the following offenses shall be a misdemeanor and any person upon conviction thereof shall be punished as provided by law for the punishment of misdemeanors:

(a) To manufacture, offer for sale, or sell in this state any mixed fertilizer or fertilizer materials containing any substance used as a filler that is injurious to crop growth or deleterious to the soil, or to use in such mixed fertilizer or fertilizer materials as a filler any substance that contains inert plant food material or any other substance for the purpose or with the effect of defrauding the purchaser.

(b) To offer for sale or to sell in this state for fertilizer purposes any raw or untreated leather, hair, wool waste, hoof, horn, rubber or similar nitrogenous materials, the plant food content of which is largely unavailable, either as such or mixed with other fertilizer materials.

(c) To make any false or misleading representation in regard to any mixed fertilizer or fertilizer material shipped, sold or offered for sale by him in this state, or to use any misleading or deceptive trademark or brand in connection therewith. The sale or offer for sale of any mixture of nitrogenous fertilizer materials under a name or other designation descriptive of only one of the components of the mixture shall be considered deceptive and fraudulent.

The commissioner is hereby authorized to refuse registration for any commercial fertilizer with respect to which this section is violated.

(d) The filing with the commissioner of any false statement of fact in connection with the registration under § 106-50.4 of any commercial fertilizer.

(e) Forcibly obstructing the commissioner or any official inspector authorized by the commissioner in the lawful performance by him of his duties in the administration of this article.

(f) Knowingly taking a false sample of commercial fertilizer for use under provisions of this article; or knowingly submitting to the commissioner for analysis a false sample thereof; or making to any person any false representation with regard to any commercial fertilizer sold or offered for sale in this state for the purpose of deceiving or defrauding such other person.

(g) The fraudulent tampering with any lot of commercial fertilizer so that as a result thereof any sample of such commercial fertilizer taken and submitted for analysis under this article may not correctly represent the lot; or tampering with any sample taken or submitted for analysis under this article, if done prior to such analysis and disposition of the sample under the direction of the commissioner.

(h) The delivery to any person by the fertilizer chemist or his assistants or other employees of the commissioner of a report that is willfully false and misleading on any analysis of commercial fertilizer made by the department in connection with the administration of this article.

(i) Selling or offering for sale in this state commercial fertilizer without marking the same as required by § 106-50.5.

(j) Selling or offering for sale in this state commercial fertilizer containing less than the minimum content required by § 106-50.10.

(k) Failure to obtain and affix tags as provided for in this article. (1947, c. 1086, s. 20.)

§ 106-50.21. Sales or exchanges between manufacturers.— Nothing in this article shall be construed to restrict or avoid sales or exchanges of commercial fertilizers to each other by importers or manufacturers who mix fertilizer materials for sale or as preventing the free and unrestricted shipments of commercial fertilizers to manufacturers who have registered their brands as required by the provisions of this article. (1947, c. 1086, s. 21.)

§ 106-50.22. Appeals from assessments and orders of commissioner. — Nothing contained in this article shall prevent any person from appealing to a court of competent jurisdiction from any assessment or penalty or other final order or ruling of the commissioner or board of agriculture. (1947, c. 1086, s. 22.)

Art. 4. Insecticides and Fungicides.

Editor's Note.—For subsequent law affecting this article, see §§ 106-65.1 to 106-65.12.

§ 106-62. Seizure of articles.—(a) When any Paris green, calcium arsenate, lead arsenate or any other insecticide or fungicide is found to be sold, offered or exposed for sale in this state in violation of any provisions of this article, or whenever a duly authorized agent of the department of agriculture finds he has probable cause to believe that any insecticide or fungicide is being sold, offered or exposed for sale in this state in violation of any provisions of this article, he shall affix to such insecticide or fungicide a tag, appropriate marking, or shall post a notice on the premises in which said insecticide or fungicide is located, giving notice that such insecticide or fungicide is suspected of being sold, offered or exposed for sale in violation of the provisions of this article or that the same is being sold, offered or exposed for sale in violation of the provisions of this article, and that the same has been detained or embargoed, and warning all persons not to remove or dispose of such Paris green, calcium arsenate, lead arsenate or other insecticides or fungicide by sale or otherwise until permission for removal or disposal is given by such agent or the court. It shall be unlawful for any person to remove or dispose of such detained or embargoed insecticide or fungicide by sale or to offer to expose same for sale without such permission.

(b) When an insecticide or fungicide detained or embargoed under subsection (a) has been found by such agent to be sold, offered or exposed for sale in violation of any provisions of this article he shall petition the judge of any recorder's, county or superior court in whose juris-

diction the insecticide or fungicide is detained or embargoed for an order of condemnation of such insecticide or fungicide. When such agent has found that such insecticide or fungicide so detained or embargoed is not being sold, offered or exposed for sale in violation of any of the provisions of this article he shall remove the tag, marking or notice.

(c) If the court finds that the detained or embargoed insecticide or fungicide is being sold, offered or exposed for sale in violation of any of the provisions of this article such insecticide and fungicide shall, after entry of the decree of the court, be destroyed at the expense of the claimant thereof, under the supervision of such agent and all court costs and fees and storage and other proper expenses, shall be taxed against the claimant of such article or his agent: Provided, that if any insecticide or fungicide can be corrected by proper labeling or processing or by any other correction so that the same will comply with the provisions of this article, the court, after entry of the decree and after such costs, fees, and expenses have been paid and a good and sufficient bond, conditioned that such insecticide or fungicide shall be so labeled, processed or corrected, has been executed, may by order direct that such insecticide or fungicide be delivered to the claimant thereof for such labeling, processing or correction under the supervision of an agent of the department of agriculture. The expense of such supervision shall be paid by the claimant. Such bond shall be returned to the claimant on representation to the court by the department of agriculture that the insecticide or fungicide is no longer in violation of this article, and that the expenses of such supervision have been paid. (1927, c. 53, s. 11; 1945, c. 668.)

Editor's Note.—The 1945 amendment rewrote this section.

Art. 4A. Insecticide, Fungicide and Rodenticide Act of 1947.

§ 106-65.1. Title. — This article may be cited as the Insecticide, Fungicide and Rodenticide Act of 1947. (1947, c. 1087, s. 1.)

Section 15 of the act from which this article was codified made it effective as of Jan. 1, 1948.

§ 106-65.2. Definitions. — For the purpose of this article—

a. The term "economic poison" means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any insects, rodents, fungi, bacteria, weeds, or other forms of plant or animal life or viruses, except viruses on or in living man or other animals, which the commissioner shall declare to be a pest.

b. The term "device" means any instrument or contrivance intended for trapping, destroying, repelling, or mitigating insects or rodents or destroying, repelling, or mitigating fungi, bacteria, or weeds, or such other pests as may be designated by the commissioner, but not including simple, mechanical devices such as rat traps, or equipment used for the application of economic poisons when sold separately therefrom.

c. The term "insecticide" means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any insects which may be present in any environment whatsoever.

d. The term "fungicide" means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any fungi, or plant disease.

e. The term "rodenticide" means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating rodents or any other vertebrate animal which the commissioner shall declare to be a pest.

f. The term "herbicide" means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any weed.

g. The term "insect" means any of the numerous small invertebrate animals generally having the body more or less obviously segmented, for the most part belonging to the class insecta, comprising six-legged, usually winged forms, as, for example, beetles, bugs, bees, flies, and to other allied classes of arthropods whose members are wingless and usually have more than six legs, as, for example, spiders, mites, ticks, centipedes, and wood lice, also nematodes and other worms, or any other invertebrates which are destructive, constitute a liability and may be classed as pests.

h. The term "fungi" means all non-chlorophyll-bearing thallophytes (that is, all non-chlorophyll-bearing plants of a lower order than mosses and liverworts) as, for example, rusts, smuts, mildews, molds, yeasts, bacteria, and viruses, except those on or in living man or other animals.

i. The term "weed" means any plant which grows where not wanted.

j. The term "ingredient statement" or "guaranteed analysis statement" means a statement of the name and percentage of each active ingredient, together with the total percentage of the inert ingredients, in the economic poison; and, in addition, in case the economic poison contains arsenic in any form, a statement of the percentages of total and water soluble arsenic, each stated as elemental (metallic) arsenic.

k. The term "active ingredient" means an ingredient which will prevent, destroy, repel, or mitigate insects, fungi, rodents, weeds, or other pests.

l. The term "inert ingredient" means an ingredient which is not an active ingredient.

m. The term "antidote" means the most practical immediate treatment in case of poisoning and includes first aid treatment.

n. The term "person means any individual, partnership, association, corporation, or organized group of persons whether incorporated or not.

o. The term "board of agriculture" or "board" means the North Carolina board of agriculture.

p. The term "commissioner" means the commissioner of agriculture.

q. The term "registrant" means the person registering any economic poison pursuant to the provisions of this article.

r. The term "label" means the written, printed, or graphic matter on, or attached to, the economic poison or device, or the immediate container thereof, and the outside container or wrapper of the retail package, if any there be, or relating to the economic poison or device when employed for commercial purposes.

s. The term "labeling" means all labels and other written, printed, or graphic matter—

(1) upon the economic poison or device or any of its containers or wrappers;

(2) accompanying the economic poison or device at any time;

(3) to which reference is made on the label or in literature accompanying or relating commercially to the economic poison or device, except when accurate, non-misleading reference is made to current official publications of the state experiment station, the state college of agriculture, the North Carolina department of agriculture, the North Carolina state board of health, or similar federal institutions or other official agencies of this state or other states when such agencies are authorized by law to conduct research in the field of economic poisons.

t. The term "adulterated" shall apply to any economic poison if its strength or purity falls below the professed standard or quality as expressed on labeling or under which it is sold, or if any substance has been substituted wholly or in part for the article, or if any valuable constituent of the article has been wholly or in part abstracted.

u. The term "misbranded" shall apply —

(1) to any economic poison or device if its labeling bears any statement, design, or graphic representation relative thereto or to its ingredients which is false or misleading in any particular;

(2) to any economic poison —

(a) if it is an imitation of or is offered for sale under the name of another economic poison;

(b) if its labeling bears any reference to registration under this article;

(c) if the labeling accompanying it does not contain instructions for use which are necessary and, if complied with, adequate for the protection of the public;

(d) if the label does not contain a warning or caution statement which may be necessary and, if complied with, adequate to prevent injury to living man and other vertebrate animals:

(e) if the label does not bear an ingredient or guaranteed analysis statement on that part of the immediate container and on the outside container or wrapper, if there be one, through which the ingredient or guaranteed analysis statement on the immediate container cannot be clearly read, of the retail package which is presented or displayed under customary conditions of purchase;

(f) if any word, statement, or other information required by or under the authority of this article to appear on the labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or graphic matter in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use; or

(g) if in the case of an insecticide, fungicide, or herbicide, when used as directed or in accordance with commonly recognized safe practice, it shall be injurious to living man or other vertebrate animals or vegetation, to which it is applied, or to the person applying such economic poison, excepting pests and weeds. (1947, c. 1087, s. 2.)

§ 106-65.3. Prohibited acts.— a. It shall be unlawful for any person to distribute, sell, or offer for sale within this state or deliver for transportation or transport in intrastate commerce or between points within this state through any point outside this state any of the following:

(1) Any economic poison which is not registered pursuant to the provisions of § 106-65.5, or any economic poison if any of the claims made for it or any of the directions for its use differ in substance from the representations made in connection with its registration, or if the composition of an economic poison differs from its composition as represented in connection with its registration: Provided, that, in the discretion of the commissioner, a change in the labeling or formula of an economic poison may be made within a registration period without requiring reregistration of the product: Provided further, that changes at no time are permissible if they lower the efficacy of the product.

(2) Any economic poison unless it is in the registrant's or the manufacturer's unbroken immediate container, and there is affixed to such container, and to the outside container or wrapper of the retail package, if there be one through which the required information on the immediate container cannot be clearly read, a label bearing

(a) the name and address of the manufacturer, registrant, or person for whom manufactured;

(b) the name, brand, or trade mark under which said article is sold; and

(c) the net weight or measure of the content subject, however, to such reasonable variations as the board of agriculture may permit.

(3) Any economic poison which contains any substance or substances in quantities highly toxic to man, determined as provided in § 106-65.6, unless the label shall bear, in addition to any other matter required by this article,

(a) the skull and crossbones;

(b) the word "poison" prominently, in red, on a background of distinctly contrasting color; and

(c) a statement of an antidote for the economic poison.

(4) The economic poisons commonly known as lead arsenate, basic lead arsenate, calcium arsenate, magnesium arsenate, zinc arsenate, zinc arsenite, sodium fluoride, sodium fluosilicate, and barium fluosilicate unless they have been distinctly colored or discolored as provided by regulations issued in accordance with this article, or any other white or lightly colored powder economic poison which the board of agriculture, after investigation of and after public hearing on the necessity for such action for the protection of the public health and the feasibility of such coloration or discoloration, shall, by regulation, require to be distinctly colored or discolored; unless it has been so colored or discolored; provided, that the board may exempt any economic poison to the extent that it is intended for a particular use or uses from the coloring or discoloring required or authorized by this subsection if he determines that such coloring or discoloring for such use or uses is not necessary for the protection of the public health.

(5) Any economic poison which is adulterated or misbranded, or any device which is misbranded.

b. It shall be unlawful—

(1) for any person to detach, alter, deface, or destroy, in whole or in part, any label or labeling provided for in this article or the rules and regulations promulgated hereunder, or to add any substance to, or take any substance from an economic poison in a manner that may defeat the purpose of this article;

(2) for any manufacturer, distributor, dealer, carrier, or other person to refuse, upon a request in writing specifying the nature or kind of economic poison or device to which such request relates, to furnish to or permit any person designated by the commissioner to have access to and to copy such records of business transactions as may be essential in carrying out the purposes of this article;

(3) for any person to give a guaranty or undertaking provided for in § 106-65.8 which is false in any particular, except that a person who receives and relies upon a guaranty authorized under § 106-65.8 may give a guaranty to the same effect, which guaranty shall contain in addition to his own name and address the name and address of the person residing in the United States from whom he received the guaranty or undertaking;

(4) for any person to use for his own advantage or to reveal, other than to the commissioner, or officials or employees of the United States department of agriculture, or other federal agencies, or to the courts in response to a subpoena, or to physicians, and in emergencies to pharmacists and other qualified persons, for use in the preparation of antidotes, in accordance with such directions as the commissioner may prescribe, any information relative to formulas of products acquired by authority of § 106-65.5; and

(5) for any person to oppose or interfere in any way with the commissioner or his duly authorized agents in carrying out the duties imposed by this article. (1947, c. 1087, s. 3.)

§ 106-65.4. Injunctions.— In addition to the remedies herein provided the commissioner of agriculture is hereby authorized to apply to the superior court for, and such court shall have jurisdiction upon hearing and for cause shown, to grant a temporary or permanent injunction restraining any person from violating any provision of § 106-65.3, irrespective of whether or not there exists an adequate remedy at law. (1947, c. 1087, s. 4.)

§ 106-65.5. Registration.—a. Every economic poison which is distributed, sold, or offered for sale within this state or delivered for transportation or transported in interstate commerce or between points within this state shall be registered in the office of the commissioner, and such registrations shall be renewed annually; provided, that products which have the same formula, are manufactured by the same person, the labeling of which contains the same claims, and the labels of which bear a designation identifying the product as the same economic poison may be registered as a single economic poison; and additional names and labels may, in the discretion of the commissioner, be added by supplement statements during the current period of registration. The registrant shall file with the commissioner a statement including—

(1) the name and address of the registrant and the name and address of the person whose name will appear on the label, if other than the registrant;

(2) the name of the economic poison;

(3) a complete copy of the labeling accompanying the economic poison and a statement of all claims to be made for it including directions for use; and

(4) if requested by the commissioner a full description of the tests made and the results thereof upon which the claims are based. In the case of renewal of registration, a statement shall be required only with respect to information which is different from that furnished when the economic poison was registered or last reregistered.

b. The registrant, before selling or offering for sale any economic poison in this state, shall register each brand or grade of such economic poison with the department of agriculture upon forms furnished by the department, and, for purposes of defraying expenses connected with the enforcement of this article, shall pay to the department an annual inspection fee of ten ($10.00) dollars for each and every brand or grade to be offered for sale in this state, whereupon there shall be issued to the registrant by the department of agriculture, a certificate entitling the registrant to sell all duly registered brands in this state until the expiration of the certificate. All certificates shall expire on December 31st of each year and are subject to renewal upon receipt of annual inspection fees.

c. The commissioner, whenever he deems it necessary in the administration of this article, may require the submission of the complete formula of any economic poison. If it appears to the commissioner that the composition of the article is such as to warrant the proposed claims for it and if the article and its labeling and other material required to be submitted comply with the requirements of this article, he shall register the article.

d. If it does not appear to the commissioner that the article is such as to warrant the proposed claims for it or if the article and its labeling and other material required to be submitted do not comply with the provisions of this article, he shall notify the registrant of the manner in which the article, labeling, or other material required to be submitted fail to comply with the article so as to afford the registrant an opportunity to make the necessary corrections.

e. The commissioner is authorized and empowered to refuse to register, or to cancel the registration of, any brand of economic poison as herein provided, upon satisfactory proof that the registrant has been guilty of fraudulent and deceptive practices in the evasions or attempted evasions of the provisions of this article or any rules and regulations promulgated thereunder: Provided, that no registration shall be revoked or refused until the registrant shall have been given a hearing by the board of agriculture.

f. Notwithstanding any other provision of this article, registration is not required in the case of an economic poison shipped from one plant within this state to another plant within this state operated by the same person. (1947, c. 1087, s. 5.)

§ 106-65.6. Determination; rules and regulations; uniformity.—a. The commissioner is authorized, after opportunity for a hearing,

(1) to declare as a pest any form of plant or animal life or virus which is injurious to plants, man, domestic animals, articles, or substances;

(2) to determine whether economic poisons are highly toxic to man; and

(3) to determine standards of coloring or dis-

coloring for economic poisons, and to subject economic poisons to the requirements of paragraph (4), subsection a of § 106-65.3.

b. The commissioner is further authorized

(1) to effect the collection and examination of samples of economic poisons and devices to determine compliance with the requirements of this article; and he shall have the authority at all reasonable hours to enter into any car, warehouse, store, building, boat, vessel or place supposed to contain economic poison, or devices, for the purpose of inspection or sampling, and to procure samples for analysis or examination from any lot, package or parcel of economic poison, or any device;

(2) to publish from time to time, in such forms as he may deem proper, complete information concerning the sale of economic poisons, together with such data on their production and use as he may consider advisable, and reports of the results of the analyses based on official samples of economic poisons sold within the state.

c. The board of agriculture is authorized to prescribe, after public hearing following due public notice, such rules, regulations, and standards relating to the sale and distribution of economic poisons as they may find necessary to carry into effect the full intent and meaning of this article.

d. In order to avoid confusion endangering the public health, resulting from diverse requirements, particularly as to the labeling and coloring of economic poisons, and to avoid increased costs to the people of this state due to the necessity of complying with such diverse requirements in the manufacture and sale of such poisons, the board of agriculture and the commissioner are authorized and empowered to cooperate with, and enter into agreements with, any other agency of this state, the United States department of agriculture, and any other state or agency thereof for the purpose of carrying out the provisions of this article and securing uniformity of regulations. (1947, c. 1087, s. 6.)

§ 106-65.7. Violations.—a. If it shall appear from the examination or evidence that any of the provisions of this article or the rules and regulations issued thereunder have been violated, the commissioner may cause notice of such violation to be given to the registrant, distributor, and possessor from whom said sample or evidence was taken. Any party so notified shall be given an opportunity to be heard under such rules and regulations as may be prescribed by the board of agriculture. If it appears after such hearing that there has been a sufficient number of violations of this article or the rules and regulations issued thereunder, the commissioner may certify the facts to the proper prosecuting attorney and furnish that officer with a copy of the results of the examination of such sample duly authenticated by the analyst or other officer making the examination under the oath of such officer. It shall be the duty of every solicitor to whom the commissioner shall report any violation of this article to cause proceedings to be prosecuted without delay for the fines and penalties in such cases. Any person convicted of violating any provisions of this article or the rules and regulations issued thereunder shall be adjudged guilty of a misdemeanor and shall be punished in the discretion of the court.

b. Nothing in this article shall be construed as requiring the commissioner to report for the institution of proceedings under this article, minor violations of this article, whenever the commissioner believes that the public interest will be adequately served in the circumstances by a suitable written notice or warning. (1947, c. 1087, s. 7.)

§ 106-65.8. Exemptions.—a. The penalties provided for violations of subsection a of § 106-65.3 shall not apply to—

(1) any carrier while lawfully engaged in transporting an economic poison within this state, if such carrier shall, upon request, permit the commissioner or his designated agent to copy all records showing the transactions in and movement of the articles;

(2) public officials of this state and the federal government engaged in the performance of their official duties;

(3) the manufacturer or shipper of an economic poison for experimental use only

(a) by or under the supervision of an agency of this state or of the federal government authorized by law to conduct research in the field of economic poisons; or

(b) by others if the economic poison is not sold and if the container thereof is plainly and conspicuously marked "For experimental use only —Not to be sold", together with the manufacturer's name and address: Provided, however, that if a written permit has been obtained from the commissioner, economic poisons may be sold for experimental purposes subject to such restrictions and conditions as may be set forth in the permit;

(4) any person who establishes a guaranty signed by, and containing the name and address of, the registrant or person residing in the United States from whom he purchased and received in good faith the article in the same unbroken package, to the effect that the article was lawfully registered at the time of sale and delivery to him, and that it complies with the other requirements of this article, designating this article. In such case the guarantor shall be subject to the penalties which would otherwise attach to the person holding the guaranty under the provisions of this article. (1947, c. 1087, s. 8.)

§ 106-65.9. Short weight.—If any economic poison in the possession of consumers is found by the commissioner to be short in weight, the registrant of said economic poison shall within thirty days after official notice from the commissioner pay to the consumer a penalty equal to four times the value of the actual shortage. (1947, c. 1087, s. 9.)

§ 106-65.10. "Stop sale" orders.—It shall be the duty of the commissioner to issue and enforce a written or printed "stop sale, use, or removal" order to the owner or custodian of any lot of economic poison and to hold at a designated place when the commissioner finds said economic poison is being offered or exposed for sale in violation of any of the provisions of this article until the law has been complied with and said economic poison is released in writing by the commissioner or said violation has been otherwise

legally disposed of by written authority. The commissioner shall release the economic poison so withdrawn when the requirements of the provisions of this article have been complied with and upon payment of all costs and expenses incurred in connection with the withdrawal. (1947, c. 1087, s. 10.)

§ 106-65.11. Seizures, condemnation and sale.— Any lot of economic poison not in compliance with the provisions of this article shall be subject to seizure on complaint of the commissioner to a court of competent jurisdiction in the area in which said economic poison is located. In the event the court finds the said economic poison to be in violation of this article and orders the condemnation of said economic poison, it shall be disposed of in any manner consistent with the quality of the economic poison and the laws of the state: Provided, that in no instance shall the disposition of said economic poison be ordered by the court without first giving the claimant an opportunity to apply to the court for the release of said economic poison or for permission to process or relabel said product to bring it into compliance with this article. (1947, c. 1087, s. 11.)

§ 106-65.12. Delegation of duties.— All authority vested in the commissioner by virtue of the provisions of this article may with like force and effect be executed by such employees of the department of agriculture as the commissioner may from time to time designate for said purpose. (1947, c. 1087, s. 12.)

Art. 8. Sale, etc., of Agricultural Liming Material, etc.

§ 106-84. Registration and tonnage fees; tags showing payment; reporting system; license certificates.

(c) Each bag, parcel, or shipment of said materials shall have attached thereto a tag, or label, to be furnished by the department of agriculture, stating that all charges specified in this article have been paid, and the commissioner of agriculture, with the advice and consent of the board of agriculture is hereby empowered to prescribe a form for such tags, or labels, and to adopt such regulations as will insure enforcement of this article. Whenever any manufacturer or vendor shall have paid the required charges, his goods shall not be liable to any further tax, whether by city, town or county. Tax tags or labels shall be issued each year by the commissioner of agriculture, and sold to persons applying for same at the tax rate provided herein. Tags or labels left in the possession of persons registering the materials coming under this article, at the end of a calendar year, may be exchanged for tags or labels for the next succeeding year.

Any manufacturer, importer, jobber, firm, corporation or person who distributes materials coming under this article in this state may make application for a permit to report the materials sold and pay the tonnage fees as set forth in subsection (b) of this section, as the basis of said report, in lieu of affixing inspection tags or labels. The commissioner of agriculture may, in his discretion, grant such permit. The issuance of all permits will be conditioned on the applicant's satisfying the commissioner that he has a good bookkeeping system and keeps such records as may be necessary to indicate accurately the tonnage of liming materials, etc., sold in the state and as are satisfactory to the commissioner of agriculture, and granting the commissioner, or his duly authorized representative, permission to examine such records and verify the statement. The report shall be quarterly and the tonnage fees shall be due and payable quarterly, on or before the tenth day of January, April, July, and October of each year, covering the tonnage of liming materials, etc., sold during the preceding quarter. The report shall be under oath and on forms furnished by the commissioner. If the report is not filed and the tonnage fees paid by the tenth day following the date due or if the report be false, the commissioner may revoke the permit, and if the tonnage fees be unpaid after a fifteen day grace period, the amount shall bear a penalty of ten per cent which shall be added to the tonnage fees due and shall constitute a debt and become the basis of judgment against the securities or bonds which may be required. In order to guarantee faithful performance with the provisions of this paragraph each manufacturer, importer, jobber, firm, corporation or person shall, before being granted a permit to use the reporting system, deposit with the commission cash in the amount of two hundred fifty dollars ($250) or securities acceptable to the commissioner of a value of at least two hundred fifty dollars ($250) or shall post with the commissioner a surety bond in like amount, executed by some corporate surety company authorized to do business in North Carolina. The commissioner shall approve all such securities and bonds before acceptance.

(1949, c. 828.)

Editor's Note.—The 1949 amendment added the second paragraph of subsection (c). As the other subsections were not affected by the amendment they are not set out.

Art. 9. Commercial Feeding Stuffs.

§ 106-93. Packages to be marked with statement of specified particulars; methods of analysis. —Every lot or parcel of concentrated commercial feeding stuff sold, offered or exposed for sale within this state shall have affixed thereto or printed thereon, in a conspicuous place on the outside thereof, a legible and plainly printed statement in the English language clearly and truly certifying the weight of the package; the name, brand, or trade-mark under which the article is sold; the name and address of the manufacturer, jobber, or importer; the names of each and all ingredients of which the article is composed; a guarantee that the contents are pure and unadulterated, and a statement of the maximum percentage it contains of crude fiber, and the percentage of crude fat, and the percentage of crude protein, and the percentage of carbohydrates: Provided, that minerals and other materials not valuable for their protein and fat content shall be labeled in accordance with rules and regulations promulgated by the state board of agriculture. The methods of analysis shall be those adopted as official by the board of agriculture and shall conform to the methods prescribed by the Association of Official Agricultural Chemists. In the absence of methods prescribed by said association, the commissioner shall prescribe the methods of analysis. (1909, c. 149, s. 1; 1949, c. 638, s. 1; C. S. 4724.)

Editor's Note.—The 1949 amendment struck out the lat-

ter part of the former section and inserted in lieu thereof the proviso and the last two sentences.

§ 106-95. Concentrated commercial feeding stuffs defined.—The term "commercial feeding stuffs" shall be held to include the so-called mineral feeds and all feeds used for livestock, domestic animals and poultry, except cottonseed hulls, whole unground hays, straws and corn stover, when the same are not mixed with other materials, nor shall it apply to whole unmixed, unground and uncrushed grains or seeds when not mixed with other materials. (1909, c. 149, s. 2; 1939, c. 354, s. 1; 1949, c. 638, s. 2; C. S. 4726.)

Editor's Note.—The 1949 amendment rewrote this section.

§ 106-99. Inspection tax on feeding stuffs; tax tags; reporting system.

Any manufacturer, importer, jobber, firm, corporation or person who distributes concentrated commercial feeding stuffs in this state may make application to the commissioner of agriculture for a permit to report the tonnage of feeding stuffs sold and pay the inspection tax of twenty-five cents (25c) per ton as hereinbefore mentioned, as the basis of said report, in lieu of affixing or furnishing inspection fee tags or stamps. The commissioner of agriculture may, in his discretion, grant such permit. The issuance of all permits will be conditioned on the applicant's satisfying the commissioner that he has a good bookkeeping system and keeps such records as may be necessary to indicate accurately the tonnage of feeding stuffs sold in the state and as are satisfactory to the commissioner of agriculture, and granting the commissioner, or his duly authorized representative, permission to examine such records and verify the tonnage statement. The tonnage report shall be monthly and the inspection fee shall be due and payable monthly, on the tenth of each month, covering the tonnage and kind of commercial feeding stuffs sold during the past month. The report shall be under oath and on forms furnished by the commissioner. If the report is not filed and the inspection fee paid by the tenth day following the date due or if the report of tonnage be false, the commissioner may revoke the permit, and if the inspection fee be unpaid after a fifteen day grace period, the amount shall bear a penalty of ten per cent (10%) which shall be added to the inspection fee due and shall constitute a debt and become the basis of judgment against the securities or bonds which may be required. In order to guarantee faithful performance with the provisions of this paragraph each manufacturer, importer, jobber, firm, corporation or person shall, before being granted a permit to use the reporting system, deposit with the commissioner cash in the amount of one thousand dollars ($1000.00) or securities acceptable to the commissioner of a value of at least one thousand dollars ($1000.00) or shall post with the commissioner a surety bond in like amount, executed by some corporate surety company authorized to do business in North Carolina. The commissioner shall approve all such securities and bonds before acceptance. (1909, c. 149, s. 6; 1939, c. 286; 1949, c. 638, s. 3; C. S. 4730.)

Editor's Note.—The 1949 amendment added the above paragraph relating to reporting system at the end of this section. As the rest of the section was not changed by the amendment it is not set out.

Art. 12. Food, Drugs and Cosmetics.

§ 106-134. Drugs deemed misbranded.

(k) If (1) it is a drug sold at retail and contains any quantity of amidopyrine, barbituric acid, cinchophen, dinitrophenol, sulfanilamide, pituitary, thyroid, or their derivatives, or (2) it is a drug or device sold at retail and its label bears a statement that it is to be dispensed or sold only by or on the prescription of a physician, dentist or veterinarian; unless it is sold on a written prescription signed by a member of the medical, dental, or veterinary profession who is licensed by law to administer such drug or device, and its label bears the name and place of business of the seller, the serial number and date of such prescription, and the name of such member of the medical, dental or veterinary profession. Such prescription shall not be refilled except on the specific authorization of the prescribing physician, dentist or veterinarian.

Nothing in this subsection shall apply to a compound, mixture, or preparation containing salts or derivatives of barbituric acid which is sold in good faith for the purpose for which it is intended and not for the purpose of evading the provisions of this subsection if

(1) Such compound, mixture, or preparation contains a sufficient quantity of another drug or drugs, in addition to such salts or derivatives, to cause it to produce an action other than its hypnotic or somnifacient action; or

(2) Such compound, mixture, or preparation is intended for use as a spray or gargle or for external application and contains, in addition to such salts or derivatives, some other drug or drugs rendering it unfit for internal administration.

(1949, c. 370.)

Editor's Note.—The 1949 amendment rewrote subsection (k). As the rest of the section was not affected by the amendment it is not set out.

Art. 13. Canned Dog Foods.

§ 106-150. Annual registration fee; inspection tax; stamps; reporting system.—Upon registration of each brand or kind of dog food, the manufacturer, agent or distributor thereof shall pay to the commissioner of agriculture an annual registration fee of five dollars ($5.00) payable at the time of registration, and thereafter on or before the last day of December of each year. Furthermore, each such manufacturer, agent or distributor shall pay to the commissioner of agriculture an inspection tax at the rate of two cents for each carton of forty-eight cans and shall affix to each such carton a stamp to be furnished by the commissioner of agriculture stating that all charges specified in this section have been paid. Said stamps shall be redeemed by the department issuing said stamps, upon surrender of same, accompanied by an affidavit that the same have not been used: Provided, said stamps shall be returned for redemption within the time fixed by the board of agriculture.

Any manufacturer, importer, jobber, firm, corporation or person who distributes canned dog food in this state may make application for a permit to report the quantity of canned dog food sold and pay the inspection tax at the rate of two (2) cents for each carton of forty-eight cans as hereinbefore mentioned, as the basis of said report, in lieu of affixing inspection stamps. The commissioner of agriculture may, in his discretion, grant

such permit. The issuance of all permits will be conditioned on the applicant's satisfying the commissioner that he has a good bookkeeping system and keeps such records as may be necessary to indicate accurately the quantity of canned dog food sold in the state and as are satisfactory to the commissioner of agriculture, and granting the commissioner, or his duly authorized representative, permission to examine such records and verify the statement. The report shall be quarterly and the inspection fee shall be due and payable quarterly, on or before the tenth day of January, April, July, and October of each year, covering the quantity of canned dog food sold during the preceding quarter. The report shall be under oath and on forms furnished by the commissioner. If the report is not filed and the inspection fee paid by the tenth day following the date due or if the report be false, the commissioner may revoke the permit, and if the inspection fee be unpaid after a fifteen day grace period, the amount shall bear a penalty of ten per cent which shall be added to the inspection fee due and shall constitute a debt and become the basis of judgment against the securities or bonds which may be required. In order to guarantee faithful performance with the provisions of this paragraph each manufacturer, importer, jobber, firm, corporation or person shall, before being granted a permit to use the reporting system, deposit with the commissioner cash in the amount of two hundred fifty dollars ($250) or securities acceptable to the commissioner of a value of at least two hundred fifty dollars ($250) or shall post with the commissioner a surety bond in like amount, executed by some corporate surety company authorized to do business in North Carolina. The commissioner shall approve all such securities and bonds before acceptance. (1939, c. 307, s. 5; 1949, c. 1058, ss. 1, 2.)

Editor's Note.—The 1949 amendment substituted "December" for "June" in the first sentence of the first paragraph, and added the second paragraph.

Art. 14. State Inspection of Slaughterhouses.

§ 106-168. Local: Sales of calves for veal.

Local Modification.—The reference to Buncombe: Public-Local 1919, c. 191, and to Transylvania: Public-Local 1919, c. 191, should be deleted. Public-Local 1919, c. 191, was repealed by Public-Local 1949, c. 593.

Art. 17. Marketing and Branding Farm Products.

§ 106-189. Sale and receptacles of standardized products must conform to requirements.

Editor's Note.—
For comment on the 1943 amendment, see 21 N. C. Law Rev. 329.

Art. 20. Standard Weight of Flour and Meal.

§§ 106-203 to 106-209: Repealed by Session Laws 1945, c. 280, s. 2.

Art. 21A. Enrichment of Flour, Bread and Corn Meal.

§ 106-219.1. Title of article.—This article may be cited as: "The North Carolina Flour, Bread, and Corn Meal Enrichment Act." (1945, c. 641, s. 1.)

Editor's Note.—The act from which this article was codified became effective June 30, 1945.
For comment on the act, see 23 N. C. Law Rev. 344.

§ 106-219.2. Definitions.—For the purpose of this article—

(1) "Commissioner" means commissioner of agriculture; "board" means the board of agriculture.

(2) "Person" includes individual, partnership, corporation, and association.

(3) "Flour" (white flour) means the fine-grained product obtained from the milling of wheat, with or without leavening, bleaching, or other agents for similar purposes. The adjectives "whole wheat" means the variety with no part of the wheat berry removed; "white" means the bolted or refined type with parts of the wheat berry removed; but the term "flour" shall not include flours such as specialty cake, pancake and pastry flours which are not used for bread, roll, bun or biscuit making.

(4) "White bread" means bread made of "white flour," also rolls and biscuits of the bread-dough type; but shall not include the extensively sweetened, iced or cake type of product.

(5) "Degerminated" applied to corn meal or grits means said products with more than ten per cent (10%) of the germ removed.

(6) "Enriched" means restored or brought up to content of vitamins and minerals as prescribed in this article.

(7) "North Carolina Food, Drug and Cosmetic Act" refers to article twelve of this chapter. (1945, c. 641, s. 2.)

§ 106-219.3. Required vitamins and minerals.—On and after the effective date of this article, it shall be unlawful for any person to manufacture, mix, compound, sell or offer for sale in this state any products covered herein which do not contain the vitamins and minerals as prescribed in the following formulae:

(a) White flour, degerminated corn meal, and degerminated hominy grits shall contain in each pound not less than two (2.0) and not more than two and five tenths (2.5) milligrams of vitamin B (thiamin); not less than one and two tenths (1.2) and not more than one and five tenths (1.5) milligrams of riboflavin; not less than sixteen (16.0) and not more than twenty (20.0) milligrams of niacin (nicotinic acid); not less than thirteen (13.0) and not more than sixteen and five tenths (16.5) milligrams of iron; except that self-rising flour shall contain, in addition to the above ingredients, not less than five hundred (500) and not more than one thousand five hundred (1500) milligrams of calcium.

(b) White bread shall contain in each pound not less than one and one tenth (1.1) and not more than one and eight tenths (1.8) milligrams of vitamin B (thiamin); not less than seven tenths (0.7) and not more than one and six (1.6) milligrams of riboflavin; not less than ten (10.0) and not more than fifteen (15.0) milligrams of niacin (nicotinic acid); not less than eight (8.0) and not more than twelve and five tenths (12.5) milligrams of iron.

(c) Enrichment may be accomplished by the addition of vitamins from a natural or synthetic source, or other harmless and assimilable enriching ingredients which will accomplish the purpose of this article and will be acceptable under the North Carolina Food, Drug and Cosmetic Act.

(d) The enriching ingredients required under subsections (a) and (b) of this section may be

added in a harmless carrier which does not impair the enriched products; provided, (1) that such carrier is used only in quantity necessary to effect uniform mixture in the finished products; (2) that the concentration of enriching ingredients does not differ more than fifteen per cent (15%) between top and bottom of containers following subjection to normal handling and transportation; and, (3) that enriched grits be so stabilized that loss of vitamins and minerals from customary rinsing before cooking shall not exceed ten per cent (10%). (1945, c. 641, s. 3.)

§ 106-219.4. Products exempted.—The terms of this article shall not apply:

(a) To white flour, degerminated grits or degerminated corn meal sold to bakers or other commercial secondary processors; provided, the purchaser furnishes to the seller an approved certificate of intent to use said flour, grits or corn meal solely in the production of the products covered in this article; or in the manufacture of legitimate products not covered by the provisions of this article.

(b) To whole wheat flour or bread made from the entire wheat berry, or meal or grits made from the entire corn grain; provided, that (1) flour or bread made from the whole wheat berry, or various portions thereof, mixed with white flour shall contain vitamins and minerals equal to that required for the respective enriched products as defined in § 106-219.3 (a) and (b); (2) that this subsection shall not be construed to prohibit the further enrichment of whole grain products when done so as to comply with standards and labeling requirements under the North Carolina Food, Drug and Cosmetic Act.

(c) To products ground for the producer's use from the producer's grain; provided, that such products shall become subject to this article when offered for sale. (1945, c. 641, s. 4.)

§ 106-219.5. Enforcement by commissioner.—(a) The provisions of this article shall be enforced by the commissioner of agriculture, who is hereby directed, and he or his duly authorized agents shall have the authority to conduct examinations and investigations and, for the purpose of inspection and collection of samples for analysis, to enter, during business hours, all mills, storages, or other establishments or vehicles where products covered in this article are, or upon reasonable grounds are believed to be processed, contained, transported or sold.

(b) In the event that there be shortage or imminence of shortage of enriching ingredients required under § 106-219.3 (a) and (b), the commissioner shall obtain the facts from all proper and authorized sources or from testimony produced at public hearing and if findings show that the distribution of a food may be substantially impeded by enforcement, he shall immediately order suspension of such requirements as threaten distribution; provided, such suspension shall be revoked as soon as supplies of enriching ingredients are again available. (1945, c. 641, s. 5.)

§ 106-219.6. Board authorized to make regulations; hearing.—The authority for promulgating regulations for the efficient enforcement of this article, and for bringing into force the provisions under § 106-219.3 (c) is hereby vested in the board of agriculture, and the board is hereby authorized to make standards hereunder conform insofar as practicable, with interstate standards. Actions under this section shall follow proper public notice and hearing. (1945, c. 641, s. 6.)

§ 106-219.7. Violation a misdemeanor.—Any person who violates any of the provisions of this article shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine for each offense of not more than one hundred dollars ($100.00) or to imprisonment of not more than thirty days, or to both such fine and imprisonment. (1945, c. 641, s. 7.)

§ 106-219.8. Application of article 12.—All of the provisions of article twelve of this chapter, said article being entitled: "Food, Drugs and Cosmetics," as far as the same are pertinent shall be applicable to the foods, ingredients and substances defined in this article, and all of the remedies contained in said article twelve are hereby made available to the commissioner, and to the commissioner and the board, for the enforcement of this article. (1945, c. 641, s. 8.)

§ 106-219.9. Mills grinding whole grain exempted.—Nothing in this article shall apply to mills operated by water or other power grinding whole grain of corn or whole wheat flour. (1945, c. 641, s. 9½.)

Art. 22. Inspection of Bakeries.

§ 106-225.1. Bakery products containing souvenirs, trinkets, etc., which may endanger consumers.—No bread or other bakery product shall contain or have in direct contact with it trinkets, metal objects, money, pictures, cardboard cutouts, balloons or other objects or materials, by way of souvenirs, premiums or otherwise, which may endanger consumers by contamination arising from insanitation, from contact with printing inks, paints or other coatings, materials or substances which are not suitable for contact with food or which may in any way expose consumers to danger of injury because of biting into or swallowing such materials or objects: Except, that these provisions shall not be interpreted to prohibit the safe and proper use of such items as cake supports, decorations and trimmings or the placing of such objects as dishes and spoons in unfinished foods when this is done in a manner which in no way endangers consumers. (1949, c. 985.)

§ 106-225.2. New bags or other new containers required for grain cereal products.—No person, firm, association, or corporation, and no flour, corn or other cereal mill, or the owner or operator of same, and no bakery or food processing establishment, or the owner or operator of same, shall do, or suffer or permit to be done, any of the following acts:

(a) Sell or offer for sale any flour, corn meal, or other grain cereal product for human consumption which has been packed in bags or containers that have been previously used for any purpose, or

(b) Use any except new bags or other new containers for the packing of flour, corn meal or other grain cereal products for human consumption, or

(c) Import, ship, or cause to be shipped into the state of North Carolina any flour, corn meal

or other grain cereal product for human consumption unless such products are packed in new bags or other new containers which have not been previously used, or

(d) Use in foods for human consumption any flour, corn meal or other grain cereal product which has been packed in used bags or in other containers which have been previously used. (1949, c. 985.)

Art. 23. Oleomargarine.

§ 106-233. Definitions.

As used in this article, the term "oleomargarine" shall be deemed applicable to the food product known as margarine and any requirement herein contained for labeling or display of the word "oleomargarine" shall be deemed sufficiently complied with by the use of the word "margarine." (1931, c. 229, s. 1; 1949, c. 978, s. 1.)

Editor's Note.—The 1949 amendment directed that the above sentence be added to subsection (c). As the rest of the section was not changed only this sentence is set out.

§ 106-234: Repealed by Session Laws 1949, c. 978, s. 2.

§ 106-235. License to sell oleomargarine.—Every person desiring to manufacture, sell, or offer or expose for sale, or have in possession with intent to sell oleomargarine, shall make application for a license to do so in such form as prescribed by the state commissioner of agriculture, but this provision shall not apply to any person engaged in the retail sale of oleomargarine.

If the said application is satisfactory to the state commissioner of agriculture, there shall be issued to the applicant a license authorizing him to engage in the manufacture or sale of oleomargarine, for which said license the applicant shall pay: If a wholesaler or distributor, the sum of twenty-five dollars ($25.00) annually for each separate plant or establishment operated or maintained in this state by such wholesaler or distributor. The said license fees shall be collected by the state department of agriculture, and covered into the state treasury as a part of the agricultural fund.

All licenses shall expire on the thirty-first day of December of each year. (1931, c. 229, s. 3; 1939, c. 282, ss. 1, 2; 1945, c. 523, s. 2; 1949, c. 978, s. 3.)

Editor's Note.—

The 1945 amendment struck out the words "not made or colored so as to look like butter" formerly appearing after the word "oleomargarine" in line three of the first paragraph. It also struck out the words "which shall not contain any color or ingredient that causes it to resemble yellow butter" formerly appearing after the word "oleomargarine" in line five of the second paragraph, as well as other provisions relating to colored oleomargarine.

The 1949 amendment substituted "twenty-five dollars" for "seventy-five dollars" in line seven of the second paragraph.

§ 106-236. Display of signs.—(a) Marking Containers.—It shall be unlawful for any person or any agent thereof to sell or offer, or expose for sale, or have in possession with intent to sell, any oleomargarine which is not marked and distinguished by the word oleomargarine on the outside of each tub, package, or parcel.

(b) Notice in Public Eating Places.—No person shall possess in a form ready for serving yellow oleomargarine at a public eating place unless a notice that oleomargarine is served is displayed prominently and conspicuously in such place and in such manner as to render it likely to be read and understood by the ordinary individual being served in such eating place or is printed or is otherwise set forth on the menu in type or lettering not smaller than normally used to designate the serving of other food items; and no person shall serve yellow oleomargarine at a public eating place, whether or not any charge is made therefor, unless each separate serving bears or is accompanied by labeling identifying it as oleomargarine. (1931, c. 229, s. 4; 1939, c. 282, s. 3; 1945, c. 523, s. 3; 1949, c. 978, s. 4.)

Editor's Note.—

The 1945 amendment struck out the words "not in imitation of yellow butter" formerly appearing after the word "oleomargarine" in line four.

The 1949 amendment rewrote this section.

Art. 26. Inspection of Ice Cream Plants, Creameries, and Cheese Factories.

§ 106-246. Cleanliness and sanitation enjoined; wash rooms and toilets, living and sleeping rooms; animals.

Editor's Note.—

Session Laws 1945, c. 739, struck out Public Laws 1933, c. 431, s. 5, and amended Public Laws 1939, c. 294, so as to make this section fully applicable to Burke, Cabarrus, Catawba and Mecklenburg counties.

§ 106-253. Standards of purity and sanitation; regulating trade or brand names of frozen desserts.—The board of agriculture is authorized to make such definitions and to establish such standards of purity for products and sanitation for plants or places of manufacture named herein with such regulations, not in conflict with this article, as shall be necessary to make provisions of this article effective and insure the proper enforcement of same, and the violation of said standards of purity or regulations shall be deemed to be a violation of this article. It shall be unlawful for any person, firm or corporation to use the words "cream," "milk," or "ice cream," or either of them, or any similar sounding word or terms, as a part of or in connection with any product, trade name or brand of any frozen dessert manufactured, sold or offered for sale and not in fact made from dairy products under and in accordance with regulations, definitions or standards approved or promulgated by the board of agriculture. (1921, c. 169, s. 8; 1933, c. 431, s. 3; 1945, c. 846; C. S. 7251(h).)

Editor's Note.—

The 1945 amendment added the second sentence.

Art. 28A. Regulation of Milk Brought into North Carolina from Other States.

§ 106-266.1. Requirements to be complied with by out-of-state shippers of milk or cream.—No person, firm, association or corporation shall ship, transport, carry, send or bring into this state any milk or cream for fluid distribution without first having applied for and obtained from the commissioner of agriculture of this state a permit authorizing such transaction, shipment or transportation. In order to defray the expenses of the enforcement of this article, the commissioner of agriculture shall collect a fee of twenty-five dollars ($25.00) for the issuance of such permit. The board of agriculture is authorized and empowered to establish, determine, fix and promulgate rules and regulations containing all necessary defini-

tions, conditions, standards and classifications of the type, kind, quality, conditions of production, sanitary conditions and other reasonable requirements that must be complied with before milk or cream is shipped, transported, carried or brought into this state, including compliance with the Milk Audit Law of this state. Before any person, firm, association or corporation ships, transports, brings, sends or carries any milk or cream into this state, advance notice of such shipment or transportation shall be given to the commissioner of agriculture of this state and contain such information as the board of agriculture shall prescribe by rules and regulations. The commissioner of agriculture is authorized to suspend, immediately upon notice to a permit holder, any permit issued under authority of this section if it is found by him that any of the conditions of the permit or any of the rules, regulations and laws have been violated. The holder of a permit so suspended shall be privileged at any time to apply for the reinstatement of such permit, and the commissioner of agriculture shall, immediately after prompt hearing and such other examinations or inspections as he deems proper, reinstate such permit if it is found that adequate measures have been taken to comply with and maintain the conditions of the permit, as originally issued or as amended. Any permit issued by the commissioner of agriculture under the authority of this section may be revoked after an opportunity for a hearing by the commissioner of agriculture, upon the violation by the holder of the permit or any of the terms, conditions, rules and regulations issued and promulgated by authority of this section. All milk or cream shipped, transported, carried, sent or brought into this state shall be sold to, consigned to, delivered to, be transported, sent or carried only to a person, firm, association or corporation or to a milk distributor in this state holding or possessing an unrevoked permit from the commissioner of agriculture authorizing the receiving or importation of such milk or cream. All unrevoked permits issued under the authority of this section shall become null and void after the expiration of December 31st of each year.

In order that a sufficient supply of milk or cream shall always be available for the inhabitants of the state the commissioner of agriculture may issue to approved permit holders, or to non-permit holders, temporary emergency permits for limited periods or limited quantities of milk or cream and may restrict such permits to a limited area in accordance with such regulations as the commissioner of agriculture may prescribe for each temporary permit. (1949, c. 822.)

§ 106-266.2. Requirements and standards for distributors in this state distributing imported milk or cream.—No person, firm, association or corporation shall import, transport into, receive, bring into or cause to be imported or to be sent into this state from another state for the purpose of sale, for the purpose of offering for sale, for the purpose of distribution any milk or cream unless such person, firm, association or corporation has obtained a permit from the commissioner of agriculture for such purpose. All permits issued under the authority of this section shall be issued after the payment of a fee of twenty-five dollars ($25.00) to the commissioner of agriculture. The permits issued hereunder shall be conditioned upon compliance by the applicant or holder with the rules and regulations and laws of North Carolina governing milk or cream and such other definitions and standards as may be established and promulgated by the board of agriculture. The commissioner of agriculture is authorized to suspend, immediately upon due notice, any permit issued under authority of this section if it is found by the commissioner that any of the conditions of the permit have been violated. The holder of a permit so suspended shall be privileged at any time to apply for the reinstatement of such permit, and the commissioner of agriculture shall, immediately after prompt hearing, reinstate such permit if it is found that adequate measures have been taken to comply with and maintain the conditions of the permit as originally issued, or as amended. The permits issued hereunder may be revoked after due notice and an opportunity for hearing by the commissioner of agriculture upon a finding at such hearing of any violation of any of the conditions, terms or requirements established and promulgated by the board of agriculture or of any of the laws of the state governing milk or cream, including but not by way of limitation, the Milk Audit Law and other dairy laws of the state. It shall be the duty of the commissioner of agriculture to issue and enforce a written or printed "Stop sale, use or removal" order to the owner or custodian of any quantity of milk or cream imported, transported, or brought into this state and to hold the same at a designated place when the commissioner of agriculture finds that said milk or cream does not meet the requirements of the provisions of this article or the rules and regulations promulgated thereunder, until the law has been complied with and said milk or cream is released in writing by the commissioner of agriculture or said violation has been otherwise legally disposed of by written authority or by written order by the commissioner of agriculture directing the owner or custodian to remove the milk or cream from the state. The commissioner of agriculture shall release the milk or cream so withdrawn from sale when the requirements of the provisions of this article and the rules and regulations promulgated thereunder have been complied with and upon payment by the out-of-state shipper of all costs and expenses incurred in connection with the withdrawal. All unrevoked permits issued under the authority of this section shall become null and void after the expiration of December 31st of each year. All authority vested in the commissioner of agriculture by virtue of the provisions of this article may, with like force and effect, be executed by such employees and agents of the commissioner of agriculture as may, from time to time, be designated by him for such purpose. The commissioner of agriculture or his duly authorized agent shall have free access at all reasonable hours to any dairy, milk processing plant, distributing plant or any establishment, depot, tank, truck or vehicle which contains milk for the purpose of inspecting any milk or cream, containers, or any other establishment or device pertaining to the transportation, the distribution, bottling or storage of milk or cream for the purpose of determining whether any of the provisions of this article or of the rules and regulations promulgated thereunder have been violated, and the commissioner of agriculture may secure samples of

specimens of any such milk or cream after paying or offering to pay for such sample.

In order that a sufficient supply of milk or cream shall always be available for the inhabitants of the state the commissioner of agriculture may issue to permit holders, or non-permit holders upon payment of a permit fee of twenty-five dollars ($25.00), temporary emergency permits for limited periods or limited quantities of milk or cream and may restrict such permits to a limited area or to a particular city or to a particular market or markets in accordance with such regulations as the commissioner of agriculture may prescribe for each temporary permit. (1949, c. 822.)

§ 106-266.3. Power to make rules and regulations.—The board of agriculture is authorized to make such regulations not in conflict with this article as shall be necessary to make the provisions of this article effective and insure the proper enforcement of same, and a violation of such regulations shall be deemed a violation of this article. (1949, c. 822.)

§ 106-266.4. Penalty for violation.—Any person, firm, association or corporation found guilty by a competent court of violating any of the provisions of this article shall be guilty of a misdemeanor and upon plea of guilty or conviction shall be fined not to exceed fifty dollars ($50.00) for the first offense and for each subsequent offense shall be fined or imprisoned in the discretion of the court. (1949, c. 822.)

§ 106-266.5. Exemption clause.—The provisions of this article shall not be construed as extending to or applying to evaporated milk, powdered whole milk, powdered skimmed milk, or cream used for manufacturing purposes. Out-of-state dairy farms producing milk for North Carolina plants under a permit from, and in accordance with the local health regulations of the county or city to which milk is being delivered, may be exempted from the provisions of this article at the discretion of the commissioner of agriculture. (1949, c. 822.)

Art. 31. North Carolina Seed Law.

§ 106-277. Short title.—This article shall be known by the short title of "The North Carolina Seed Law." (1941, c. 114, s. 1; 1945, c. 828; 1949, c. 725.)

Editor's Note.—The 1945 and 1949 amendments rewrote this article to read as here set out.

§ 106-278. Construction to conform with federal act.—This article and the terms used therein shall be construed so as to conform in so far as possible with the construction placed upon the federal seed act and regulations issued thereunder, and to effectuate its purpose to make uniform the seed laws of the states. (1945, c. 828; 1949, c. 725.)

§ 106-279. Administered by commissioner.—This article shall be administered by the commissioner of agriculture of the state of North Carolina hereinafter referred to as the "commissioner." (1941, c. 114, s. 2; 1945, c. 828; 1949, c. 725.)

§ 106-280. Definitions.—When used in this article:

a. The term "person" includes a person, firm, partnership, corporation, company, society, association, trustee, agency, or receiver.

b. The term "agricultural seeds" shall include the seeds of grass, forage, cereal, fiber, cover crops and any other kinds of seed commonly recognized within this state as agricultural or field seeds, and mixtures of such seeds.

c. The term "vegetable seeds" shall include the seeds of those crops which are grown in gardens or on truck farms and are generally known and sold under the name of vegetable seeds in this state.

d. The term "lot of seed" means a definite quantity of seeds identified by a lot number, or mark, every portion or bag of which is uniform, for the factors which appear in the labeling, within permitted tolerances.

e. The term "kind" means one or more related species or subspecies which singly or collectively is known by one common name; e. g., corn, wheat, lespedeza.

f. The term "variety" means a subdivision of a kind characterized by growth, plant, fruit, seed or other characteristics by which it can be differentiated from other sorts of the same kind; e. g., Dixie 17 Hybrid Corn, Redhart Wheat, Kobe Lespedeza.

g. The term "pure seed" shall include all seeds of the kind or kind and variety under consideration, whether shriveled, cracked, or otherwise injured, and pieces of broken seeds larger than one half the original size.

h. The term "inert matter" shall include broken seeds when one half in size or less; seeds of legumes or crucifers with the seed coats removed; undeveloped and badly injured weed seeds such as sterile dodder which, upon visual examination, are clearly incapable of growth; empty glumes of grasses; attached sterile glumes of grasses (which must be removed from the fertile glumes except in Rhodes grass); dirt, stone, chaff, nematode, fungus bodies and any matter other than seeds.

i. The term "other crop seed" shall include all seeds of plants grown in this state as crops, other than the kind or kind and variety included in the pure seed, when not more than five per cent (5%) of the whole of a single kind or variety is present, unless designated as weed seeds.

j. The term "weed seeds" shall include the seeds of all plants generally recognized within this state as weeds and shall include noxious weed seeds.

k. Noxious weed seeds are seeds disseminated in seed subject to this article and shall be divided into two classes, "prohibited noxious weed seeds" and "restricted noxious weed seeds," defined as follows:

(1) "Prohibited noxious weed seeds" are the seeds of perennial weeds which not only reproduce by seed, but also spread by underground roots or stems and which, when established, are highly destructive and are not controlled in this state by cultural practices commonly used.

(2) "Restricted noxious weed seeds" are the seeds of such weeds as are very objectionable in fields, lawns, or gardens of this state, and are difficult to control by cultural practices commonly used.

l. The term "germination" means the emergence and development from the seed embryo of

those essential structures which, for the kind of seed in question, are indicative of the ability to produce a normal plant under favorable conditions.

m. The term "hard seeds" means the percentage of seeds which, because of hardness or impermeability do not absorb moisture or germinate under prescribed tests but remain hard during the period prescribed for germination of the kind of seed concerned.

n. The term "mixture" means seeds consisting of more than one kind or variety, each present in excess of five per cent (5%) of the whole.

o. The term "labeling" includes all labels, or tags, and other written, printed, or graphic representations, in any form whatsoever, accompanying and pertaining to any seed whether in bulk or in containers, and includes invoices.

p. The term "advertisement" means all representations, other than those on the label, disseminated in any manner or by any means, relating to seed within the scope of this article.

q. The term "processing" means cleaning, scarifying, or blending to obtain uniform quality and other operations which would change the purity or germination of the seed and therefore require retesting to determine the quality of the seed, but does not include operations such as packaging, labeling, blending together of uniform lots of the same kind or variety without cleaning, or the preparation of a mixture without cleaning, any of which would not require retesting to determine the quality of the seed.

r. The terms "certified seed," "registered seed" and "foundation seed" mean seed that has been produced and labeled in accordance with the procedure and in compliance with the rules and regulations of an officially recognized seed certifying agency or association of agencies which have previously been approved by the commissioner.

s. The term "hybrid seed corn" as applied to field corn, sweet corn, or pop corn means the first generation seed of a cross produced by controlling the pollination, and by combining two, three or four inbred lines, or by combining one inbred line or a single cross with an open pollinated variety: Provided the board of agriculture may in its discretion and upon recommendation of the director of the agricultural experiment station, based upon results of the official variety tests, redefine "hybrid seed corn." Hybrid designations shall be treated as variety names.

t. The term "grower" shall mean any person who produces seed sold, offered, or exposed for sale directly as a landlord, tenant, sharecropper, or lessee.

u. The term "dealer" shall mean any person not classified as a "grower"; buying, selling or offering for sale any seed for seeding purposes, and shall include any person who has seed grown under contract for resale for seeding purposes.

v. The term "North Carolina seed analysis tag" shall mean the tag designed and prescribed by the commissioner as the official North Carolina seed analysis tag, said tag to be purchased from the commissioner.

w. The term "non-coded" shall mean that the pedigree of the hybrid shall show the same designation for the hybrid as that originally assigned by the person developing the hybrid at the time it is first put in official test, production, or sale and each inbred line used in producing the hybrid shall show the same designation as that used when it was first used in a hybrid which was put into official test, production, or sale. (1941, c. 114, s. 3; 1943, c. 203, s. 1; 1945, c. 828; 1949, c. 725.)

§ 106-281. Tag and label requirements.—Each container of agricultural or vegetable seed, sold, offered for sale, or exposed for sale within this state for seeding purposes, shall have attached thereto a North Carolina seed analysis tag or label on which is plainly written or printed the following information:

a. For agricultural seeds:

(1) Commonly accepted name of kind and variety of each agricultural seed component in excess of five per cent (5%) of the whole and the percentage by weight of each, in the order of its predominance.

(a) Where more than one component is required to be named, the word "mixture" or "mixed" shall be included in the name on the label.

(b) Hybrid seed corn shall be labeled with the name and/or number by which the hybrid is commonly designated.

(2) Lot number or other identification.

(3) Origin, if known; if unknown, so stated.

(4) Percentage by weight of inert matter.

(5) Percentage by weight of other crop seeds.

(6) Percentage by weight of all weed seeds.

(7) The name and number per pound of each kind of "restricted" noxious weed seeds.

(8) For each named agricultural seed the:

(a) Percentage of germination exclusive of hard seeds.

(b) Percentage of hard seeds, if present.

(c) Calendar month and year the test was completed to determine such percentages.

(9) Name and address of the person who labeled said seed or who sells, offers, or exposes said seed for sale within this state.

b. For vegetable seeds:

(1) Name of kind and variety of seed.

(2) Origin of snap beans; if unknown so stated.

(3) Per cent of germination with month and year of test.

(4) For seeds which germinate less than the standards last established by the commissioner and board of agriculture under this article the following information shall be shown on the label:

(a) The words "BELOW STANDARD" in not less than eight-point type.

(b) Percentage of germination exclusive of hard seed.

(c) Percentage of hard seed, if present.

(d) The month and year of test.

(5) The name and address of person who labeled said seed or who sells, offers, or exposes said seed for sale.

c. Exemptions:

(1) The label requirements for peanuts, cotton and tobacco seed shall be limited to:

(a) Lot number or other identification.

(b) Origin, if known; if unknown, so stated.

(c) Commonly accepted name of kind and variety.

(d) Percentage of germination with month and year of test.

(e) Name and address of person who labeled said seed or who sells, offers, or exposes said seed for sale.

(2) The label requirement as to the "origin" of snap beans shall not apply to seed in containers weighing less than ten (10) pounds.

(3) The label requirement as to the "germination" of vegetable seeds, when equal to or exceeding the standards last adopted by the commissioner and board of agriculture under this article, shall not apply to seed in containers weighing less than ten (10) pounds.

(4) When the required analysis and other information regarding the seed is present on a seedsman's label or tag, accompanied by the North Carolina seed analysis tag on which is written, stamped or printed the words "See Attached Tag for Seed Analysis," the provisions of this section shall be deemed to have been complied with.

(5) No tag or label shall be required, unless requested, on seeds sold directly to, and in the presence of, the purchaser and taken from a bag or container properly labeled in accordance with the provisions of this section.

(6) The official tag or label of the North Carolina Crop Improvement Association shall be considered an "official North Carolina seed analysis tag" when it provides information in compliance with this section, and when attached to containers of seed duly certified by the said association, and when fees applicable to said tag have been paid to the commissioner.

(7) No person shall be subject to the penalties of this article for having sold, offered, or exposed for sale in this state any agricultural or vegetable seeds which were incorrectly labeled or represented as to origin, kind and variety, when such seeds cannot be identified by examination thereof, unless he has failed to obtain an invoice or grower's declaration giving origin, kind and variety, and to take such other precautions as may be necessary to insure the identity to be that stated. (1941, c. 114, s. 4; 1943, c. 203, s. 2; 1945, c. 828; 1949, c. 725.)

§ 106-282. Invoices and records.—Each person handling agricultural seed subject to this article shall keep for a period of two years complete records of each lot of agricultural and vegetable seed handled. When there is evidence of a violation of this article, invoices, records of purchases and sales, and any other records pertaining to the lot or lots involved shall be accessible for inspection by the commissioner or his authorized agent in connection with the administration of this article at any time during customary business hours. (1945, c. 828; 1949, c. 725.)

§ 106-283. Prohibitions.—It shall be unlawful:

a. For any person within this state to sell, offer, or expose for sale any agricultural or vegetable seed for seeding purposes:

(1) Unless a license has been obtained in accordance with the provisions of this article.

(2) Unless the test to determine the percentage of germination shall have been completed within a nine-month period, exclusive of the calendar month in which the test was completed, prior to sale or exposure for sale or offering for sale or transportation.

(3) Not labeled in accordance with the provisions of § 106-281, or having a false or misleading label, or having seed analysis tags attached to the containers of seed bearing thereon a liability or non-warranty clause: Provided, that the provisions of § 106-281 shall not apply to seed being sold by a grower to a dealer, or to seed consigned to or in storage in a seed cleaning or processing establishment for cleaning or processing: Provided, further, that any labeling or other representation which may be made with respect to the unclean seed shall be subject to this article.

(4) Containing prohibited noxious weed seeds, subject to tolerances and method of determination prescribed in the rules and regulations under this article.

(5) Seed that have been treated with poisonous material unless the label on such seed is plainly marked in not less than eight-point type with the information that they have been "poison treated."

b. For any person within this state:

(1) To detach, substitute, imitate, alter, deface or destroy any label provided for in this article, or in the rules and regulations made and promulgated thereunder, or to alter or substitute seed in a manner that may defeat the purpose of this article.

(2) To disseminate any false or misleading advertisement concerning agricultural or vegetable seed in any manner or by any means.

(3) To hinder or obstruct in any way a duly authorized person in the performance of his duties under this article.

(4) To fail to comply with a written order of the commissioner or his authorized agent to withdraw from sale, or to move, or allow to be moved without written permission of the commissioner or his authorized agent, any seed ordered removed from sale not complying with the requirements of this article.

(5) To sell, offer, or expose for sale any seed labeled "foundation seed," "registered seed," or "certified seed" unless it has been produced and labeled in compliance with the rules and regulations of a seed-certifying agency approved by the commissioner.

(6) To sell, offer, or expose for sale any hybrid seed corn that has not been recorded annually with the commissioner, giving the true, noncoded pedigree of the hybrid and the name of the person who developed each inbred line involved in the cross. (1941, c. 114, s. 5; 1943, c. 203, s. 3; 1945, c. 828; 1949, c. 725.)

§ 106-284. Disclaimers and nonwarranties.—The use of a disclaimer or nonwarranty clause in any invoice, advertising, labeling, or written, printed, or graphic matter, pertaining to any seed shall not constitute a defense, or be used as a defense in any way, in any prosecution, or in any proceeding for confiscation of seeds, brought under the provisions of this article, or the rules and regulations made and promulgated thereunder. (1945, c. 828; 1949, c. 725.)

§ 106-284.1. Administration.—For the purpose of carrying out the provisions of this article, it shall be the duty of the commissioner or his authorized agents and they are hereby authorized:

A. To sample, inspect, make analysis of, and test agricultural and vegetable seeds transported,

sold, offered, or exposed for sale within this state for seeding purposes, at such time and place and to such extent as he may deem necessary to determine whether said agricultural or vegetable seeds are in compliance with the provisions of this article and the rules and regulations made and promulgated thereunder, and to notify promptly the person who transported, sold, or offered or exposed seed for sale, of any violation.

B. The commissioner of agriculture jointly with the board of agriculture, after public hearing immediately following ten (10) days' public notice may adopt such rules, regulations and standards which they may find to be advisable or necessary to carry out and enforce the purposes and provisions of this article, which shall have the full force and effect of law. The commissioner and board of agriculture shall adopt rules, regulations and standards as follows:

(1) Prescribing the methods of sampling, inspecting, analyzing, testing and examining agricultural and vegetable seed, and determining the tolerances to be followed in the administration of this article.

(2) Declaring a list of prohibited and restricted noxious weeds, conforming with the definitions stated in this article, and to add to or subtract therefrom, from time to time, after a public hearing following due public notice.

(3) Declaring the maximum percentage of total weed seed content permitted in agricultural seed.

(4) Declaring the maximum number of "restricted" noxious weed seeds per pound of agricultural seed permitted to be sold, offered or exposed for sale, and to define "low grade seed."

(5) Declaring the minimum percentage of germination permitted sale for "agricultural seeds."

(6) Declaring "germination standards" for vegetable seeds.

(7) Declaring "North Carolina grade standards" for agricultural seed.

(8) Prescribing the form and use of tags to be used in labeling seed.

(9) Prescribing standards for moisture content of seeds.

(10) Prescribing such other rules and regulations as may be necessary to secure the efficient enforcement of this article.

C. To enter upon any public or private premises during business hours in order to have access to seeds and to obtain such information and records as may be deemed necessary to enforce the provisions of this article and the rules and regulations promulgated thereunder.

D. To issue and enforce a written or printed "stop-sale" order to the owner or custodian of any lot of agricultural or vegetable seed which the commissioner or his authorized agent finds in violation of any of the provisions of this article or the rules and regulations made and promulgated thereunder, which order shall prohibit further sale or movement of such seed until such officer has evidence that the law has been complied with, or the seed otherwise legally disposed of, and a written release has been issued to the owner or custodian of said seed. However, any person repeatedly violating the labeling requirements of the law shall be subject to a penalty covering all costs and expenses incurred in connection with the withdrawal from sale and the release of said seed: Provided, that in respect to seeds which have been denied sale as provided in this paragraph, the owner or custodian of such seed shall have the right to appeal from such order to a court of competent jurisdiction in the locality in which the seeds are found, praying for a judgment as to the justification of said order and for the discharge of such seed from the order prohibiting the sale in accordance with the findings of the court: And provided, further, that the provisions of this paragraph shall not be construed as limiting the right of the enforcement officer to proceed as authorized by other sections of this article.

E. To revoke any seed license or to refuse to issue a seed license to any person after such person has been given a hearing by the commissioner, notice of which hearing shall be given by registered mail at least ten (10) days before the date of such hearing, upon the commissioner of agriculture finding that such person has violated any of the provisions of this article or any rule or regulation adopted pursuant thereto: Provided, however, if the license of such person is revoked or refused he may appeal to the superior court within ten (10) days after the revocation or refusal of such license. Notice of such appeal shall be given to the commissioner within said ten (10) days whose duty shall be to immediately cause a transcript of the evidence and pertinent documents of the proceedings to be filed with the clerk of the superior court for Wake county, and the hearing in the superior court shall be before the presiding judge and the cause may not be heard de novo but upon the record filed with the clerk by the commissioner of agriculture.

F. To establish and maintain a "state seed laboratory" with adequate facilities and qualified personnel for such inspection, sampling and testing as may be necessary for the efficient enforcement of this article.

G. To make or provide for making purity and germination tests of seeds, upon request, for farmers or seedmen, and to prescribe rules and regulations governing such testing.

H. To accept for purposes of recording annually the hybrid seed corn which has been tested or approved the previous year in the official variety tests of the North Carolina Agricultural Experiment station in the section or sections of the state where it is to be offered for sale. The commissioner, by and with the advice of the director of the North Carolina Agricultural Experiment Station, shall refuse to accept for recording any hybrid corn seed which has been shown to be inferior, or which has not been tested, or is mislabeled with respect to genetic identity or has not been approved by the North Carolina Agricultural Experiment Station from the results of the official variety tests.

I. To publish or cause to be published at intervals information covering the findings of the state seed laboratory.

J. To cooperate with the United States department of agriculture in seed law enforcement. (1941, c. 114, s. 6; 1943, c. 203, s. 4; 1945, c. 828; 1949, c. 725.)

§ 106-284.2. Seizure.—If the commissioner of agriculture has reason to believe that any agricultural or vegetable seeds fail to comply with the provisions of this article, he may apply for a writ

of seizure to any court of competent jurisdiction in the county in which such seed is located. If the trial judge finds, after having heard the contentions of both the commissioner and the person claiming title to such seed, that such seed does not meet the requirements of this article or rules and regulations adopted pursuant thereto, he may order the condemnation of such seed and require it to be disposed of in any manner consistent with the quality of the seed and the laws of the state. (1945, c. 828; 1949, c. 725.)

§ 106-284.3. Funds for expenses; licensing; seed analysis tags; inspection stamps.—For the purpose of providing a fund to defray the expenses of the inspection, examination, analysis of seeds and enforcement of the provisions of this article:

A. Each seed dealer selling, offering, or exposing for sale in this state, any agricultural or vegetable seed for seeding purposes, shall purchase from the commissioner for two cents each, official North Carolina seed analysis tags and shall attach a tag to each container holding ten pounds or more of seed.

B. Each seed dealer selling, offering, or exposing for sale in, or exporting from, this state, any agricultural or vegetable seeds, other than packet or package seeds, for seeding purposes, shall register with the commissioner his name and shall obtain a license annually on January 1st of each year, and shall pay for such license as follows:

(1) Twenty-five dollars ($25.00), if a wholesaler, or a wholesaler and retailer.

(2) Ten dollars ($10.00), if a retailer with sale in excess of one hundred dollars ($100.00), for the calendar year. Each branch of any wholesaler or retailer shall be required to obtain a retail license.

(3) One dollar ($1.00), if a retailer at a permanent location with sales not in excess of one hundred dollars ($100.00): Provided, that if and when the seed sales for the calendar year shall exceed one hundred dollars ($100.00), application must be made for a ten dollar ($10.00) license, credit to be given for the one dollar ($1.00) license previously secured.

C. A one dollar ($1.00) inspection stamp shall be purchased from the commissioner for each seventy-two (72) dozen packets or packages of vegetable or flower seeds, or fraction thereof. The said stamp shall be secured by the producer, grower, jobber or other person, firm or corporation shipping such seed into the state before shipment to agent or retailer, and shall be furnished to said agent or retailer for attachment to display case: Provided, also, that any producer, grower, jobber or other person, firm, or corporation, residing within this state shall secure said stamp before furnishing any such seed to any agent or retailer within the state for resale. The said agent or retailer is made responsible for obtaining said stamp which shall be attached to the display case before the seed are offered or exposed for sale, and shall expire at the end of the calendar year for which issued: Provided, further that in cases where package seed of one kind or variety are offered or exposed for sale in boxes or display cases not in excess of six (6) dozen packages, a ten cent (10c) stamp shall be purchased from the commissioner and attached to said box or display case.

D. No owner or operator of any harvester or threshing machine operating on a share basis and selling only the seed obtained in this manner shall come under the provisions of this section. (1941, c. 114, s. 7; 1945, c. 828; 1947, c. 928; 1949, c. 725.)

Editor's Note.—The 1947 amendment increased the price of tags from one cent to two cents each.

§ 106-284.4. Violations and prosecutions.—Any person, firm or corporation violating any provision of this article or any rule or regulation adopted pursuant thereto shall be guilty of a misdemeanor and upon conviction thereof shall pay a fine of not more than five hundred dollars ($500.00) or be imprisoned for not more than six (6) months, or both.

When the commissioner of agriculture finds that this article or the rules and regulations thereunder have been violated, as shown by tests, examination or analysis, he shall give notice to the person charged with violating this article, designating a time and place for a hearing. The person involved shall have the right to introduce evidence either in person or by agent or attorney. If after said hearing, or without a hearing in case said person fails or refuses to appear, the commissioner decides that the evidence warrants prosecution, he, or his duly authorized agent or agents, may institute proceedings in a court of competent jurisdiction against such person. The sworn statement of the analyst shall be admitted as evidence in any court of this state in any proceeding instituted under this article, but upon motion of the accused, such analyst shall be required to appear as a witness and be subject to cross-examination.

When the provisions of this article have been fully complied with regarding any seeds which have been withdrawn from sale or have been ordered by the commissioner to be disposed of for other than seeding purposes, the commissioner, in his discretion, in writing may release the same for sale upon the payment of all costs and expenses incurred by the department of agriculture in any proceeding connected with such withdrawal. (1941, c. 114, s. 8; 1945, c. 828; 1949, c. 725.)

Art. 31A. Seed Potato Law.

§ 106-284.5. Title.—This article shall be known as the Seed Potato Law. (1947, c. 467, s. 1.)

§ 106-284.6. Purposes; definitions and standards.—In order to improve farming in North Carolina and to enable potato growers to secure higher quality Irish potatoes and sweet potatoes and parts thereof for the purpose of propagation, and in order to prevent the spread of diseases affecting the future stability of the potato industry and the general welfare of the public, the following definitions and standards are hereby adopted:

"Certified" sweet potatoes and Irish potatoes and parts thereof for propagation uses shall mean sweet potatoes and Irish potatoes and parts thereof which conform to the standards adopted by the state board of agriculture, which shall conform to the standards fixed by the International Crop Improvement Association in classifying and determining what shall constitute "certified" potatoes for propagation uses.

"U. S. No. 1" Irish potatoes and/or sweet potatoes when the same are intended to be used for propagation purposes shall mean Irish and/or sweet potatoes which conform to the standards issued by the United States department of agri-

culture for "U. S. No. 1" potatoes when the same are intended to be used for propagation purposes. (1947, c. 467, s. 2.)

§ 106-284.7. Unlawful to sell seed potatoes not conforming to standards; rules and regulations.—It shall be unlawful for any person, firm or corporation to pack for sale, offer or expose for sale, or ship into this state for such purposes, or sell, any Irish potatoes, sweet potatoes or parts thereof intended for propagation purposes, which do not conform to the standards of "certified" and "U. S. No. 1" potatoes set out in § 106-284.6.

The state board of agriculture is hereby authorized to make such reasonable rules and regulations as may be necessary to carry out the purposes of this article. (1947, c. 467, s. 3.)

§ 106-284.8. Employment of inspectors; prohibiting sale.—The board of agriculture is authorized to employ qualified inspectors to assist in the enforcement of laws and regulations affecting the distribution and sale of Irish potatoes and sweet potatoes and parts thereof intended for propagation purposes, and may prohibit the sale for propagation purposes of such potatoes which fail to meet the standards set out in § 106-284.6, and which have not been produced and labeled in accordance with the provisions of this article or rules and regulations adopted pursuant thereto. (1947, c. 467, s. 4.)

§ 106-284.9. Inspection; interference with inspectors; "stop sale" orders.—To effectively enforce the provisions of this article, the commissioner of agriculture shall require the inspectors to inspect Irish and sweet potatoes and parts thereof shipped into, possessed, sold or offered for sale within this state for the purpose of propagation, and may enter any place of business, warehouse, common carrier or other place where such potatoes are stored or being held, for the purpose of making such inspection; and it shall be unlawful for any person, firm or corporation in custody of such potatoes or of the place in which the same are held to interfere with the commissioner or his duly authorized agents in making such inspections. When the commissioner or his authorized inspectors find potatoes or parts thereof held, offered or exposed for sale in violation of any of the provisions of this article or any rule or regulation adopted pursuant thereto, he may issue a written or printed "stop sale" order to the owner or custodian of any such potatoes and it shall be unlawful for anyone, after receipt of such "stop sale" order, to sell for propagation purposes any potatoes with respect to which such order has been issued. Such "stop sale" order shall not prevent the sale of any such potatoes for other than propagation purposes. (1947, c. 467, s. 5.)

§ 106-284.10. Authority to permit sale of substandard potatoes.—Notwithstanding any other provisions of this article, the state board of agriculture is authorized and directed when the public necessity, welfare, economy, or any emergency situation requires it, to permit for such periods of time as, in its discretion, may seem necessary, the sale for propagation purposes of potatoes which do not meet the standards set out in § 106-284.6, but which do meet such other lower standards as the board of agriculture may describe. (1947, c. 467, s. 6.)

§ 106-284.11. Sale of potatoes by grower to planter with personal knowledge of growing conditions.—Nothing in this article shall prohibit the sale, for propagation purposes in this state, of Irish or sweet potatoes or parts thereof grown within this state when sold by the grower thereof to a planter having personal knowledge of the conditions under which such potatoes were grown. (1947, c. 467, s. 7.)

§ 106-284.12. Violation a misdemeanor; notice to persons violating article; opportunity of hearing; duties of solicitors.—Any person, firm or corporation violating any of the provisions of this article or any rule or regulation promulgated pursuant thereto shall be guilty of a misdemeanor and punished by fine or imprisonment, or both, in the discretion of the court. Whenever the commissioner of agriculture becomes cognizant of any violation of the provisions of this article he shall immediately notify in writing the person, firm or corporation if same be known. Any party so notified shall be given an opportunity to be heard under such rules and regulations as may be prescribed by the commissioner and the board of agriculture. If it appears that any of the provisions of this article have been violated, the commissioner of agriculture shall certify the facts to the solicitor in the district in which the inspection was made, and furnish that officer with a copy of the results of the inspection of such Irish potatoes, sweet potatoes, or parts thereof duly authenticated by the inspector making such inspection, under the oath of such inspector. It shall be the duty of the several solicitors of the superior courts of the state and the solicitors of inferior courts to prosecute any case involving the violation of the provisions of this article when requested to do so by the commissioner of agriculture. (1947, c. 467, s. 8.)

§ 106-284.13. Article 30 not repealed.—Nothing in this article shall be construed as repealing article 30 of chapter 106 of the General Statutes, but all other laws and clauses of laws in conflict with the provisions of this article are repealed to the extent of such conflict. (1947, c. 467, s. 9.)

Art. 34. Animal Diseases.

Part 1. Quarantine and Miscellaneous Provisions.

§ 106-307.1. Serums, vaccines, etc., for control of animal diseases.

Editor's Note.—For comment on this and the five following sections, see 21 N. C. Law Rev. 323.

§ 106-307.4. Livestock brought into state.

Validity of Regulations.—Regulations relating to the importation of cattle, promulgated under authority of this section for the purpose of control of brucellosis or Bang's disease, if reasonable in their scope and incidence and not in conflict with federal regulations or statutes already preempting the field, are constitutional and valid. State v. Lovelace, 228 N. C. 186, 45 S. E. (2d) 48.

A provision in the regulations promulgated under authority of this section, limiting the exception to the requirement of a health certificate for imported cattle solely to those consigned to a slaughterhouse, is reasonable and valid. Id.

§ 106-307.6. Violation made misdemeanor.

Applied in State v. Lovelace, 228 N. C. 186, 45 S. E. (2d) 48.

Part 7. Rabies.

§ 106-364. Definitions.—The following definitions shall apply to §§ 106-364 to 106-387:

(a) The term "dog" shall mean dogs of any sex.

(b) The term "vaccination" shall be understood to mean the administration of anti-rabic vaccine approved by the department of agriculture, and the United States bureau of animal industry, non-virulent and potent as shown by the required tests of the United States bureau of animal industry. (1935, c. 122, s. 1; 1949, c. 645, s. 1.)

Editor's Note.—The 1949 amendment made changes in subsection (b).

§ 106-367. Time of vaccination.—The vaccination of all dogs in the counties shall begin annually on April first and shall be completed within ninety (90) days from the date of beginning the vaccination in the several counties: Provided, however, that the county health officer, in those counties having health officers, and the county commissioners, in those counties which do not have health officers, may require the vaccination of all dogs within any area of said county when such vaccination is deemed necessary for the control of rabies. (1935, c. 122, s. 4; 1949, c. 645, s. 2.)

Editor's Note.—The 1949 amendment added the proviso.

§ 106-371. Canvass of dogs not wearing metal tags; notice to owners to have dogs vaccinated; killing of ownerless dogs.

Local Modification.—Forsyth: 1949, c. 622, s. 2; Guilford: 1949, c. 462, § 1.

§ 106-372. Fee for vaccination; dog tax credit; penalty for late vaccination.—The rabies inspector shall collect from the owner of each dog vaccinated as provided for in § 106-368, not more than one dollar ($1.00), to be fixed by the board of county commissioners for each dog, the same to be credited on the dog tax when certificate of vaccination is presented to the sheriff or tax collector of said county. Any owner who fails to have his dog vaccinated at the time the rabies inspector is in the township in which the owner resides as provided in § 106-368, shall have said dog vaccinated in accordance with § 106-371 and shall pay the rabies inspector the additional sum of twenty-five cents to be retained by him for each dog treated: Provided, that in cases where dogs are vaccinated in accordance with § 106-371, the total charge for such treatment shall not exceed one dollar ($1.00) to be fixed by the board of county commissioners, only fifty cents of which shall be credited on such dog tax. (1935, c. 122, s. 9; 1941, c. 259, s. 7; 1949, c. 645, s. 5.)

Local Modification.—Guilford: 1949, c. 462, s. 2.

Session Laws 1949, cc. 529, 1226, struck out the words "Edgecombe" and "Nash" in Public Laws 1941, c. 259, s. 7, so as to make this section applicable to such counties.

Editor's Note.—The 1949 amendment struck out the words "seventy-five cents" and inserted in lieu thereof the words and figures "one dollar ($1.00), to be fixed by the board of county commissioners."

§ 106-372.1. Rabies inspector to collect dog tax; fee for vaccination.—The rabies inspector shall collect from the owner of each dog vaccinated as provided in § 106-368, the full amount of the tax imposed by § 67-5. The rabies inspector shall be furnished with forms of receipt books to be used in collecting such dog taxes and, at the time same is collected, shall send carbon copies thereof to the county auditor and to the sheriff or tax collector of the county and on the said receipt books shall be kept stubs provided for such purpose, the name of the taxpayer, the amount paid, and the date of collection. The rabies inspector shall, by the end of each month in which said taxes are collected, pay over to the sheriff or tax collector of the county the amount of dog taxes collected by him after deducting therefrom for his services in vaccinating such dogs, seventy-five (75c) for each dog vaccinated and five cents (5c) for each dog vaccinated for his service in making such reports. The sheriff or tax collector of the county shall give the taxpayer credit on the tax books for the full amount of the tax so paid by the taxpayer: Provided, in cases where the dogs are vaccinated in accordance with § 106-371, the rabies inspector shall collect from the owner of the dog twenty-five cents (25c) additional for each dog vaccinated, which additional amount shall be retained by the inspector.

This section shall be in full force and effect in lieu of the provisions of § 106-372 in those counties in the state in which the boards of county commissioners shall, on or before the first day of July in any year, accept the provisions hereof as applicable to that county by resolution duly adopted and spread upon the minutes of the board, and thereafter the provisions of § 106-372 shall not be applicable to that county. Upon adoption of this provision, it shall be applicable for the year beginning January first thereafter, and shall thereafter remain in full force and effect.

The sheriff or tax collector of any county shall be, notwithstanding the provisions of this section, fully authorized and empowered to collect any taxes due by the taxpayer which have not been collected in the manner above provided. The boards of county commissioners are authorized to pay the premiums on the bonds required of rabies inspectors for the forthcoming of the dog taxes collected under the authority of this section, provided, that this section shall not apply to Bladen, Pender, Alamance, Madison, Cabarrus, Durham, Burke, Wilkes, Ashe, Stokes, Surry, Scotland, Robeson, Sampson, Rowan, Stanly, Anson, Pitt, Iredell, Catawba and Rutherford counties. (1945, c. 571.)

§ 106-373. Vaccination of dogs after annual vaccination period.—It shall be the duty of the owner of any dog born after the annual vaccination of dogs in his county or any dog that was not six months old at the time of said annual vaccination to take the same when six months old to a rabies inspector for the purpose of having same vaccinated. The fee charged in such cases by the rabies inspector shall not exceed one dollar ($1.00) per animal, to be fixed by the board of county commissioners. (1935, c. 122, s. 10, c. 344; 1941, c. 259, s. 8; 1949, c. 645, s. 6.)

Local Modification.—Session Laws 1949, cc. 529, 1226, struck out the words "Edgecombe" and "Nash" in Public Laws 1941, c. 259, s. 8, so as to make this section applicable to such counties.

Editor's Note.—The 1949 amendment struck out of the second sentence the words "seventy-five cents per animal" and inserted in lieu thereof the words and figures "one dollar ($1.00) per animal, to be fixed by the board of county commissioners."

§ 106-375. Quarantine of districts infected with rabies.—The county health officer, and in those counties where health officers are not employed, the board of county commissioners, may declare quarantine against rabies in any designated district when in its judgment this disease exists to the extent that the lives of persons are endan-

gered and all dogs in said district shall be confined on the premises of the owner or in a veterinary hospital: Provided, a dog may be permitted to leave the premises of the owner if on leash or under the control of its owner or other responsible person. (1935, c. 122, s. 12; 1941, c. 259, s. 9; 1949, c. 645, s. 3.)

Editor's Note.—The 1949 amendment inserted the words "and in those counties where health officers are not employed, the board of county commissioners."

§ 106-383. Regulation of content of vaccine; doses.—Rabies vaccine intended for use on dogs and other animals shall not be shipped or otherwise brought into North Carolina, used, sold or offered for sale unless said rabies vaccine shall be approved by the United States bureau of animal industry and be non-virulent and potent as shown by the required tests of the United States bureau of animal industry. Said rabies vaccine shall be recommended in doses of not less than five (5) c. c. each for dogs and other small animals; relatively larger doses being recommended for larger animals. (1935, c. 122, s. 20; 1949, c. 645, s. 4.)

Editor's Note.—The 1949 amendment struck out the words "contain not less than twenty per cent (20%) of fixed virus material" and inserted in lieu thereof the words "be approved by the United States bureau of animal industry."

Part 8. Bang's Disease.

§ 106-389. "Bang's disease" defined; co-operation with the federal department of agriculture.—Bang's disease shall mean the disease wherein an animal is infected with the Bang's bacillus, irrespective of the occurrence or absence of an abortion. An animal shall be declared infected with Bang's disease if it reacts to a serological test, or, if the Bang's bacillus has been found in the body or its secretions or discharges. The state veterinarian is hereby authorized and empowered to set up a program for the vaccination of calves between the ages of four and eight months, and older cattle, with strain nineteen Brucella vaccine in accordance with the recommendations of the United States bureau of animal industry. Such vaccination shall be done under rules and regulations promulgated by the department of agriculture. The committee of agriculture may permit the sale of valuable animals that have reacted to an official Bang's test or are suspicious to same, provided such animals go direct to infected herds that have been vaccinated with strain nineteen Brucella vaccine, as provided for in this section, and are held under quarantine in accordance with the law and regulations covering. Such vaccinated animals shall be permanently identified by tattooing or other methods approved by the committee of agriculture and no indemnity shall be paid on any such vaccinated animal. It shall be the duty of the state veterinarian to test all animals vaccinated with strain nineteen Brucella vaccine twelve months after the date of vaccination and regularly thereafter. All such vaccinated animals that show a positive reaction to an official Bang's test eighteen months or more after vaccination shall be considered as affected with Bang's disease and shall be branded with the letter "B" in accordance with the law covering. It shall be unlawful to sell, offer for sale, distribute or use strain nineteen Brucella vaccine or any other product containing living Bang's organisms, except as provided for in this section.

The control and eradication of Bang's disease in the herds of the state shall be conducted as far as funds of the department of agriculture will permit, and in accordance with the rules and regulations made by the said department. Said department of agriculture is hereby authorized to co-operate with the United States department of agriculture in the control and eradication of Bang's disease. (1937, c. 175, s. 2; 1945, c. 462, s. 1.)

Editor's Note.—The 1945 amendment omitted the words "or if it has been treated with a live culture of the Bang bacillus," formerly appearing at the end of the second sentence, and inserted the part of the first paragraph beginning with the third sentence.

§ 106-390. Blood samples; diseased animals to be branded and quarantined; sale, etc.—All blood samples for a Bang's disease test shall be drawn by a qualified veterinarian whose duty it shall be to brand all animals affected with Bang's disease with the letter "B" on the left hip or jaw, not less than three or more than four inches high, and to tag such animals with an approved cattle ear tag and to report same to the state veterinarian. Cattle affected with Bang's disease shall be quarantined on the owner's premises. No animal affected with Bang's disease shall be sold, traded or otherwise disposed of except for immediate slaughter, and it shall be the duty of the person disposing of such infected animals to see that they are promptly slaughtered and a written report of same is made to the state veterinarian. All dairy and breeding cattle over six months of age offered or sold at public sale, except for immediate slaughter, shall be negative to a Bang's test made within thirty days prior to sale and approved by the state veterinarian. (1937, c. 175, s. 3; 1945, c. 462, s. 2.)

Editor's Note.—The 1945 amendment added the last sentence. The amendatory act directed that the sentence be added to § 106-389 but it seems clear that this section was intended.

Art. 35. Public Livestock Markets.

§ 106-406. Permits for public livestock markets; restraining order for certain violations.

Cited in State v. Lovelace, 228 N. C. 186, 45 S. E. (2d) 48.

§ 106-408. Marketing facilities prescribed; time of sales; records of purchases and sales.

The sales of all livestock at livestock auction markets shall start promptly at 1:00 P. M. on each sales day and the selling of livestock shall be continuous until all livestock is sold. (1941, c. 263, s. 3; 1949, c. 997, s. 1.)

Editor's Note.—The 1949 amendment added the above paragraph at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

§ 106-409. Health certificates for cattle removed for nonslaughter purposes; identification; information form; bill of sale.—No cattle except those for immediate slaughter shall be removed from any public livestock market unless they are accompanied by a health certificate issued by a qualified veterinarian, said veterinarian to be approved or provided by the commissioner of agriculture, showing that such animals are apparently healthy and come directly from a herd all of which animals in the herd have passed a negative test for Bang's disease within twelve months prior to the date of sale, or that said animal or animals have passed a satisfactory test for Bang's disease

made within thirty days prior to sale and such other tests and vaccinations as the commissioner of agriculture may require.

(1949, c. 997, s. 2.)

Editor's Note.—The 1949 amendment inserted the words "or provided" in line six of the first sentence. As only this sentence was changed the rest of the section is not set out.

§ 106-410. Health certificates for swine removed for nonslaughter purposes; identification; information form; bill of sale.—No swine, except those for immediate slaughter, shall be removed from any public livestock market unless they are accompanied by a health certificate issued by a qualified veterinarian, said veterinarian to be approved or provided by the commissioner of agriculture, showing that such animals are apparently healthy and that they have received a proper dose of anti-hog cholera serum not more than twenty-one days or a proper dose of serum and virus not less than thirty days prior to the date of sale, and such other vaccinations as may be required by the commissioner of agriculture. All such swine shall be identified by an approved, numbered ear tag and descriptions which shall be entered on the health certificate. A copy of said certificate shall be kept on file by the market. All swine removed from any public livestock market for immediate slaughter shall be identified by a distinguishing paint mark or by other methods approved by the commissioner of agriculture and the person removing same shall sign a form in duplicate showing number of hogs, their description, where same are to be slaughtered or resold for slaughter. Said swine shall be resold only to a recognized slaughter plant or the agent of same, or to a person, firm or corporation that handles swine for immediate slaughter only and said swine shall be used for immediate slaughter only. No market operator shall allow the removal of any swine from a market in violation of this section.

Provided, however, that the commissioner of agriculture may permit swine to be shipped out of the state of North Carolina, without vaccination and under the same conditions as if said swine were being delivered for immediate slaughter, for immediate delivery to holding or feeding lots in any other state when he determines that said holding or feeding lots are being operated in compliance with the laws of said state and the rules and regulations promulgated thereunder. (1941, c. 263, s. 5; 1943, c. 724, s. 3; 1949, c. 997, ss. 3, 4.)

Editor's Note.—The 1949 amendment inserted the words "or provided" in line six of the first paragraph, and added the second paragraph.

§ 106-411. Regulation of use of livestock removed from market; swine shipped out of state.—Any person or persons who shall remove from a public livestock market any cattle, swine, or other livestock for immediate slaughter shall use them for immediate slaughter only or resale for slaughter in accordance with this article and the regulations issued in accordance with same. The owner of said animals shall be charged with the responsibility of having said animals slaughtered and shall be liable for all damages resulting from diverting them to other uses or failing to have them slaughtered, in addition to the criminal liability imposed in this article.

Provided this section shall not apply to swine shipped out of this state to holding or feeding lots as provided for in G. S. § 106-410. (1941, c. 263, s. 6; 1943, c. 724, s. 4; 1949, c. 997, s. 5.)

Editor's Note.—The 1949 amendment added the second paragraph.

§ 106-413. Sale, etc., of certain diseased animals prohibited; application of article; sales by farmers.

Editor's Note.—
The word "identication" in the tenth line of this section should read "identification."

§ 106-415. Fees for permits; term of permits; cost of tests, serums, etc.—The commissioner of agriculture is hereby authorized to collect a fee of one hundred dollars ($100.00) for each permit issued to a public livestock market under the provisions of this article. The fees provided for in this article shall be used exclusively for the enforcement of this article. All permits issued under the provisions of this article shall be effective until the following July first unless cancelled for cause. The cost of all tests, serums, vaccine, and other medical supplies necessary for the enforcement of this article and the protection of livestock against contagious and infectious diseases shall be paid for by the owner of said livestock and said cost shall constitute a lien against all of said animals. (1941, c. 263, s. 10; 1949, c. 997, s. 6.)

Editor's Note.—The 1949 amendment increased the fee from $25.00 to $100.00.

Art. 38. Marketing Cotton and Other Agricultural Commodities.

§ 106-451. Numbering of cotton bales by public ginneries; public gin defined.—Any person, firm or corporation operating any public cotton gin; that is, any cotton gin other than one ginning solely for the individual owner, owners, or operators thereof, shall hereafter be required to distinctly and clearly number, serially, each and every bale of cotton ginned, in one of the following ways: (1) attach a metal strip carrying the serial number to one of the ties of the bale and ahead of the tie lock, and so secure it that ordinary handling will not remove or disfigure the number; (2) impress the serial number upon one of the bands or ties around the bale. Any person, firm or corporation failing or refusing to comply with this section shall be guilty of a misdemeanor for each and every offense, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not more than thirty days.

Any person, firm or corporation buying a bale of cotton on which this number has: (1) been removed; (2) defaced by cutting; (3) or otherwise altered, unless a new metal strip is attached and impression made by the original gin ginning said bale or bales of cotton, shall be guilty of a misdemeanor for each and every offense and upon conviction shall be fined not exceeding fifty dollars ($50.00) or imprisoned not more than thirty (30) days.

Every public ginnery, as defined in the first paragraph of this section, shall keep a book in which shall be registered all cotton received at the gin to be ginned in the name of the owner of the cotton and the name of the person from whom the cotton is received for ginning. Any person giving false information for entry in this book shall be guilty of a misdemeanor. There shall be furnished by the ginner for each bale of cotton ginned, to the owner thereof, a gin ticket bearing the name

of the gin, the serial number of the bale prescribed by the first paragraph of this section, the weight of the bale and the name of the owner of the cotton. Such gin ticket shall be presented, for comparison with the serial number prescribed in the first paragraph of this section, at the time such bale is sold or offered for sale, as prima facie evidence of ownership thereof. (1923, c. 167; 1949, c. 824.)

Editor's Note.—The 1949 amendment deleted "(1) mark in color upon the bagging of the bale, in figures", formerly appearing in the first paragraph, and renumbered former (2) and (3) to be (1) and (2), respectively. It also added the second and third paragraphs.

§ 106-451.1. Purchasers of cotton to keep records of purchases.—Every cotton broker or other person buying cotton from the producer after it is ginned shall keep a record of such purchase for a period of one year from date of purchase. This record shall contain the name and address of the seller of the cotton, the date on which purchased, the weight or amount and the serial number of the bales provided for by § 106-451. Any person violating the provisions of this section shall be guilty of a misdemeanor and shall, upon conviction, be fined or imprisoned in the discretion of the court: Provided, any person, firm or corporation who purchases cotton which has been ginned outside this state shall be required to keep only so much of the records herein above specified as purchasers are required to keep by the law of the state where said cotton was ginned. (1945, c. 61; 1947, c. 977.)

Editor's Note.—The 1947 amendment added the proviso.

Art. 39. Leaf Tobacco Warehouses.

§ 106-452. Maximum warehouse charges.

Cited in Davies Warehouse Co. v. Bowles, 321 U. S. 144, 64 S. Ct. 474, 88 L. Ed. 635.

Art. 40. Leaf Tobacco Sales.

§ 106-461. Nested, shingled or overhung tobacco.

Editor's Note.—Session Laws 1945, c. 305, repealed Public Laws 1933, c. 467, sec. 5, which previously exempted Alamance, Person, Rockingham, Surry, Vance and Warren counties from the provisions of §§ 106-461 through 106-463. Therefore, the counties named are no longer exempted from the provisions of said sections.

Art. 45. Agricultural Societies and Fairs.

Part 1. State Fair.

§ 106-503.1. Board authorized to construct and finance facilities and improvements for fair.

1. Borrowing Money and Issuing Bonds.—For the purpose of building, enlarging and improving the facilities on the properties of the state fair, the state board of agriculture is hereby empowered and authorized to borrow a sum of money not to exceed one hundred thousand dollars ($100,000.00), and to issue revenue bonds therefor, payable in series at such time or times and bearing such rate of interest as may be fixed by the governor and council of state: Provided, that no part of the payments of the principal or interest charges on said loan shall be made out of the general revenue of the state of North Carolina, and the credit of the state of North Carolina and the state department of agriculture or the agricultural fund, other than the revenue of the state fair funds, shall not be pledged either directly or indirectly for the payment of said principal or interest charges. The receipts, funds, and any other state fair assets may be pledged as security for the payment of any bonds that may be issued.

2. Contracts and Leases; Pledge of Gate Receipts, etc.—For the further purpose of acquiring, constructing, operating and financing said properties and facilities for the North Carolina state fair, the board of agriculture may enter into such agreements, contracts and leases as may be necessary for the purpose of this section, and may pledge, appropriate, and pay such sums out of the gate receipts or other revenues coming to the state board of agriculture from the operation of any facilities of the state fair as may be required to secure, repay, or meet the principal and interest charges on the loan herein authorized.

3. Gifts and Endowments.—The state board of agriculture may receive gifts and endowments, whether real estate, moneys, goods or chattels, given or bestowed upon or conveyed to them for the benefit of the state fair, and the same shall be administered in accordance with the requirements of the donors. (1945, c. 1009.)

Part 2. County Societies.

§ 106-505. Incorporation; powers and term of existence.—Any number of resident persons, not less than ten, may associate together in any county, under written articles of association, subscribed by the members thereof, and specifying the object of the association to encourage and promote agriculture, domestic manufactures, and the mechanic arts, under such name and style as they may choose, subject to any other applicable provisions of law, and thereby become a body corporate with all the powers incident to such a body, and may take and hold such property, both real and personal, as may be needful to promote the objects of their association.

Whenever any such association is formed subsequent to April 1, 1949, a copy of the articles of incorporation shall be filed with the secretary of state, together with any other information the secretary of state may require. A fee of ten dollars ($10.00) shall be paid to the secretary of state when such articles are filed. Upon receipt of such articles in proper form, and such other information as may be required, and the filing fee, the secretary of state shall issue a charter of incorporation.

The corporate existence shall continue as long as there are ten members, during the will and pleasure of the general assembly. (Rev., ss. 3868, 3869; Code, s. 2220; R. C., c. 2, ss. 6, 7; 1852, c. 2, ss 1, 2, 3; 1949, c. 829, s. 2; C. S. 4941.)

Editor's Note. — The 1949 amendment inserted the words "subject to any other applicable provisions of law" in lines eight and nine of the first paragraph and struck out of said paragraph the words "not exceeding ten thousand dollars in value." The amendment also inserted the second paragraph.

§ 106-507. Exhibits exempt from state and county taxes.—Any society or association organized under the provisions of this chapter, desiring to be exempted from the payment of state, county, and city license taxes on its exhibits, shows, attractions, and amusements, shall each year, not later than sixty (60) days prior to the opening date of its fair, file an application with the commissioner

of revenue for a permit to operate without the payment of said tax; said application shall state the various types of exhibits and amusements for which the exemption is asked, and also the date and place they are to be exhibited. The commissioner of revenue shall immediately refer said application to the commissioner of agriculture for approval or rejection. If the application is approved by said commissioner of agriculture, the commissioner of revenue shall issue a permit to said society or association authorizing it to exhibit within its fair grounds and during the period of its fair, without the payment of any state, county, or city license tax, all exhibits, shows, attractions, and amusements as were approved. Provided, however, that the commissioner of revenue shall have the right to cancel said permit at any time upon the recommendation of said commissioner of agriculture. Any society or association failing to so obtain a permit from the commissioner of revenue or having its permit canceled shall pay the same state, county, and city license taxes as may be fixed by law for all other persons or corporations exhibiting for profit within the state shows, carnivals, or other attractions. (Rev., s. 3871; 1905, c. 513, s. 2; 1935, c. 371, s. 107; 1949, c. 829, s. 2; C. S. 4944.)

Editor's Note.—Prior to the 1949 amendment a committee exercised the authority now vested in the commissioner of agriculture.

§ 106-508. Funds to be used in paying premiums.—All moneys so subscribed, as well as that received from the state treasury as herein provided, shall after paying the necessary incidental expenses of such society, be annually paid for premiums awarded by such societies, in such sums and in such way and manner as they severally, under their by-laws, rules and regulations, shall direct, on such live animals, articles of production, and agricultural implements and tools, domestic manufactures, mechanical implements, tools and productions as are of the growth and manufacture of the county or region, and also such experiments, discoveries, or attainments in scientific or practical agriculture as are made within the county or region wherein such societies are respectively organized. (Rev., s. 3873; Code, s. 2223; R. C., c. 2, s. 9; 1852, c. 2, s. 7; 1949, c. 829, s. 2; C. S. 4945.)

Editor's Note.—The 1949 amendment inserted the words "or region" in lines twelve and fifteen.

Part 4. Supervision of Fairs.

§ 106-520.1. Definition.—As used in this article the word "fair" means a bona fide exhibition designed, arranged and operated to promote, encourage and improve agriculture, horticulture, livestock, poultry, dairy products, mechanical fabrics, domestic economy, and 4-H Club and Future Farmers of America activities, by offering premiums and awards for the best exhibits thereof or with respect thereto. (1949, c. 829, s. 1.)

§ 106-520.2. Use of "fair" in name of exhibition.—It shall be unlawful for any person, firm, corporation, association, club, or other group of persons to use the word "fair" in connection with any exhibition, circus, show, or other variety of exhibition unless such exhibition is a fair within the meaning of G. S. § 106-520.1. (1949, c. 829, s. 1.)

§ 106-520.3. Commissioner of agriculture to regulate.—The commissioner of agriculture, with the advice and approval of the state board of agriculture, is hereby authorized, empowered and directed to make rules and regulations with respect to classification, operation and licensing of fairs, so as to insure that such fairs shall conform to the definition set out in G. S. § 106-520.1, and shall best promote the purposes of fairs as set out in such definition. Every fair, and every exhibition using the word "fair" in its name, except fairs classified by the commissioner of agriculture as non-commercial community fairs, must comply with the standards, rules and regulations set up and promulgated by the commissioner of agriculture, and must secure a license from the commissioner of agriculture before such exhibition or fair is staged or operated. No license shall be issued for any such exhibition or fair unless it meets the standards and complies with the rules and regulations of the commissioner of agriculture with respect thereto. (1949, c. 829, s. 1.)

§ 106-520.4. Local supervision of fairs.—No county or regional fairs shall be licensed to be held unless such fair is operated under supervision of a local board of directors who shall employ appropriate managers, who shall be responsible for the conduct of such fair, and otherwise comply with the standards, rules and regulations promulgated by the commissioner of agriculture. The commissioner of agriculture, with the advice and approval of the state board of agriculture, shall make rules and regulations requiring county and regional fairs to emphasize agricultural, education, home and industrial exhibits by providing adequate premiums. (1949, c. 829, s. 1.)

§ 106-520.5. Reports.—Every fair shall make such reports to the commissioner of agriculture, as said commissioner may require. (1949, c. 829, s. 1.)

§ 106-520.6. Premiums and premium lists supplemented.—The state board of agriculture may supplement premiums and premium lists for county and regional fairs and the North Carolina state fair, and improve and expand the facilities for exhibits at the North Carolina state fair, at any time or times, out of any funds which may be available for such purposes. (1949, c. 829, s. 1.)

§ 106-520.7. Violations made misdemeanor.—Any person who violates any provision of G. S. § 106-520.1 through G. S. § 106-520.6 is guilty of a misdemeanor punishable by a fine or imprisonment in the discretion of the court. (1949, c. 829, s. 1.)

Art. 49. Poultry.

§ 106-539. National poultry improvement plan.—In order to promote the poultry industry of the state, the department of agriculture is hereby authorized to cooperate with the United States department of agriculure in the operation of the national poultry improvement plan. (1945, c. 616, s. 1.)

§ 106-540. Rules and regulations.—The state board of agriculture is hereby authorized to make such regulations as may be necessary, after public hearing following due public notice, to carry out the provisions of said national poultry improvement plan and to promulgate regulations setting up minimum standards for the operation of public hatcheries and to regulate chick dealers and job-

bers and to provide standards and to regulate the shipping into this state of baby chicks, turkey poults, and hatching eggs and for the control and eradication of contagious and infectious diseases of poultry. (1945, c. 616, s. 2.)

§ 106-541. Definitions.—For the purpose of this article, a public hatchery shall be defined as any establishment that artificially hatches and sells or offers for sale to the public baby chicks or the young of any domestic fowl under six weeks of age, or hatching eggs, or that does custom hatching. A chick dealer or jobber shall mean any person, firm or corporation that buys baby chicks or turkey poults and sells or offers same for sale. The terms "mixed chicks" or "assorted chicks" shall mean chicks of two or more distinct breeds. The term "crossbred chicks" shall mean chicks produced from eggs from purebred females of a distinct breed mated to a purebred male of distinct breed. (1945, c. 616, s. 3.)

§ 106-542. Hatcheries and chick dealers to obtain permit to operate.—No person, firm or corporation shall operate a public hatchery and no chick dealer or jobber shall operate within this state without first obtaining a permit from the department of agriculture to so operate. Said permit may be cancelled for violation of this article or the regulations promulgated thereunder Any person who is refused a permit or whose permit is revoked may appeal within thirty (30) days of such refusal or revocation to any court of competent jurisdiction. (1945, c. 616, s. 4.)

§ 106-543. Requirements of national poultry improvement plan must be met.—All baby chicks, turkey poults and hatching eggs sold or offered for sale shall originate in flocks that meet the requirements of the national poultry improvement plan as administered by the North Carolina department of agriculture and regulations issued by authority of this article for the control of pullorum disease: Provided, that nothing in this article shall require any hatchery to adopt the national poultry improvement plan. (1945, c. 616, s. 5.)

§ 106-544. Shipments from out of state.—All baby chicks, turkey poults and hatching eggs shipped or otherwise brought into this state shall originate in flocks that meet the minimum requirements of pullorum disease control provided for in this article and the regulations issued by authority of this article shall be accompanied by a certificate approved by the official state agency or the livestock sanitary officials of the state of origin, certifying same. (1945, c. 616, s. 6.)

§ 106-545. False advertising.—No public hatchery, chick dealer or jobber shall use false or misleading advertising in the sale of their products. (1945, c. 616, s. 7.)

§ 106-546. Notice describing grade of chicks to be posted.—All hatcheries, chick dealers and jobbers offering chicks for sale to the public shall post in a conspicuous manner in their place of business a poster furnished by the department of agriculture describing the grade of chicks approved by the department of agriculture. (1945, c. 616, s. 8.)

§ 106-547. Records to be kept.—Every public hatchery, chick dealer or jobber shall keep such records of operation as the regulations of the department of agriculture may require for the proper inspection of said hatchery, dealer or jobber. (1945, c. 616, s. 9.)

§ 106-548. Fees.—For the purpose of carrying out the provisions of this article and the regulations issued thereunder, the department of agriculture is authorized to collect annually from every public hatchery a fee not to exceed ten dollars ($10.00) where the egg capacity is not more than fifty thousand (50,000) eggs; twenty dollars ($20.00) where the egg capacity is fifty thousand and one (50,001) to one hundred thousand (100,000) eggs; and thirty dollars ($30.00) where the egg capacity is over one hundred thousand (100,000). Chick dealers and jobbers shall pay a fee of three dollars ($3.00) annually, said fees to be used for the enforcement of this article. The minimum fee for any flock tested shall be five dollars ($5.00) for one hundred birds or less and shall apply also to flocks that are dropped due to heavy infection or other causes. The fee for the first test shall be four cents (4c) per bird with a charge of two cents (2c) per bird for the second test and one cent (1c) per bird for all subsequent tests, during the same season. (1945, c. 616, s. 10.)

§ 106-549. Violation a misdemeanor.—Any person, firm or corporation who shall wilfully violate any provision of this article or any rule or regulation duly established by authority of this article shall be guilty of a misdemeanor. (1945, c. 616, s. 11.)

Art. 50. Promotion of Use and Sale of Agricultural Products.

§ 106-550. Policy as to promotion of use of, and markets for, farm products; tobacco and cotton excluded.—It is declared to be in the interest of the public welfare that the North Carolina farmers who are producers of agricultural products, including peanuts, potatoes, peaches, apples, berries, vegetables and other fruits of all kinds, as well as bulbs and flowers and other agricultural products having a domestic or foreign market, shall be permitted and encouraged to act jointly and in cooperation with handlers, dealers and processors of such products in promoting and stimulating, by advertising and other methods, the increased use and sale, domestic and foreign, of any and all of such agricultural commodities. The provisions of this article, however, shall not include the agricultural products of tobacco or cotton, with respect to which separate provisions and enactments have heretofore been made. (1947, c. 1018, s. 1.)

Editor's Note.—For comment on this article, suggesting its invalidity as an unlawful delegation of governmental power, see 25 N. C. Law Rev. 396.

§ 106-551. Federal Agricultural Marketing Act.—The passage by the Seventy-ninth Congress of a law designated as Public Law 733, and more particularly Title II of that act, cited as "Agricultural Marketing Act of 1946", makes it all the more important for producers, handlers, processors and others of specific agricultural commodities to associate themselves in action programs, separately and with public and private agencies, to obtain the greatest and most immediate benefits under the provisions of such law, in respect

to research, studies and problems of marketing, transportation and distribution. (1947, c. 1018, s. 2.)

§ 106-552. Associations, activity, etc., deemed not in restraint of trade.—No association, meeting or activity undertaken in pursuance of the provisions of this article and intended to benefit all of the producers, handlers and processors of a particular commodity shall be deemed or considered illegal or in restraint of trade. (1947, c. 1018, s. 3.)

§ 106-553. Policy as to referenda, assessments, etc., for promoting use and sale of farm products.—It is hereby further declared to be in the public interest and highly advantageous to the agricultural economy of the state that farmers, producers and growers commercially producing the commodities herein referred to shall be permitted by referendum to be held among the respective groups and subject to the provisions of this article, to levy upon themselves an assessment on such respective commodities or upon the acreage used in the production of the same and provide for the collection of the same, for the purpose of financing or contributing towards the financing of a program of advertising and other methods designed to increase the consumption of and the domestic as well as foreign markets for such agricultural products. (1947, c. 1018, s. 4.)

§ 106-554. Application to board of agriculture for authorization of referendum.—Any existing commission, council, board or other agency fairly representative of the growers and producers of any agricultural commodity herein referred to, and any such commission, council, board or other agency hereafter created for and fairly representative of the growers or producers of any such agricultural commodity herein referred to, may at any time after the passage and ratification of this article make application to the board of agriculture of the state of North Carolina for certification and approval for the purpose of conducting a referendum among the growers or producers of such particular agricultural commodity, for commercial purposes, upon the question of levying an assessment under the provisions of this article, collecting and utilizing the same for the purposes stated in such referendum. (1947, c. 1018, s. 5.)

§ 106-555. Action by board on application.—Upon the filing with the board of agriculture of such application on the part of any commission, council, board or other agency, the said board of agriculture shall within thirty days thereafter meet and consider such application; and if upon such consideration the said board of agriculture shall find that the commission, council, board or other agency making such application is fairly representative of and has been duly chosen and delegated as representative of the growers producing such commodity, and shall otherwise find and determine that such application is in conformity with the provisions of this article and the purposes herein stated, then and in such an event it shall be the duty of the board of agriculture to certify such commission, council, board or other agency as the duly delegated and authorized group or agency representative of the commercial growers and producers of such agricultural commodity, and shall likewise certify that such agency is duly authorized to conduct among the growers and producers of such commodity a referendum for the purposes herein stated. (1947, c. 1018, s. 6.)

§ 106-556. Conduct of referendum among growers and producers on question of assessments.—Upon being so certified by the said board of agriculture in the manner hereinbefore set forth, such commission, council, board or other agency shall thereupon be fully authorized and empowered to hold and conduct on the part of the producers and growers of such particular agricultural commodity a referendum on the question of whether or not such growers and producers shall levy upon themselves an assessment under and subject to and for the purposes stated in this article. Such referendum may be conducted either on a state-wide or area basis. (1947, c. 1018, s. 7.)

§ 106-557. Notice of referendum; statement of amount, basis and purpose of assessment; maximum assessment.—With respect to any referendum conducted under the provisions of this article, the duly certified commission, council, board or other agency shall, before calling and announcing such referendum, fix, determine and publicly announce at least sixty days before the date determined upon for such referendum, the date, hours and polling places for voting in such referendum, the amount and basis of the assessment proposed to be collected, the means by which such assessment shall be collected if authorized by the growers, and the general purposes to which said amount so collected shall be applied; no annual assessment levied under the provisions of this article shall exceed one-half of one per cent of the value of the year's production of such agricultural commodity grown by any farmer, producer or grower included in the group to which such referendum is submitted. (1947, c. 1018, s. 8.)

§ 106-558. Management of referendum; expenses.—The arrangements for and management of any referendum conducted under the provisions of this article shall be under the direction of the commission, council, board or other agency duly certified and authorized to conduct the same, and any and all expenses in connection therewith shall be borne by such commission, council, board or other agency. (1947, c. 1018, s. 9.)

§ 106-559. Basis of referendum; eligibility for participation; question submitted.—Any referendum conducted under the provisions of this article may be held either on an area or state-wide basis, as may be determined by the certified agency before such referendum is called; and such referendum, either on an area or state-wide basis, may be participated in by all farmers engaged in the production of such agricultural commodity on a commercial basis, including owners of farms on which such commodity is produced, tenants and share-croppers. In such referendum, such individuals so eligible for participation shall vote upon the question of whether or not there shall be levied an annual assessment for a period of three years in the amount set forth in the call for such referendum on the agricultural product covered by such referendum. (1947, c. 1018, s. 10.)

§ 106-560. Effect of more than one-third vote against assessment.—If in such referendum with respect to any agricultural commodity herein referred to more than one-third of the farmers and

producers in the area in which such referendum is conducted, eligible to participate and voting therein shall vote in the negative and against the levying or collection of such assessment, then in such an event no assessment shall be levied or collected. (1947, c. 1018, s. 11.)

§ 106-561. Effect of two-thirds vote for assessment.—If in such referendum called under the provisions of this article two-thirds or more of the farmers or producers in the area in which such referendum is conducted, eligible to participate and voting therein shall vote in the affirmative and in favor of the levying and collection of such assessment proposed in such referendum on the agricultural commodity covered thereby, then such assessment shall be collected in the manner determined and announced by the agency conducting such referendum. (1947, c. 1018, s. 12.)

§ 106-562. Regulations as to referendum; notice to farm organizations and county agents.—The hours, voting places, rules and regulations and the area within which such referendum herein authorized with respect to any of the agricultural commodities herein referred to shall be established and determined by the agency of the commercial growers and producers of such agricultural commodity duly certified by the board of agriculture as hereinbefore provided; the said referendum date, area, hours, voting places, rules and regulations with respect to the holding of such referendum shall be published by such agency conducting the same through the medium of the public press in the state of North Carolina at least sixty days before the holding of such referendum, and direct written notice thereof shall likewise be given to all farm organizations within the state of North Carolina and to each county agent in any county in which such agricultural product is grown. Such notice shall likewise contain a statement of the amount of annual assessment proposed to be levied—which assessment in any event shall not exceed one-half of one per cent of the value of the year's production of such agricultural commodity grown by any farmer, producer or grower included in the group to which such referendum is submitted—and shall likewise state the method by which such assessment shall be collected and how the proceeds thereof shall be administered and the purposes to which the same shall be applied, which purposes shall be in keeping with the provisions of this article. (1947, c. 1018, s. 13.)

§ 106-563. Distribution of ballots; arrangements for holding referendum; declaration of results.—The duly certified agency of the producers of any agricultural product among whom a referendum shall be conducted under the provisions of this article shall likewise prepare and distribute in advance of such referendum all necessary ballots for the purposes thereof, and shall, under rules and regulations promulgated by said agency, arrange for the necessary poll holders for conducting the said referendum; and following such referendum; and within ten days thereafter the said agency shall canvass and publicly declare the result of such referendum. (1947, c. 1018, s. 14.)

§ 106-564. Collection of assessments; custody and use of funds.—In the event two-thirds or more of the farmers eligible for participation in such referendum and voting therein shall vote in favor of such assessment, then the said assessment shall be collected annually for the three years set forth in the call for such referendum, and the collection of such assessment shall be under such method, rules and regulations as may be determined by the agency conducting the same; and the said assessment so collected shall be paid into the treasury of the agency conducting such referendum, to be used together with other funds from other sources, including donations from individuals, concerns or corporations, and grants from state or governmental agencies, for the purpose of promoting and stimulating, by advertising and other methods, the increased use and sale, domestic and foreign, of the agricultural commodity covered by such referendum. (1947, c. 1018, s. 15.)

§ 106-565. Subsequent referendum. — In the event such referendum so to be conducted as herein provided shall not be supported by two-thirds or more of those eligible for participation therein and voting therein, then the duly certified agency conducting the said referendum shall have full power and authority to call another referendum for the purposes herein set forth in the next succeeding year, on the question of an annual assessment for three years. (1947, c. 1018, s. 16.)

§ 106-566. Referendum as to continuance of assessments approved at prior referendum.—In the event such referendum is carried by the votes of two-thirds or more of the eligible farmers participating therein and assessments in pursuance thereof are levied annually for the three years set forth in the call for such referendum, then the agency conducting such referendum shall in its discretion have full power and authority to call and conduct during the third year of such period another referendum in which the farmers and producers of such agricultural commodity shall vote upon the question of whether or not such assessments shall be continued for the next ensuing three years. (1947, c. 1018, s. 17.)

§ 106-567. Rights of farmers dissatisfied with assessments; time for demanding refund.—In the event such referendum is carried in the affirmative and the assessment is levied and collected as provided herein and under the regulations to be promulgated by the duly certified agency conducting the same, any farmer or producer upon and against whom such annual assessment shall have been levied and collected under the provisions of this article, if dissatisfied with said assessment and the results thereof, shall have the right to demand of and receive from the treasurer of said agency a refund of such annual assessment so collected from such farmer or producer, provided such demand for refund is made in writing within thirty days from the date on which said assessment is collected from such farmer or producer. (1947, c. 1018, s. 18.)

§ 106-568. Publication of financial statement by treasurer of agency; bond required.—In event of the levying and collection of assessments as herein provided, the treasurer of the agency conducting same shall within thirty days after the end of any calendar year in which such assessments are collected, publish through the medium of the press of the state a statement of the amount or amounts

so received and collected by him under the provisions of this article. Before collecting and receiving such assessments, such treasurer shall give a bond in the amount of at least the estimated total of such assessments as will be collected, such bond to have as surety thereon a surety company licensed to do business in the state of North Carolina, and to be in the form and amount approved by the agency conducting such referendum and to be filed with the chairman or executive head of such agency. (1947, c. 1018, s. 19.)

Art. 51. Inspection and Regulation of Sale of Antifreeze Substances and Preparations.

§ 106-569. Definitions.—When used in this article, unless the context or subject matter otherwise requires:

(a) The term or word "antifreeze" shall include all substances and preparations intended for use as the cooling medium, or to be added to the cooling liquid, in the cooling system of internal combustion engines to prevent freezing of the cooling liquid or to lower its freezing point.

(b) The term "person," as used in this article, shall be construed to mean both the singular and plural as the case demands, and shall include individuals, partnerships, corporations, companies and associations. (1949, c. 1165.)

§ 106-570. Adulteration; what constitutes.—An antifreeze shall be deemed to be adulterated:

(1) If it consists in whole or in part of any substance which will render it injurious to the cooling system of an internal combustion engine or will make the operation of the engine dangerous to the user.

(2) If its strength, quality, or purity falls below the standard of strength, quality, or purity under which it is sold.

(3) If it consists of, or is compounded with calcium chloride, magnesium chloride, sodium chloride, petroleum distillates or other chemicals or substances in quantities harmful to the cooling systems of internal combustion engines. (1949, c. 1165.)

§ 106-571. Misbranding; what constitutes.—An antifreeze shall be deemed to be misbranded:

(1) If its labeling is false or misleading in any particular.

(2) If in package form it does not bear a label containing the name and place of business of the manufacturer, packer, seller or distributor; and an accurate statement of quantity of the contents in terms of weight or measure, and they are not plainly and correctly stated on the outside of the package or container. (1949, c. 1165.)

§ 106-572. Inspection, analysis and permit for sale of antifreeze.—Before any antifreeze shall be sold, exposed for sale, or stored, packed or held with intent to sell within this state, a sample thereof must be inspected under the supervision of the state chemist in the department of agriculture, created by chapter 106 of the General Statutes. Upon application of the manufacturer, packer, seller or distributor and the payment of a license or inspection fee of twenty-five dollars ($25.00) for each brand or type of antifreeze submitted, the state chemist shall subject to inspection or analysis the antifreeze so submitted. If the antifreeze is not adulterated or misbranded, if it meets the standards established and promulgated by the North Carolina state board of agriculture, established by chapter 106 of the General Statutes, and if the said antifreeze is not such a type or kind that is in violation of this article, the commissioner of agriculture shall give the applicant a written license or permit authorizing the sale of such antifreeze in this state for the fiscal year in which the license or inspection fee is paid, which license or permit shall be subject to renewal annually. If the commissioner of agriculture shall, at a later date, find that the antifreeze product or substance to be sold, exposed for sale or held with intent to sell has been materially altered or adulterated, or a change has been made in the name, brand or trademark under which the antifreeze is sold, or that it violates the provisions of this article, the commissioner of agriculture shall notify the applicant and the license or permit shall be canceled forthwith. No license or permit for the sale of antifreeze in this state shall be issued until application has been made as provided by this article and such samples of the product as may be required by the state chemist to qualify it have been submitted and until the state chemist notifies the commissioner of agriculture that said antifreeze meets the requirement of this article. (1949, c. 1165.)

§ 106-573. Article to be administered by the commissioner of agriculture.—The commissioner of agriculture shall administer and enforce the provisions of this article by inspections, chemical analysis, or any other appropriate methods. All quantities or samples of antifreeze submitted for inspection or analysis shall be taken from stocks in this state or intended for sale in this state, or the commissioner of agriculture, through his agents, may call upon the manufacturer or distributor applying for an inspection of antifreeze to supply such sample thereof for analysis. The commissioner of agriculture, through his agents or inspectors, shall have free access during business hours to all places of business, buildings, vehicles, cars and vessels used in the manufacture, transportation, sale or storage of any antifreeze, and the commissioner of agriculture, acting through his agents, may open any box, carton, parcel, package or container holding or containing or supposed to contain any antifreeze and may take therefrom samples for analysis. If it appears that any of the provisions of this article have been violated, the commissioner of agriculture, acting through his authorized agents, inspectors or representatives, is hereby authorized to issue a "stop-sale" order which shall prohibit further sale of any antifreeze being sold, exposed for sale or held with intent to sell within this state in violation of this article, until the law has been complied with or said violation has otherwise been legally disposed of. Any antifreeze not in compliance with the provisions of this article shall be subject to seizure upon complaint of the commissioner of agriculture or any of his agents, inspectors or representatives to a court of competent jurisdiction in the area in which said antifreeze is located. In the event the court finds said antifreeze to be in violation of this article, it may order the condemnation of said antifreeze, and the same shall be disposed of in any manner consistent with the rules and regulations of the board of agriculture and the laws of the state: Provided, that in no instance

shall the disposition of said antifreeze be ordered by the court without first giving the claimant or owner of same an opportunity to apply to the court for the release of said antifreeze or for permission to process or relabel said antifreeze so as to bring it into compliance with this article. In case any "stop sale" order shall be issued under the provisions of this article, the agents, inspectors or representatives of the commissioner of agriculture shall release the antifreeze so withdrawn from sale when the requirements of the provisions of this article have been complied with and upon payment of all costs and expenses incurred in connection with the withdrawal. (1949, c. 1165.)

§ 106-574. Rules and regulations.—The board of agriculture shall have authority to establish and promulgate such rules and regulations and standards as are necessary to promptly and efficiently enforce the provisions of this article. The commissioner of agriculture shall administer this article and shall execute all orders, rules and regulations established by the board of agriculture. All authority vested in the commissioner of agriculture by virtue of the provisions of this article may, with like force and effect, be executed by such employees, agents, inspectors and representatives of the commissioner of agriculture as he may, from time to time, designate for such purpose. The commissioner of agriculture may publish or furnish, upon request, a list of the brands and classes or types of antifreeze inspected by the state chemist during the fiscal year which have been found to be in accord with this article and for which a license or permit for sale has been issued, and it shall be lawful for any manufacturer, packer, seller, or distributor of antifreeze to show, by advertising, in any manner, that his or its brand of antifreeze has been inspected, analyzed and licensed for sale by the commissioner of agriculture, acting through the state chemist. It shall be unlawful for any manufacturer, packer, seller, or distributor of antifreeze to advertise, in any manner, that such antifreeze so advertised for sale has been approved by the commissioner of agriculture. (1949, c. 1165.)

§ 106-575. Gasoline and oil inspectors may be designated as agents of the commissioner.—The commissioner of agriculture, with the approval of the commissioner of revenue, may designate any or all of the gasoline and oil inspectors appointed under article 3 of chapter 119 of the General Statutes as agents and representatives of the commissioner of agriculture for the purposes of administering and carrying out the duties imposed by this article. All or any gasoline and oil inspectors designated as agents of the commissioner of agriculture pursuant to this section shall have all of the power and authority that may be delegated to them by the commissioner of agriculture for the enforcement of this article; and when acting in the enforcement of this article, such gasoline and oil inspectors shall be deemed to be agents and representatives of the commissioner of agriculture. (1949, c. 1165.)

§ 106-576. Submission of formula or chemical contents of antifreeze to the commissioner.—When any manufacturer, packer, seller or distributor of antifreeze applies to the commissioner of agriculture for a license or permit to sell antifreeze in this state, the commissioner of agriculture may require such manufacturer, packer, seller or distributor to furnish the state chemist a statement of the formula or contents of such antifreeze, which said statement shall conform to rules and regulations established by the board of agriculture: Provided, that the statement or formula or contents need not include the inhibitor ingredients if such inhibitor ingredients total less than five percent (5%) by weight of the antifreeze and if in lieu thereof the manufacturer, packer, seller or distributor furnishes the state chemist with satisfactory evidence, other than by disclosure of the inhibitor ingredients, that the said antifreeze is in conformity with the provisions of § 106-570. All statements of contents, formulae or trade secrets furnished under this section shall be privileged and confidential and shall not be made public or open to the inspection of any person, firm, association or corporation other than the state chemist. All such statements of contents shall not be subject to subpoena nor shall the same be exhibited or disclosed before any administrative or judicial tribunal by virtue of any order or subpoena of such tribunal unless with the consent of the person, firm, association or corporation owning and/or furnishing to the state chemist such statement of contents. (1949, c. 1165.)

§ 106-577. Penalties for violation.—Any person, firm, association or corporation violating or failing to comply with any of the provisions of this article, or any rule, regulation or standard issued pursuant thereto, shall be deemed guilty of a misdemeanor, and upon plea of guilty or conviction shall be punished in the discretion of the court, and each day that any violation of this article shall exist shall be deemed to be a separate offense. Whenever the commissioner of agriculture or his agents or representatives shall discover that any antifreeze is being sold or has been sold in violation of this article, the commissioner of agriculture or his agent or representative may furnish the facts to the solicitor or prosecuting officer of the court having jurisdiction in the area in which such violation occurred, and it shall be the duty of such prosecuting officer or solicitor to promptly institute proper legal proceedings. (1949, c. 1165.)

§ 106-578. Appropriation for enforcement of article.—All license or permit fees provided for in this article shall be collected by the commissioner of agriculture, deposited in the department of agriculture fund, of which the state treasurer is custodian, and shall be expended for the administration and enforcement of this article. The commissioner of agriculture is hereby authorized to employ such number of agents, clerks and experts as may be necessary to administer and effectively enforce all of the provisions of this article. There shall, from time to time, be allotted by the budget bureau from the inspection fees collected under G. S. § 119-18 such sums as may be necessary to administer and effectively enforce the provisions of this article. (1949, c. 1165.)

§ 106-579. Copy of analysis in evidence.—A copy of the analysis made by any chemist of the department of agriculture of antifreeze certified to by him shall be admitted as evidence in any court of the state on trial of any issue involving the merits of antifreeze as defined and covered by this article. (1949, c. 1165.)

Chapter 108. Board of Public Welfare.

Art. 1. State Board of Public Welfare.

§ 108-1. Appointment, term of office, and compensation.—There shall be appointed by the governor seven members who shall be styled "The State Board of Public Welfare," and at least one of such persons shall be a woman.

(1945, c. 43, s. 1.)

Editor's Note.—
The 1945 amendment changed the name of the state board of charities and public welfare to the state board of public welfare. As only the first sentence was affected by the amendment, the rest of the section is not set out.

Session Laws 1945, c. 43, s. 4 changed the title of the chapter from "Board of Charities" to "Board of Public Welfare."

§ 108-1.1. Change of name in statutes and regulations relating to board.—Wherever in the General Statutes of North Carolina, or in any session law, public, public-local, private or special act of the general assembly, or in any rule or regulation, a duty or obligation is imposed upon the state board of charities and public welfare, or any authority, privilege or power is granted to the state board of charities and public welfare, the same shall be construed as referring to the state board of public welfare. (1945, c. 43, s. 2.)

§ 108-3. Powers and duties of board.

15. To establish standards, provide rules and regulations for the operation of, and to inspect and license boarding homes, rest homes or convalescent homes for persons who are aged or mentally or physically infirm and who are not related or connected by blood or marriage to the applicant for license when a charge is made for such care: Provided said homes care for two or more persons who obtain services from the county public welfare department or are supported in whole or in part by public welfare funds. Such license shall be valid for one year from the date of issuance unless revoked earlier by the board for cause. Such homes shall be under the supervision of the board, and its agents may at any time visit and inspect the homes. Licensing authority shall not apply to any institution established, maintained or operated by any unit of government nor to commercial inns or hotels. (Rev., ss. 3914, 3915; Code, ss. 2332, 2333; 1868-9, c. 170, s. 3; 1917, c. 170, s. 1; 1919, c. 46, ss. 1, 2; 1925, c. 90, ss. 1, 2; 1927, c. 65; 1931, c. 175; 1937, c. 319, s. 2; 1937, c. 436, ss. 3, 5; 1941, c. 270, s. 1; 1945, c. 185; C. S. 5006.)

Editor's Note.—
The 1945 amendment added the above subsection. As the rest of the section was not changed it is not set out.

Art. 2. County Boards of Public Welfare.

§ 108-11. County welfare boards; appointment; duties.

The respective appointments shall be made on or before the first day of April, one thousand nine hundred and forty-five and shall be effective as of that date. In order to secure overlapping terms of office and to give continuity of policy, the first appointment of the county commission shall be for a term of two years; the first appointment of the state board of public welfare shall be for a term of three years; and the first appointment of the third member shall be for a term of one year; but at the expiration of the terms of the three appointees their successors shall be appointed for terms of three years each. Appointments to fill vacancies shall be for the remainder of the term of office. Prior service on a county welfare board shall not disqualify any person for service under this article, but no member shall be eligible in the future to serve more than two successive terms.

(1945, c. 47.)

Editor's Note.—
The 1945 amendment substituted at the end of the second paragraph the words "serve more than two successive terms" for the words "succeed himself after three successive terms as a member of a county welfare board. Provided, however, that no member shall serve more than six successive years." As the first and third paragraphs were not changed, they are not set out.

§ 108-12. Meetings of the board.—The county welfare boards so appointed shall meet immediately after their appointment and organize by electing a chairman, who shall serve for the term of his appointment, and shall forward notice of said chairman's election and the third member's appointment immediately to the state board, and shall meet at least once a month with the superin-

tendent of welfare and advise with him in regard to problems pertaining to his office.

Members of county boards of public welfare may at the discretion of the board of county commissioners receive a per diem not to exceed five dollars ($5.00) a day and actual expenses when attending official meetings; any such payments heretofore made are hereby validated. (1917, c. 170, s. 1; 1919, c. 46, s. 4; 1937, c. 319, s. 4; 1941, c. 270, s. 3; 1947, c. 92; C. S. 5015.)

Editor's Note.—The 1947 amendment rewrote the last sentence.

§ 108-12.1. Change of name in statutes and regulations relating to board.—Wherever in the General Statutes of North Carolina, or in any session law, public, public-local, private or special act of the general assembly, or in any rule or regulation, a duty or obligation is imposed upon a county welfare board or upon a county board of charities and public welfare, or any authority, privilege or power is granted thereto, the same shall be construed as referring to the county board of public welfare which shall henceforth be the designation of any of said county welfare boards or county boards of charities and public welfare. (1945, c. 43, s. 3.)

Art. 3. Division of Public Assistance.

§ 108-15. Division of public assistance created.—There is hereby created in the state board of charities and public welfare a division of public assistance, including (a) assistance to aged needy persons, (b) aid to dependent children, and (c) general assistance to other needy persons, as administered under authority of this article. (1937, c. 288, s. 1; 1949, c. 1038, s. 1.)

Editor's Note.—The 1949 amendment inserted subdivision (c).

Part 1. Old Age Assistance.

§ 108-17. Short title.

Cited in Atlantic Coast Line R. Co. v. Beaufort County, 224 N. C. 115, 29 S. E. (2d) 201; Atlantic Coast Line R. Co. v. Duplin County, 226 N. C. 719, 40 S. E. (2d) 371.

§ 108-21. Eligibility.—Assistance shall be granted under this article to any person who:

(a) Is sixty-five years of age and over;

(c) Has not sufficient income, or other resources, to provide a reasonable subsistence compatible with decency and health;

(d) Is not an inmate of any public institution at the time of receiving assistance. An inmate of such institution may, however, make application for such assistance, but the assistance, if allowed, shall not begin until after he ceases to be an inmate.

(e) Has been a resident of this state for one year immediately preceding the date of his application.

Eligibility of applicants to receive benefits under this title, and the amount of assistance given, and such other conditions of award as it may be necessary to determine shall be determined in the manner hereinafter set out.

The amount of assistance which any person shall receive shall be determined with due regard to the resources and necessary expenditures of the individual and the conditions existing in each case, and in accordance with the rules and regulations made by the state board; and shall be sufficient when added to all other income and support of recipients to provide such person with a reasonable subsistence compatible with decency and health, but not exceeding forty dollars ($40.00) per month or four hundred eighty dollars ($480.00) during one year; and of this not more than twenty dollars ($20.00) per month nor more than two hundred forty dollars ($240.00) in one year shall be paid out of state and county funds.

Within the limitations of the state appropriation the maximum payment for old age assistance may be increased not in excess of the amount which may hereafter be matched by the federal government. (1937, c. 288, s. 6; 1939, c. 395, s. 1; 1941, c. 232; 1943, c. 753, s. 1; 1945, c. 615, ss. 1, 2; 1947, c. 91, s. 1.)

Editor's Note.—

The 1945 amendment repealed subsection (b) of this section and increased the amounts specified in the next to last paragraph.

The 1947 amendment struck out former subsection (e) and re-lettered former subsection (f) as subsection (e). It also added the last paragraph of the section.

§ 108-22. State old age assistance fund.

In the event that the Federal Social Security Act is amended providing for a larger percentage of contributions to said fund, the provisions of this section shall be construed to accept such additional grants, and the percentages to be provided for old age assistance by the state and counties shall be adjusted proportionately. (1937, c. 288, s. 7; 1943, c. 505, s. 1; 1947, c. 91, s. 2.)

Editor's Note.—The 1947 amendment added the above paragraph at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

Cited in Atlantic Coast Line R. Co. v. Duplin County, 226 N. C. 719, 40 S. E. (2d) 371.

§ 108-25. Appropriations not to lapse.—No appropriation made for the purposes of this article shall lapse or revert; but the unexpended balances may be considered in the making of further appropriations. Any proceeds of county taxation for the purposes of this article remaining unexpended shall be taken into account in determining the amount to be raised by taxation during the ensuing year, but shall not be used for any purpose not authorized by this article: Provided, that if at any time during any fiscal year it appears to be necessary and feasible, the county may transfer with the approval of the state board of allotments and appeal a portion of the amount raised by the county for old age assistance to the county aid to dependent children fund. (1937, c. 288, s. 10; 1945, c. 615, s. 1.)

Editor's Note.—The 1945 amendment added the proviso.

§ 108-30. Application for assistance; determination therein.

Upon the completion of the investigation, the county board of welfare shall, upon due consideration, determine whether the applicant is eligible for assistance under the provisions of this article, and shall determine the amount of such assistance and the date on which it shall begin, but such award shall in no case exceed forty dollars ($40.00) per month or four hundred eighty dollars ($480.00) in one year, and there shall not be paid thereupon out of state and county funds more than twenty dollars ($20.00) per month or more than two hundred forty dollars ($240.00) in one year. Such award so made when effective shall thereafter be paid in advance monthly to the ap-

plicant, disbursement being made in the same manner and under the same procedure as in case of other county funds. Within the limitations of the state appropriation the maximum payment for old age assistance may be increased not in excess of the amount which may hereafter be matched by the federal government.

(1945, c. 615, s. 1; 1947, c. 91, s. 3.)

Editor's Note.—
The 1945 amendment increased the amounts specified in the third paragraph; and the 1947 amendment added the last sentence thereto. As the rest of the section was not affected by the amendment it is not set out.

§ 108-32. Assistance not assignable.—The assistance granted under this article shall not be transferable or assignable at law or in equity; and none of the money paid or payable under this article shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

In the event of the death of an old age assistance recipient during or after the first day of the month for which a grant was previously authorized by the county welfare board, any old age assistance check or checks payable to such recipient, not endorsed prior to such recipient's death, shall be endorsed by the clerk of the superior court of the county on which the check was drawn and the proceeds thereof paid to the spouse of the deceased recipient. If there is no living spouse, the proceeds of such check or checks shall be applied to the funeral expenses of such deceased recipient. (1937, c. 288, s. 17; 1945, c. 615, s. 1.)

Editor's Note.—The 1945 amendment added the second paragraph.

§ 108-38. Administration expenses.—The state board of allotments and appeal shall annually allocate to the several counties of the state, in accordance with the total amount of benefit payments to be paid in each county for old age assistance therein, the sum provided by the federal government under the Social Security Act for payment of administrative expenses. Any amounts in excess of said allotments to the several counties, which are necessary to the proper administration of the public welfare program by the several counties, shall be determined by the state board of allotments and appeal upon budgets submitted to said board by the county welfare boards in each county. Said determination shall be made on or before the first day of June in each year.

After being so determined, an amount not to exceed one half of such costs shall be allocated and paid to the respective counties by the state board of allotments and appeal from the appropriation made by the state for aid to county welfare administration. The balance of said county administrative expenses shall be paid by the respective counties. The state board of allotments and appeal shall, on or before the first day of June in each year, notify the board of county commissioners in each county as to the amount of administrative expenses such county is required to provide, and upon receipt of such notice it shall be mandatory upon each county that taxes shall be levied within said county to provide for the payment of such part of such county's administrative expenses.

The county board of commissioners and the county board of welfare, in joint session, shall determine the number and salary of employees of the county board of welfare, having been advised by the county superintendent of welfare and the state board of charities and public welfare. (1937, c. 288, s. 23; 1939, c. 395, s. 1; 1941, c. 232; 1945, c. 615, s. 1.)

Editor's Note.—
The 1945 amendment substituted in line eleven of the first paragraph the words "of the public welfare program" for the words "of this article," and rewrote the first two sentences of the second paragraph.

Cited in Atlantic Coast Line R. Co. v. Duplin County, 226 N. C. 719, 40 S. E. (2d) 371.

Part 2. Aid to Dependent Children.

§ 108-44. Short title.

Cited in Atlantic Coast Line R. Co. v. Beaufort County, 224 N. C. 115, 29 S. E. (2d) 201; Atlantic Coast Line R. Co. v. Duplin County, 226 N. C. 719, 40 S. E. (2d) 371.

§ 108-48. Amount of relief.—The maximum amount to be allowed per month under this article shall not exceed eighteen dollars ($18.00) for one child and twelve dollars ($12.00) additional per month for each of the other dependent children in the home eligible to assistance under this article: Provided, the total amount shall not exceed sixty-five dollars ($65.00), except in extraordinary circumstances in which it appears to the satisfaction of the state board that a total of sixty-five dollars ($65.00) per month would be insufficient to secure the purpose above set forth. Provided further, that within the limitations of the state appropriation the maximum amount per child may be increased not in excess of the amount which may hereafter be matched by the federal government. (1937, c. 288, s. 34; 1945, c. 615, s. 1.)

Editor's Note.—The 1945 amendment added the second proviso.

§ 108-49. Dependent children defined.—The term "dependent child" as used in this article shall mean a child under eighteen years of age who is living with his or her father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle or aunt, adoptive father, adoptive mother, grandfather-in-law, great grandfather, grandmother-in-law, great-grandmother, brother of the half-blood, brother-in-law, adoptive brother, sister of the half-blood, sister-in-law, adoptive sister, uncle-in-law, aunt-in-law, great-uncle, and great-aunt, in a place of residence maintained by one or more of such relatives as his or their own home; who has resided in the state of North Carolina for one year immediately preceding the application for aid; or who was born within the state within one year immediately preceding the application if the mother has resided in the state for one year immediately preceding the birth, and who has been deprived of parental support or care by reason of the death, physical or mental incapacity or continued absence from the home of a parent, and who has no adequate means of support. (1937, c. 288, s. 35; 1939, c. 395, s. 1; 1941, c. 232; 1945, c. 615, s. 1.)

Editor's Note.—
The 1945 amendment substituted the words "under eighteen years of age" in line three for the words "under sixteen years of age, or under eighteen years of age if regularly attending school," and struck out a former provision relating to making every effort to apprehend the parent.

§ 108-50: Repealed by Session Laws 1945, c. 615, s. 2.

§ 108-51. State aid to dependent children fund.

Cited in Atlantic Coast Line R. Co. v. Duplin County, 226 N. C. 719, 40 S. E. (2d) 371.

§ 108-54. Appropriations not to lapse.—No appropriation made for the purpose of this article shall lapse or revert; but the unexpended balances may be considered in the making of further appropriations. Any proceeds of county taxation for the purposes of this article remaining unexpended shall be taken into account in determining the amount to be raised by taxation during the ensuing year, but shall not be used for any purpose not authorized by this article: Provided, that if at any time during any fiscal year it appears to be necessary and feasible, the county may transfer with the approval of the state board of allotments and appeal a portion of the amount raised by the county for aid to dependent children to the county old age assistance fund. (1937, c. 288, s. 40; 1945, c. 615, s. 1.)

Editor's Note.—The 1945 amendment added the proviso.

§ 108-59. Application for assistance; determination thereon.

Upon the completion of the investigation the county board of welfare shall, upon due consideration, determine whether the applicant is eligible for assistance under the provisions of this article and shall determine the amount of such assistance and the date on which it shall begin, but such award shall in no case exceed eighteen dollars ($18.00) for one child and twelve dollars ($12.00) additional per month for each of the other dependent children in the home eligible to assistance under this article: Provided, the total amount shall not exceed sixty-five dollars ($65.00) except in extraordinary circumstances in which it appears to the satisfaction of the state board that a total of sixty-five dollars ($65.00) per month would be insufficient to secure the purposes above set forth: Provided further, that within the limitations of the state appropriation the maximum amount per child may be increased not in excess of the amount which may hereafter be matched by the federal government. Such award so made when effective shall thereafter be paid in advance monthly to the applicant, disbursement being made in the same manner and under the same procedure as in the case of other county funds. (1945, c. 615, s. 1.)

Editor's Note.—
The 1945 amendment inserted the second proviso in the third paragraph. As the rest of the section was not affected by the amendment it is not set out.

§ 108-66. Allocation of funds.

Provided, that in the event any temporary vacancy should exist in the office of county welfare superintendent or in the office of chairman of the county welfare board, the signature of either remaining officer together with that of the county auditor shall be sufficient for the disbursement of such funds. (1937, c. 288, s. 52; 1939, c. 395, s. 1; 1941, c. 232; 1945, c. 615, s. 1.)

Editor's Note.—
The 1945 amendment added the above proviso at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

§ 108-67. Administration expenses.—The state board of allotments and appeal shall annually allocate to the several counties of the state the sum provided by the federal government under the Social Security Act for payment of administrative expenses. Any amounts in excess of said allotments to the several counties, which are necessary to the proper administration of the public welfare program by the several counties, shall be determined by the state board of allotments and appeal upon budgets submitted to said board by the county welfare boards in each county. Said determination shall be made on or before the first day of June in each year.

After being so determined, an amount not to exceed one half of such costs shall be allocated and paid to the respective counties by the state board of allotments and appeal from the appropriation made by the state for aid to county administration. The balance of said county administrative expenses shall be paid by the respective counties.

The state board of allotments and appeal shall, on or before the first day of June in each year, notify the board of county commissioners in each county as to the amount of administrative expenses such county is required to provide, and upon receipt of such notice, it shall be mandatory upon each county that taxes shall be levied within said county to provide for the payments of such part of such county's administrative expenses. (1937, c. 288, s. 53; 1941, c. 232; 1943, c. 505, s. 9; 1945, c. 615, s. 1.)

Editor's Note.—
The 1945 amendment substituted in line nine of the first paragraph the words "the public welfare program" for the words "this article," and rewrote the first two sentences of the second paragraph.

Cited in Atlantic Coast Line R. Co. v. Duplin County, 226 N. C. 719, 40 S. E. (2d) 371.

Part 3. General Assistance.

§ 108-73.1. Establishment of relief.—The care and relief of all persons who are in need and who are unable to provide for themselves is a legitimate obligation of government which cannot be ignored or avoided without injustice to such persons and serious detriment to the purposes of organized society. Such care and relief is hereby declared to be a matter of state concern and necessary to promote the public health and welfare. In order to provide such care and relief at public expense, to the extent that the same may be proper, with due regard to state and county revenues and with due regard for other necessary objects of public expenditure, a state-wide system of general assistance is hereby established, to operate with due regard to the varying living conditions and the financial, physical, and other conditions of the recipient of such assistance. (1949, c. 1038, s. 2.)

§ 108-73.2. Acceptance of federal grants in aid; part liberally construed.—The state board of public welfare is hereby authorized to accept any grants in aid for general assistance which may be made available to the state by the federal government and the provisions of Part 3 of this article shall be liberally construed in order that the state and its needy citizens may benefit fully from such grants in aid. (1949, c. 1038, s. 2.)

§ 108-73.3. General assistance defined.—General assistance as herein used is defined to be assistance granted in money or in kind to an individual for the purpose of providing him with the necessities of life including food, clothing, shelter, fuel,

and other necessary living expenses but not including, directly or indirectly, any hospital or other institutional care or treatment: Provided, that residence in a duly licensed boarding home shall not constitute institutional care or treatment within the meaning of this section. (1949, c. 1038, s. 2.)

§ 108-73.4. Eligibility. — Assistance may be granted to any person who:

(a) Is unable to earn a sufficient income and is without any resources to provide a subsistence compatible with decency and health; and

(b) Is not an inmate of any public institution at the time of receiving assistance.

Applications for general assistance shall be made to the county superintendent of public welfare who by and with the approval of the county welfare board shall determine whether aid is to be granted and the amount thereof.

The amount of assistance which any eligible person may receive shall be determined with due regard to the resources and necessary expenditures of the individual and the conditions existing in each case, and in accordance with the rules and regulations of the state board of public welfare. In so far as funds will permit, such assistance shall be sufficient when added to all other income and resources to provide such person with a reasonable subsistence compatible with decency and health, but the principle of equitable treatment shall be followed in each county as provided in the rules and regulations of the state board of public welfare. Assistance may be granted to any person or for any purpose coming within the provisions of this section and the rules and regulations of the state board of public welfare not inconsistent herewith, although such person or purpose may not come within federal requirements governing the use of federal grants in aid for general assistance purposes. Applications for general assistance shall be handled in the manner prescribed by the rules and regulations of the said board. (1949, c. 1038, s. 2.)

§ 108-73.5. State general assistance fund.—A fund shall be created to be known as the "state general assistance fund." This fund shall be created by appropriations made by the general assembly and such grants as may be received from the federal government for this purpose. Such fund shall be used exclusively for assistance to needy persons found to be eligible in accordance with the provisions of Part 3 of this Article and the rules and regulations of the state board of public welfare not inconsistent therewith.

The treasurer of the state of North Carolina is hereby made ex officio treasurer of the state general assistance fund herein established, including therein such grants in aid for general assistance as may be received from the federal government for administration and distribution in this state; and the said treasurer is hereby designated as the proper officer to receive grants in aid from the federal government. The treasurer shall keep the funds in a separate account, to be known as the "state general assistance fund," and shall be responsible therefor on his official bond; and the said funds shall be protected by proper depository security as other state funds. The said funds shall be disbursed for the purposes of this article on warrants drawn on the county treasurer or other designated county officials where there is no county treasurer, signed by the superintendent of public welfare, countersigned by the county auditor, for both payments of grants to recipients and for administrative purposes: Provided, that in the event any temporary vacancy should exist in the office of county welfare superintendent, the signature of the chairman of the county welfare board together with that of the county auditor shall be sufficient for the disbursement of such funds. (1949, c. 1038, s. 2.)

§ 108-73.6. Allotment and transfer of federal and state funds to the counties.—Allotments shall be made annually by the state board of allotments and appeal, created by § 108-33, in the manner prescribed in §§ 108-36 and 108-37: Provided, that no participating county shall receive from the state general assistance fund during any fiscal year less than ten per cent (10%) or more than fifty per cent (50%) of the total expenditures for general assistance as herein defined until such time as federal grants in aid for general assistance are available to the state.

When federal funds are available to North Carolina for general assistance, the state board of allotments and appeal shall allot annually to each county from the state general assistance fund any proportion of the total amount to be expended for such purpose that the amount of federal and state funds available will permit: Provided that no county shall receive from such federal and state funds during any fiscal year more than ninety per cent (90%) of the total expenditures for general assistance.

It is the purpose of the general assembly that the allotments herein provided for shall be used by the counties entitled thereto solely as supplementary funds to increase the general assistance being provided, and no allotment shall be used, directly or indirectly, to replace county appropriations or expenditures.

State and federal funds shall be transferred to the counties as prescribed in § 108-39 of the General Statutes of North Carolina and all provisions of that section shall apply to general assistance funds, except that all funds so transferred shall be deposited in the county general assistance fund. (1949, c. 1038, s. 2.)

§ 108-73.7. Assistance not assignable.—The assistance granted under this article shall not be transferable or assignable at law or in equity; and none of the money paid or payable under this article shall be subject to execution, levy, attachment, garnishment, or other legal processes, or to the operation of any bankruptcy or insolvency law. (1949, c. 1038, s. 2.)

§ 108-73.8. Accounts and reports from county officers. — The boards of county commissioners shall cause proper accounts to be kept of the receipts and disbursements under this article, and shall make a quarterly report to the state board of public welfare in detail, showing such receipts and the persons to whom disbursements have been made, and the amount thereof. Such reports may be required by the state board of public welfare as often as may be deemed necessary. The accounts shall at all times be open to inspection by the state board of public welfare and its authorized auditors, supervisors and deputies. (1949, c. 1038, s. 2.)

§ 108-73.9. Further powers and duties of state board.—The provisions of § 108-28 shall apply to Part 3 of this article. The state board of public welfare is authorized and directed to make such reports as may be required by the federal government under the Social Security Act; to keep the funds received from the federal government in such manner and in such account, and cause the same to be disbursed as may be required by such federal administrative authority, notwithstanding any provisions hereof; and the provisions of this article with respect to the handling and disbursement of federal funds, where contrary to the rules and regulations of federal authority, shall be deemed directory only, so that such rules and regulations shall prevail; but otherwise they shall be mandatory. (1949, c. 1038, s. 2.)

§ 108-73.10. Participation permissive; effect of federal grants.—The general assistance program herein established shall be administered as provided for in the rules and regulations of the state board of public welfare, except that no county shall be granted any allotment from the state general assistance fund nor shall be subject to provisions of Part 3 of this article unless its consent be given in the manner prescribed by the rules and regulations of the state board of public welfare: Provided, that in the event federal general assistance grants shall be made available to the state upon condition that each county thereof participate in the general assistance program, then and in that event all of the provisions of Part 3 of this article shall apply to and become mandatory upon every county. (1949, c. 1038, s. 2.)

Art. 5. Regulation of Organizations and Individuals Soliciting Public Alms.

§ 108-80. Regulation of solicitation of public aid for charitable, etc., purposes.—Except as hereinafter provided in G. S. § 108-84, no person, organization, corporation, institution, association, agency or co-partnership except in accordance with provisions of this article shall solicit the public whether by mail, or through agents or representatives or other means for donations, gifts or subscriptions of money and/or of gifts of goods, wares, merchandise or other things of value or to sell or offer for sale or distribute to the public anything or object whatever to raise money or to sell memberships, periodicals, books or advertising space or to secure or attempt to secure money or donations or other property by promoting any public bazaar, sale, entertainment or exhibition or by any similar means for any charitable, benevolent, health, educational, religious, patriotic or other similar public cause or for the purpose of relieving suffering of animals unless the solicitation is authorized by and the money or other goods or property is to be given to an organization, corporation, institution, association, agency or co-partnership holding a valid license for such purpose from the state board of public welfare, issued as herein provided. (1939, c. 144, s. 1; 1947, c. 572.)

Editor's Note.—The 1947 amendment rewrote former sections 108-80 to 108-90 to appear as present sections 108-80 to 108-86.

§ 108-81. Application for license to solicit public aid.—Any person, organization, corporation, institution, association, agency, or co-partnership wishing to secure a license from the state board of public welfare for the purpose of soliciting the public for any of the aforenamed causes shall file a written application with the state board of public welfare on a form furnished by the said board setting forth proof of the worthiness of the cause, chartered responsibility, the existence of an adequate and responsible governing board to administer receipts and disbursements of funds, goods, or other property sought, the need of public solicitation, proposed use of funds sought, and a verified report of the operation of such organization, corporation, institution, association, agency or co-partnership for a fiscal period determined by the said state board, said verified report to show reserve funds and endowment funds as well as receipts and disbursements. (1939, c. 144, s. 1; 1947, c. 572.)

§ 108-82. Issuance of license by state board of public welfare.—If the state board of public welfare after full investigation and careful study of the purpose and functioning of an organization, corporation, institution, association, agency, or co-partnership filing an application for a license to solicit deems such organization, corporation, institution, association, agency or co-partnership a proper one and not inimical to the public welfare and its proposed solicitations to be truly for the purpose set forth in its application and provided for in this article, it shall issue to such organization, corporation, institution, association, agency or co-partnership a license to solicit for its purposes and program for a period not to exceed one year, unless revoked for cause.

The state board of public welfare shall not issue a license to solicit to any such organization, corporation, institution, association, agency or co-partnership which pays or agrees to pay to any individual, corporation, co-partnership or association an unreasonable or exorbitant amount of the funds collected as compensation.

In the event the said board refuses to issue said license, the organization, corporation, institution, association, agency or co-partnership shall be entitled to a hearing before said board provided written request therefor is made within fifteen days after notice of refusal is delivered or mailed to the applicant. All such hearings shall be held in the offices of said board and shall be open to the public. Decisions of said board shall be mailed to the interested parties within ten days after the hearing.

The state board of public welfare before granting or refusing a license as herein provided shall call upon the state commission for the blind, the division of vocational rehabilitation and other divisions of the state department of public instruction, the bureau of labor for the deaf, and the state board of health for advice in any situation or cause in which any of the several state agencies named has an interest or responsibility. (1939, c. 144, s. 1; 1947, c. 572.)

§ 108-83. Solicitors and collectors must have evidence of authority and show same on request.—No person shall solicit or collect any contribution in money or other property for any of the purposes set forth in this article without a written authorization, pledge card, receipt form, or other evidence of authority to solicit for a duly licensed organization, corporation, institution, association,

agency, or co-partnership for which the donation or contribution is made and said evidence of authority must be shown to any person on request. Said evidence of authority must be provided by the organization, corporation, institution, association, agency or co-partnership for which the donation or contribution is solicited or by the agency through which the donation or contribution is collected and distributed. (1939, c. 144, s. 2; 1947, c. 572.)

§ 108-84. Organizations, etc., exempted from article.—The provisions of this article shall not apply to any solicitation or appeal made by any church, or religious organization, school or college, fraternal or patriotic organization, or civic club located in this state when such appeal or solicitation is confined to its membership nor shall the provisions of this article apply to any locally indigenous organization, institution, association or agency having its own office, managing board, committee or trustees or chief executive offices located in or residing in a city or county from publicly soliciting donations or contributions within a city and the county or counties in which said city is located or within the county in which such an organization, institution, association or agency is located and operates; provided that nothing in this article shall apply to any solicitation or appeal by any church for the construction, upkeep, or maintenance of the church and its established organization or for the support of its clergy. (1939, c. 144, s. 2a; 1947, c. 572.)

§ 108-85. Regulation and licensing of solicitation of alms for individual livelihood.—It shall be unlawful for an individual to engage in the business of soliciting alms or begging charity for his or her own livelihood or for the livelihood of another individual upon the streets or highways of this state or through door to door solicitations without first securing a license to solicit for this purpose from the state board of public welfare.

Any individual desiring to engage in the business of soliciting alms or begging charity for his or her own livelihood or for the livelihood of another individual as set forth in the first paragraph of this section shall file a written application for a license on a form or forms furnished by the said board, setting forth his or her own true name and address, his or her correct address or addresses for the past five years, the purpose for which he or she desires to solicit alms, the reason why public solicitation is considered a necessary means to obtain a livelihood or relief from suffering rather than the pursuit of a legitimate trade or the acceptance of benefits provided through the social security measures and funds administered by the federal, state and county governments and any other information which the said board may deem necessary to carry out the provisions of this article. A copy of the license must be carried by the solicitor while soliciting and must be shown upon request.

The carrying and offering for sale of merchandise by the individual soliciting alms or begging charity shall not exempt the individual so soliciting from the provisions of this article. The state board of public welfare shall call upon the several state agencies named in § 108-82 for advice in issuing a license to an individual in accordance with the provisions of this article. (1947, c. 572.)

§ 108-86. Punishment for violation of article; misapplication of funds collected.—Any person who, or any organization, corporation, institution, association, agency or co-partnership which violates any of the provisions of this article or solicits donations and contributions from the public without first applying for and obtaining a license as herein provided shall be guilty of a misdemeanor, and upon conviction shall be punished in case of an organization, corporation, institution, association, agency or co-partnership by a fine of not more than one thousand dollars ($1,000.00); in the case of an individual the punishment shall be that provided for a misdemeanor.

Any person who, or organization, corporation, institution, association, agency or co-partnership which, after having conducted a solicitation campaign and obtained funds from such solicitation shall wilfully convert or misapply any of said funds from the purposes for which solicited as set out in the application for license to solicit shall be guilty of a felony and shall be punished in the discretion of the court. (1939, c. 144, s. 3; 1947, c. 572.)

§§ 108-87 to 108-90: Omitted by Session Laws 1947, c. 572.

Chapter 109. Bonds.

Sec.

Art. 4. Deposit in Lieu of Bond.

109-32. Deposit of cash or securities in lieu of bond; conditions and requirements.

Art. 1. Official Bonds.

§ 109-1. Irregularities not to invalidate.

County A. B. C. Board as Obligee.—The naming of county A. B. C. Board as obligee in bond, rather than state, works no limitation of its character as official bond and affords no escape from its obligations as such. Jordan v. Harris, 225 N. C. 763, 36 S. E. (2d) 270, 271.

Art. 4. Deposit in Lieu of Bond.

§ 109-32. Deposit of cash or securities in lieu of bond; conditions and requirements.—In lieu of any written undertaking or bond required by law in any matter, before any court of the state, the party required to make such undertaking or bond may make a deposit in cash or securities of the state of North Carolina or of the United States of America, of the amount required by law or, in the case of fiduciaries, of the amount of the trust, in lieu of the said undertaking or bond and such deposit shall be subject to all of the same conditions and requirements as are provided for in written undertakings or bonds, in lieu of which such deposit is made. (1923, c. 58; 1947, c. 936; C. S. 352(a).)

Editor's Note.—Prior to the 1947 amendment this section related only to deposits of cash. See 25 N. C. Law Rev. 384.

Art. 5. Actions on Bonds.

§ 109-34. Liability and right of action on official bonds.

Sections Construed Together.—This section and § 109-37 allowing damages at twelve per cent on any such recovery, relate to the same subject matter, are part of one and the same statute, and must be construed together. State v. Watson, 223 N. C. 437, 27 S. E. (2d) 144.

Remedies against Clerks of Superior Courts.—Our statutes provide two separate and distinct remedies against clerks of the Superior Courts—one in behalf of the injured individual for a specific fund to which he is entitled or on account of a particular wrong committed against him by the officer, as provided in this section; and one in behalf of the new clerk against his predecessor in office to recover possession of records, books, papers and money in the hands of the outgoing clerk by virtue or under color of his office, as provided for in § 2-22. State v. Watson, 223 N. C. 437, 27 S. E. (2d) 144.

Cited in Jordan v. Harris, 225 N. C. 763, 36 S. E. (2d) 270, following Dunn v. Swanson, 217 N. C. 279, 7 S. E. (2d) 563; Price v. Honeycutt, 216 N. C. 270, 4 S. E. (2d) 611 and distinguishing Davis v. Moore, 215 N. C. 449, 2 S. E. (2d) 366; Midgett v. Nelson, 214 N. C. 396, 199 S. E. 393.

§ 109-36. Summary remedy on official bond.

Applied in State v. Sawyer, 223 N. C. 102, 25 S. E. (2d) 443.

§ 109-37. Officer unlawfully detaining money liable for damages.

This Section Must Be Considered in Connection with, etc.—

Authority for an individual to sue an officer for money wrongfully detained, as provided for in § 109-34, and this section relate to the same subject matter and are a part of one and the same statute. They must be construed together. State v. Watson, 223 N. C. 437, 441, 27 S. E. (2d) 144.

Interest by Way of Damages.—Whether or not the clerk is entitled to the benefits of this section, in a suit against his predecessor, is not now decided; but, granting that he is not so entitled, the law allows interest by way of damages on money wrongfully detained. State v. Watson, 223 N. C. 437, 27 S. E. (2d) 144; State v. Watson, 224 N. C. 502, 31 S. E. (2d) 465.

Chapter 110. Child Welfare.

Art. 2. Juvenile Courts.

Art. 4. Placing or Adoption of Juvenile Delinquents or Dependents.

Art. 2. Juvenile Courts.

§ 110-21. Exclusive original jurisdiction over children.

Purpose.—

Juvenile courts were created and organized for the purpose of administering this law, and for the original hearing and determination of matters and causes within its scope, and as such were empowered to "make such orders and decrees therein as the right and justice of the case may require," with right of appeal. In re Prevatt, 223 N. C. 833, 835, 28 S. E. (2d) 564.

This section imposes upon the court the constant duty to give to each child subject to its jurisdiction such oversight and control in the premises as will conduce to the welfare of such child and to the best interest of the state. In re Morris, 224 N. C. 487, 492, 31 S. E. (2d) 539.

Section Not Inconsistent with § 17-39.—Original jurisdiction to adjudge a child delinquent or neglected having been conferred on the juvenile court by this section, nevertheless this statute does not repeal § 17-39, and is not inconsistent therewith. No limitation is placed by this statute upon the jurisdiction previously conferred upon the Superior Court by that section to issue writs of habeas corpus and to hear and determine the custody of children of parents separated but not divorced. In re Prevatt, 223 N. C. 833, 836, 28 S. E. (2d) 564.

Willful Neglect of or Refusal to Support Illegitimate Child.—Where defendant is over sixteen years of age during the time he is charged with willfully neglecting or refusing to support his illegitimate child, the superior court and not the juvenile court has jurisdiction, notwithstanding that conception of the child occurred prior to defendant's sixteenth birthday. State v. Bowser, 230 N. C. 330, 53 S. E. (2d) 282.

Jurisdiction to determine the right of custody of an infant as between persons with whom the infant had been placed with a view to adoption and welfare officers seeking to place the infant with his family, is within the exclusive jurisdiction of the juvenile court. In re Thompson, 228 N. C. 74, 44 S. E. (2d) 475.

Exceptions to Jurisdiction in Cases Involving Custody of Child.—The juvenile branch of the superior court has exclusive original jurisdiction in all cases wherein the custody of an infant under sixteen years of age is the subject of the controversy except (1) in cases between undivorced parents living in a state of separation, § 17-39, or (2) where there is an action for divorce, in which a complaint has been filed, pending in this state, § 50-13, or (3) where the parents have been divorced by decree of a court of a state other than North Carolina, § 50-13. Phipps v. Vannoy, 229 N. C. 629, 50 S. E. (2d) 906. And see the 1949 amendment to § 50-13 which was intended to give the superior court jurisdiction in all cases where one of the parents is seeking custody. 27 N. C. Law Rev. 452.

"Controversy" Respecting Custody of Child.—In a proceeding by a father to obtain custody of his child from the parents of his deceased wife, it was contended that the father, being a fit and suitable person, had sole right to the custody of his child as a matter of law, and that therefore a "controversy" respecting the child's custody, such as would confer jurisdiction upon the juvenile court under paragraph 3 of this section, could not arise in the absence of proof of abandonment or other special fact. It was held that this contention was untenable, since the question was one of jurisdiction and not of the father's right to custody, and since the contention was perforce made in the midst of a "controversy." Phipps v. Vannoy, 229 N. C. 629, 50 S. E. (2d) 906. See the 1949 amendment to § 50-13.

Controversy between Father and Parents of Deceased Wife.—Under paragraph 3 of this section the juvenile branch of the superior court has exclusive jurisdiction of a proceeding by a father to obtain custody of his child from the parents of his deceased wife, notwithstanding that the custody of the child was awarded to the wife in a divorce action pursuant to the provisions of § 50-13. Phipps v. Vannoy, 229 N. C. 629, 50 S. E. (2d) 906. The 1949 amendment to § 50-13 was intended to overrule this case and give the superior court jurisdiction in all cases where one of the parents is seeking custody. 27 N. C. Law Rev. 452.

Voluntary Surrender of Custody to Juvenile Court.—Where the mother of minor children, for the purpose of having their custody given to their paternal grandmother, the father being dead, voluntarily came before the juvenile court and signed a paper turning over the custody of her children to such court, the court obtained jurisdiction during such time as the custody and control of the children is necessary, notwithstanding the absence of the statutory requirements in cases where the juvenile court proceeds directly, and the mother might not thereafter attack on the ground of want of jurisdiction a subsequent order of the juvenile court taking the custody away from the grandmother for change of condition and placing the children in the custody of an institution. In re Bumgarner, 228 N. C. 639, 46 S. E. (2d) 833.

A court awarding exclusive custody of a minor assumes the obligation to see that its confidence is not abused, and the court is justified in proceeding to that end with an inquiry ex mero motu or at the instance of an interested party. In re Morris' Custody, 225 N. C. 48, 33 S. E. (2d) 243.

§ 110.21.1. Jurisdiction of juvenile courts over violations of motor vehicle laws.—All jurisdiction heretofore vested in the superior courts by the provisions of G. S. § 20-218.1 is hereby vested in the juvenile courts of the state of North Carolina. (1949, c. 163, s. 2.)

Editor's Note.—Section 4 of the act from which this section was derived made it effective on February 28, 1949.

Former § 20-218.1 referred to in the above section provided: "No juvenile court or domestic relations court of this state shall have jurisdiction over any offense involving violation of any of the motor vehicle laws or of any of the laws relating to the operation of motor vehicles on the highways of this state when such offense has been committed by a person over fifteen years of age. Any such offense shall be within the jurisdiction of the court or courts which would have jurisdiction if the offender were over sixteen years of age."

§ 110-22. Juvenile courts created; part of superior court; joint county and city courts.—There shall be established in each county of the state a separate part of the superior court of the district for the hearing of cases coming within the provisions of this article. Such part of the superior court shall be called the juvenile court of ..... county.

The clerk of the superior court of each county in the state shall act as judge of the juvenile court in the hearing of cases coming within the provisions of this article, in which cases the child or children concerned therein reside in or are at the time within such county. Proceedings in such cases may be initiated before such judge, and in hearing such cases such judge shall comply with all the requirements and conform to the procedure provided in this article: Provided, the board of commissioners of any county shall have the right in their discretion to coöperate with the governing body of such city in the election of a judge of a juvenile court provided for in § 110-44, which judge when so elected shall perform all the duties, and possess all the powers and jurisdiction conferred by this article upon the clerk of superior court, as well as that conferred upon the judge of the juvenile court of such cities by this article; such judge to be so elected by the joint action of the governing bodies of such city and county shall hold office for the term of one year, and until his successor shall be duly elected, and the county availing itself of the provisions of this section shall pay said judge for services rendered the county (outside of city) such sum as the county commissioners of said county shall deem just and proper. (1919, c. 97, s. 2; Ex. Sess. 1920, c. 85; 1945, c. 186, s. 2; C. S. 5040.)

Local Modification.—Durham: 1945, c. 503.

Editor's Note.—

Prior to the 1945 amendment the proviso to the second sentence of the second paragraph applied only to counties whose county seat contained twenty-five thousand inhabitants or more.

For comment on the 1945 amendment, see 23 N. C. Law Rev. 341.

Cited in State v. Bowser, 230 N. C. 330, 53 S. E. (2d) 282.

§ 110-23. Definitions of terms.

The Term "Court."—While the act confers general jurisdiction upon the Superior Court, it will be understood that the term "court" when used in this statute without modification refers to the juvenile court which is therein created as a separate but not independent part of the Superior Court. In re Prevatt, 223 N. C. 833, 835, 28 S. E. (2d) 564.

Cited in In re McGraw, 228 N. C. 46, 44 S. E. (2d) 349.

§ 110-25. Petition to bring child before court.

While the record in In re Prevatt, 223 N. C. 833, 28 S. E. (2d) 564, did not disclose that a written petition to the juvenile court was originally filed by appellant, as provided in this section, it was held that appellant might not be heard to complain of irregularity in this respect, since the proceeding was instituted at his instance, and he was personally present at the hearing.

§ 110-31.1. Probation officers as members of county welfare staffs.—(a) By written agreement between the judge of the juvenile court and the county superintendent of public welfare, all probation officers of the juvenile court may be regular employees of the county department of public welfare, attached to the staff of the department and responsible directly to the county superintendent of public welfare as chief probation officer of the county. Upon the election or appointment of a judge of the juvenile court who is not a party to any agreement heretofore entered into under this section, a new agreement may be entered into as provided herein.

(b) When such agreement shall have been entered into, probation officers shall be employed and compensated in the same manner as all other employees of the county department of public welfare are employed and compensated. (1947, c. 94.)

§ 110-39. Neglect by parents; encouraging delinquency by others; penalty.

Instruction.—In a prosecution under this section, a charge that defendant would be guilty if he encouraged, aided and abetted the prosecuting witness "in moral delinquency" is error, since this section uses the term "to be adjudged a delinquent" and the two terms are not synonymous. State v. Bullins, 226 N. C. 142, 36 S. E. (2d) 915.

§ 110-40. Appeals.—An appeal may be taken from any judgment or order of the juvenile court to the superior court having jurisdiction in the county by the parent or, in case there is no parent, by the guardian, custodian or next friend of any child, or by any adult described in §§ 110-38 and 110-39 of this article on behalf of any child whose case has been heard by the juvenile court. Written notice of such appeal shall be filed with the juvenile court within five days after the issuance of the judgment or order of such court.

On receipt of notice of such appeal the judge of the juvenile court shall, within five days thereafter, prepare, sign, and file with the record of the case a statement of the case on appeal, together with his decision, and notice of the appeal, and exhibit such statement to the parties or their attorneys upon request. If either party excepts or objects to the statement as partial, inadequate, or erroneous he must put his exceptions or objections in writing, and file the original and two copies thereof with the judge of the juvenile court within ten days of the filing by the judge of a statement of case on appeal. The judge of the juvenile court shall forthwith transmit his statement of the case on appeal and any exceptions or objections thereto to the resident judge of the district or to the judge holding the courts of the district.

The judge of the superior court shall on receiving a statement or record of appeal from the juvenile court hear and determine the questions of law or legal inference and the judge shall deliver to the clerk of the superior court of the county in which the action or proceeding is pending his order or judgment. The clerk of the superior court shall immediately notify the judge of the juvenile court of the order or judgment.

Where the appeal is to the superior court upon issues of fact, either party may demand that the same be tried at the first term of said court after the appeal is docketed in said court, and said trial shall have precedence over all other cases except the cases of exceptions to homesteads and the cases of summary ejectment: Provided, that said appeal shall have been docketed prior to the convening of the said court: Provided further, that the presiding judge may take up for trial in advance any pending case in which the rights of the parties or the public require it. (1919, c. 97, s. 20; 1949, c. 976; C. S. 5058.)

Editor's Note.—The 1949 amendment rewrote this section. For brief comment on the amendment, see 27 N. C. Law Rev. 443.

Effect of Juvenile Court's Adjudication.—Where the juvenile court has by proper proceeding acquired jurisdiction of the parties and of the subject matter of children whose custody is subject to controversy, its adjudication for the welfare of the children must be held effective and binding on the parties, subject to review on appeal. In re Prevatt, 223 N. C. 833, 28 S. E. (2d) 564.

§ 110-44. City juvenile courts and probation officers.—Every city in North Carolina where the population was, by the last federal census report, ten thousand or more may maintain a juvenile court, to which is hereby given the powers, duties and obligations of this article to be exercised within their territorial boundaries. Such city juvenile courts shall conduct their business in accordance with the procedure set forth in this article as applying to the county juvenile court. It is hereby made the duty of governing bodies of such cities to make provisions for such courts and bear the expense thereof, either by requiring the recorder to act as a juvenile judge or by the appointment of a separate judge. The governing bodies of such cities shall also appoint one or more assistant probation officers who shall serve within its jurisdiction under the general supervision of the chief probation officer of the county, which chief probation officer of the county is hereby made the chief probation officer of the city court hercin provided for. The salary of the juvenile court judge shall be fixed and paid by the governing body of the city, and such governing bodies are hereby given authority to expend such sums from the public funds of the city as may be required to carry this article into effect.

In case it may appear to the governing bodies of such cities herein described that it would be best to allow the county juvenile court to transact the business of the city, they may make such provisions and agreements with the county commissioners for the expense of the joint court as may be agreed upon, and in such event such a city is hereby permitted to make such arrangement in lieu of establishing a city juvenile court. But in case the county commissioners will not agree to such arrangement, then the city may establish a juvenile court, as provided in this section. Provided, that in the event the governing bodies of such cities reach an agreement with the county commissioners, whereby the county juvenile court shall also transact the business of the city juvenile court, the governing bodies of such city and county, by joint resolution, may elect a judge and an assistant judge of the combined court, who may be persons other than the clerk of the superior court, and who shall hold such office for the term of one year, and until their successors shall be duly elected. Such judge and assistant judge, when so elected, shall perform all the duties and possess all the powers and jurisdiction conferred by this article upon the clerk of the superior court, as well as that conferred upon the judge of the juvenile court of such cities by this article. The assistant judge provided for by this section shall only perform the functions of judge of the combined juvenile court when the regular judge is unavoidably absent, or sick, and no orders shall be entered by him except in such cases. The compensation of the judge and of the assistant judge provided for by this section shall be determined by the county commissioners and paid by such county. The part of said salary that shall be paid by such city shall be determined by agreement between the governing bodies of the two units, as hereinbefore provided for. The authority is also hereby given by this section for the election of an assistant judge of the juvenile court in cases where counties elect to combine with a city juvenile court and let such court transact the joint business of both county and city.

Any town of five thousand population which is not a county seat, and in which there is a recorder's court, may, if deemed advisable and necessary by the governing body, provide for the conduct of a juvenile court within the territorial jurisdiction of such recorder's court: Provided, that the provisions and procedure of this article are fully followed as in case for towns of ten thousand inhabitants. (1919, c. 97, s. 24; 1923, c. 193; 1943, c. 594; 1945, c. 186, s. 1; C. S. 5062.)

Local Modification.—Durham: 1945, c. 503; City of Greensboro: 1949, c. 669.

Editor's Note.—

The 1945 amendment substituted in the first sentence the words "last federal census report" for the words "census of one thousand nine hundred and twenty." Prior to the amendment the maintenance and establishment of a juvenile court was made mandatory by the first and second paragraphs.

For comment on the 1943 amendment, see 21 N. C. Law Rev. 344.

For comment on the 1945 amendment, see 23 N. C. Law Rev. 340.

Art. 4. Placing or Adoption of Juvenile Delinquents or Dependents.

§ 110-50. Consent required for bringing child into state for placement or adoption.—(a) No person, agency, association, institution, or corporation shall bring or send into the state any child for the purpose of giving his custody to some person in the state or procuring his adoption by some person in the state without first obtaining the written consent of the state board of public welfare.

(b) The person with whom a child is placed for either of the purposes set out in subsection (a) of this section shall be responsible for his proper care and training. The board or its agents shall have the same right of visitation and supervision of the child and the home in which it is placed as in the case of a child placed by the board or its agents as long as the child shall remain within the state and until he shall have reached the age of eighteen years or shall have been legally adopted. (1931, c. 226, s. 1; 1947, c. 609, s. 1.)

Editor's Note.—The 1947 amendment rewrote this section.

§ 110-51. Bond required.—The state board of

public welfare may, in its discretion, require of a person, agency, association, institution, or corporation which brings or sends a child into the state with the written consent of the board, as provided by § 110-50, a continuing bond in a penal sum not in excess of one thousand dollars ($1000.00) with such conditions as may be prescribed and such sureties as may be approved by the state board of public welfare. Said bond shall be made in favor of and filed with the state board of public welfare with the premium prepaid by the said person, agency, association, institution or corporation desiring to place such child in the state. (1931, c. 226, s. 2; 1947, c. 609, s. 2.)

Editor's Note.—The 1947 amendment rewrote the first sentence.

§ 110-52. Consent required for removing child from state.—No child shall be taken or sent out of the state for the purpose of placing him in a foster home or in a childcaring institution without first obtaining the written consent of the state board of public welfare. The foster home or childcaring institution in which the child is placed shall report to the board at such times as the board may direct as to the location and well-being of such child until he shall have reached the age of eighteen years or shall have been legally adopted. (1931, c. 226, s. 3; 1947, c. 609, s. 3.)

Editor's Note.—The 1947 amendment rewrote this section.

§ 110-53: Repealed by Session Laws 1947, c. 609, s. 4.

§ 110-57. Application of article.—None of the provisions of this article shall apply when a child is brought into or sent into, or taken out of, or sent out of the state, by the guardian of the person of such child, or by a parent, step-parent, grand-parent, uncle or aunt of such child, or by a brother, sister, half-brother, or half-sister of such child, if such brother, sister, half-brother, or half-sister is twenty-one years of age or older. (1947, c. 609, s. 5.)

Chapter 111. Commission for the Blind.

Art. 1. Organization and General Duties of Commission.

Art. 2. Aid to the Needy Blind.

Art. 1. Organization and General Duties of Commission.

§ 111-6.1. Pre-conditioning center for the adult blind.—In addition to other powers and duties granted it by law, the North Carolina state commission for the blind is hereby authorized and directed to establish and operate a pre-conditioning center for the blind for the purpose of assisting them in their mental, emotional, physical, and economic adjustments to blindness through the application of proper tests, measurements, and intensive training in order that they may develop manual dexterity, obstacle and direction awareness, acceptable work habits, and maximum skills in industrial and commercial processes.

The commission shall make all rules and regulations necessary for this purpose and is hereby authorized to enter into any agreement or contract, to purchase or lease property both real and personal, to accept grants and gifts of whatsoever nature, and to do all other things necessary to carry out the intent and purpose of such a pre-conditioning center.

The state commission for the blind is hereby authorized to receive grants in aid from the federal government for carrying out the provisions of this section, as well as for other related rehabilitation programs for the North Carolina blind, under the provisions of the act of congress known as the Barden-Rehabilitation Act (volume fifty-seven, United States Statutes at Large, chapter one hundred and ninety). Blind persons, who have been residents of North Carolina for one year immediately preceding the date of application for rehabilitation services or who show an established intent to reside continuously in this state, may enjoy the benefits of this section, or any other related rehabilitation benefits under the said Barden-Rehabilitation Act. (1945, c. 698.)

Editor's Note.—The act inserting this section appropriated from the general funds of the state the sum of fifteen thousand dollars for the purpose of establishing a pre-conditioning center for the adult blind.

§ 111-8.1. Certain eye examinations to be reported to commission.—Whenever, upon examination at a clinic, hospital or other institution, or elsewhere by a physician, optometrist or other person examining eyes any person is found to have no vision or vision with glasses which is so defective as to prevent the performance of ordinary activities for which eyesight is essential, the physician, the superintendent of such institution or other person who conducted or was in charge of the examination shall within thirty days report the results of the examination to the North Carolina state commission for the blind. (1945, c. 72, s. 3.)

Art. 2. Aid to the Needy Blind.

§ 111-17. Amount and payment of assistance; source of funds.

Cited in Atlantic Coast Line R. Co. v. Beaufort County, 224 N. C. 115, 29 S. E. (2d) 201.

§ 111-19. When applications for relief made directly to state commission; transfer of residence.

Any recipient of aid to the blind who moves to another county in this state shall be entitled to receive aid to the blind in the county to which he has moved, and the board of county commissioners, or its authorized agent, of the county from

which he has moved shall transfer all necessary records relating to the recipient to the board of county commissioners, or its authorized agent, of the county to which he has moved. The county from which the recipient moves shall pay the aid to such recipient for a period of three months following such removal, not in excess of the amount paid before removal, and thereafter aid to such recipient shall be paid by the county to which such recipient has moved subject to the rules and regulations of the North Carolina state commission for the blind. (1937, c. 124, s. 8; 1947, c. 374.)

Editor's Note.—The 1947 amendment added the above paragraph at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

§ 111-27.1. Commission authorized to conduct certain business operations.—For the purpose of assisting blind persons to become self-supporting the North Carolina state commission for the blind is hereby authorized to carry on activities to promote the rehabilitation and employment of the blind, including the operation of various business enterprises suitable for the blind to be employed in or to operate. The executive budget act shall apply to the operation of such enterprises as to all appropriations made by the state to aid in the organization and the establishment of such businesses. Purchases and sales of merchandise or equipment, the payment of rents and wages to blind persons operating such businesses, and other expenses thereof, from funds derived from local subscriptions and from the day by day operations shall not be subject to the provisions of law regulating purchases and contracts, or to the deposit and disbursement thereof applicable to state funds but shall be supervised by the state commission for the blind. All of the business operations under this law, however, shall be subject to regular audits by the state auditor. (1945, c. 72, s. 2.)

§ 111-28.1. Commission authorized to cooperate with federal government in rehabilitation of blind.—The North Carolina state commission for the blind is hereby authorized and empowered to make the necessary rules and regulations to cooperate with the federal government in the furtherance of the provisions of the act of congress known as the Barden-Rehabilitation Act (Volume fifty-seven, United States Statutes at Large, chapter one hundred and ninety) providing for the rehabilitation of the blind. (1945, c. 72, s. 1.)

§ 111-30. Appointment of guardians for certain blind persons.—If any indigent blind person, who is receiving any moneys available to the needy blind, is unable to manage his own affairs, and this fact is brought to the attention of the clerk of the superior court of the county where said indigent blind person resides by petition of a relative of said blind person, or other interested person, or by the chairman of the county commissioners or by the state commission for the blind, it shall be the duty of the clerk to set a day for hearing the facts in the matter and to notify all interested persons. The indigent blind person shall be present at the hearing in person, or by representation, and the clerk of the superior court shall inquire into his condition. The hearing and inquiry shall be conducted in the manner provided by the general guardianship laws of North Carolina. If, after the hearing, the clerk finds that such indigent blind person is unable to manage his own affairs, it shall be the duty of the clerk to appoint some discreet and solvent person to act as guardian for said indigent blind person to whom said moneys may be paid. No bond shall be required of, or fee paid to, the guardian where the amount of money received does not exceed fifty dollars ($50.00) per month. Such person so designated shall use and faithfully apply said moneys for the sole benefit and maintenance of such indigent blind person. The person so designated shall give a receipt to the officer disbursing said moneys and the clerk, in his discretion, may require such person to render a periodic account of the expenditure of such moneys. (1945, c. 72, s. 4.)

Chapter 112. Confederate Homes and Pensions.

Art. 1. Confederate Woman's Home.

§ 112-1. Incorporation and powers of association.—Julian S. Carr, John H. Thorp, Robert H. Ricks, Robert H. Bradley, E. R. Preston, Simon B. Taylor, Joseph F. Spainhour, A. D. McGill, M. Leslie Davis, T. T. Thorne, and W. A. Grier, together with their successors in office, are constituted a body politic and corporate under the name and style of Confederate Woman's Home Association, and by that name may sue and be sued, purchase, hold and sell real and personal property, and have all the powers and enjoy all the privileges of a charitable corporation under the law enabling them to establish, maintain, and govern a home for the deserving wives, daughters and widows of North Carolina Confederate Soldiers: Provided, however, no such daughters of North Carolina Confederate Soldiers shall be admitted to said home after January 1, 1953.

The corporation may solicit and receive donations in money or property for the purpose of obtaining a site on which to erect its buildings, for equipping, furnishing and maintaining them, or for any other purpose whatsoever; and said corporation may invest its funds to constitute an endowment fund. Said corporation shall have a corporate existence until January 1, 1960. It shall also have the power to solicit and receive donations for the purpose of aiding indigent Confederate women at their homes in the various counties of the state, and shall have all powers necessary to this end. (1913, c. 62, s. 1; 1949, c. 121; C. S. 5134.)

Editor's Note.—The 1949 amendment rewrote the last few lines of the first paragraph, and substituted "until January 1, 1960" for the words "for forty years" in the second sentence of the second paragraph.

Art. 2. Pensions.

§ 112-17: Repealed by Session Laws 1945, c. 699, s. 2.

Editor's Note.—
The repealing act was made effective as of Dec. 31, 1944.

§ 112-18. Classification of pensions for soldiers and widows.

Class "A." To all Confederate soldiers not included in § 112-17, who are now disabled from any cause to perform manual labor, twelve hundred dollars ($1200.00).

Class "B." To such colored servants who went with their masters to the war and can prove their service to the satisfaction of the county and state pension boards, four hundred and fifty-six dollars ($456.00).

Widows

Class "A." To the widows of ex-Confederate soldiers who are blind in both eyes or totally helpless, six hundred dollars ($600.00).

Class "B." To the widows of ex-Confederate soldiers who were married to such soldiers on or before January first, eighteen hundred and eighty, and to such widows who were married to such soldiers subsequent to January first, eighteen hundred and eighty, and who are now on the pension rolls, by virtue of previous statutes, three hundred and twelve dollars ($312.00). Provided, that the state board of pensions upon the recommendation of the county pension board, may add to Class B list of pensions such widows of Confederate veterans who were married to the deceased veterans prior to the year one thousand eight hundred and ninety-nine and who are now more than sixty years of age, as in the judgment of the said state board of pensions are meritorious and deserving, and who from old age or other afflictions are unable to earn their own living. (1921, c. 189, s. 9; Ex. Sess. 1921, c. 89; Ex. Sess. 1924, c. 111; 1927, c. 96, s. 2; 1929, c. 300, s. 1; 1935, c. 46; 1937, c. 318; 1945, c. 699, s. 1; c. 1051, ss. 1-3; 1949, c. 1158, ss. 1-4; C. S. 5186(j).)

Editor's Note.—The 1945 and 1949 amendments increased the various allowances. As the introductory paragraph was not affected by the amendments it is not set out.

§ 112-34. State payment of burial expenses. — Whenever in any county of this state a Confederate pensioner on the pension roll shall die, and such fact has been determined by the state auditor, the state auditor shall forward to the clerk of the superior court of the county in which such pensioner resided a state warrant in the amount of one hundred dollars ($100.00), to be paid by the clerk of the superior court of the county in which such pensioner resided to the personal representative, or next of kin of such deceased pensioner to be applied toward defraying the funeral expenses of such deceased pensioner: Provided, that this section shall also apply to pensioners transferred to Old Age Assistance under the provisions of § 112-21: Provided further, that this section shall apply to persons who otherwise would be entitled to pensions but who are not on pension roll at time of death because of being admitted to county home, county institution or state institution. (1939, c. 187, s. 2; 1941, c. 152, s. 4; 1949, c. 1018.)

Editor's Note.—The 1949 amendment added the last proviso.

Chapter 113. Conservation and Development.

SUBCHAPTER I. DEPARTMENT OF CONSERVATION AND DEVELOPMENT.

Art. 1. Organization and Powers.

§ 113-3. Duties of the department.

Cross References.—See note under § 113-8. For authority of state board of education to convey or lease marsh and swamp lands to department of conservation and development, see §§ 146-99 to 146-101. As to wildlife resources law, see §§ 143-237 to 143-254.

§ 113-5. Appointment and terms of office of board.—On May first, one thousand nine hundred and forty-five, the governor shall appoint fifteen (15) persons to be members of the board of conservation and development, five of whom shall serve for a term of office of two years and until their successors are appointed and qualified. Upon the expiration of their term of office, their successors shall be named for a term of six years and until their successors are appointed and qualified. Five of said persons shall be named for a term of four years and until their successors are appointed and qualified. At the end of their term of office, their successors shall be named for a term of six years and until their successors are appointed and qualified. Five of said persons shall be named for a term of six years and until their successors are appointed and qualified. At the end of their term of office, their successors shall be named for a term of six years and until their successors are appointed and qualified. Any vacancy occurring in the membership of said board because of death, resignation, or otherwise shall be filled by the governor for the unexpired term of such member. In making the appointments, the governor shall take into consideration the functions and activities of the board and in selecting the members shall give, as nearly as possible, proportionate representation to each and all of such functions and activities of the department. (1925, c. 122, s. 6; 1927, c. 57, s. 3; 1941, c. 45; 1945, c. 638, s. 1.)

Editor's Note.—The 1945 amendment rewrote this section.

§ 113-6. Meetings of the board.—The said board may meet at least four times each year; one of said meetings to be held in Raleigh during the

month of January and one in July at Morehead City, and the other two meetings to be held at a date and place to be fixed by the board, and it may hold such other meetings as may be deemed necessary by the board for the proper conduct of the business of the department. (1925, c. 122, s. 7; 1927, c. 57, s. 3; 1941, c. 45; 1945, c. 638, s. 2; 1947, c. 699.)

Editor's Note.—Prior to the 1945 amendment only two meetings a year were required, and no place of meeting was designated.

The 1947 amendment substituted "may" for "shall" in line two.

§ 113-8. Powers and duties of the board. The board may acquire such real and personal property as may be found desirable and necessary for the performance of the duties and functions of the department of conservation and development, and pay for same out of any funds appropriated for the department or available unappropriated revenues of the department, when such acquisition is approved by the governor and council of state. The title to any real estate acquired shall be in the name of the state of North Carolina for the use and benefit of the department. (1925, c. 122, s. 9; 1927, c. 57; 1947, c. 118.)

Editor's Note.—The 1947 amendment added the above paragraph at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

Session Laws 1945, c. 524, authorized the maintenance of one or more smallmouth bass fish hatcheries and subrearing stations.

For subsequent law relating to fish, see §§ 143-237 to 143-254.

Art. 1A. Special Peace Officers.

§ 113-28.1. Designated employees commissioned special peace officers by governor.—Upon application by the director of the department of conservation and development, the governor is hereby authorized and empowered to commission as special peace officers such of the employees of the department of conservation and development as the director may designate for the purpose of enforcing the laws, rules and regulations enacted or adopted for the protection, preservation and government of state parks, lakes, reservations and other lands or waters under the control or supervision of the department of conservation and development. Such employees shall receive no additional compensation for performing the duties of special peace officers under this article. (1947, c. 577.)

§ 113-28.2. Powers of arrest.—Any employee of the department of conservation and development commissioned as a special peace officer shall have the right to arrest with warrant any person violating any law, rule or regulation on or relating to the state parks, lakes, reservations and other lands or waters under the control or supervision of the department of conservation and development, and shall have power to pursue and arrest without warrant any person violating in his presence any law, rule or regulation on or relating to said parks, lakes, reservations and other lands or waters under the control or supervision of the department of conservation and development. (1947, c. 577.)

§ 113-28.3. Bond required.—Each employee of the state department of conservation and development commissioned as a special peace officer under this article shall give a bond with a good surety, payable to the state of North Carolina in a sum not less than one thousand dollars ($1,000.00), conditioned upon the faithful discharge of his duty as such peace officer. The bond shall be duly approved by and filed in the office of the insurance commissioner, and copies of the same, certified by the insurance commissioner, shall be received in evidence in all actions and proceedings in this state. (1947, c. 577.)

§ 113-28.4. Oaths required.—Before any employee of the department of conservation and development commissioned as a special peace officer shall exercise any power of arrest under this article, he shall take the oaths required of public officers before an officer authorized to administer oaths. (1947, c. 577.)

SUBCHAPTER II. STATE FORESTS AND PARKS.

Art. 2. Acquisition and Control of State Forests and Parks.

§ 113-34. Power to acquire lands as state forests, parks, etc.; donations or leases by United States.

Editor's Note.—

Public Acts 1941, c. 118, s. 2, excluding Stokes county from the application of the 1941 amendment was repealed by Session Laws 1945, c. 407.

§ 113-35. State timber may be sold by department of conservation and development; forest nurseries; control over parks, etc.; operation of public service facilities; concessions to private concerns.

The department may construct and operate within the state forests, state parks, state lakes and any other areas under its charge suitable public service facilities and conveniences, and may charge and collect reasonable fees for the use of same; it may also charge and collect reasonable fees for

(a) The operation and use of such boats or other craft on the surface of state lakes as may be permitted under its own regulations,

(b) The erection, maintenance and use of docks, piers and such other structures as may be permitted in or on state lakes under its own regulations,

(c) Hunting privileges on state forests and fishing privileges in state forests, state parks and state lakes, provided that such privileges shall be extended only to holders of bona fide North Carolina hunting and fishing licenses, and provided further that all state game and fish laws and regulations are complied with.

The department may also grant to private individuals or companies concessions for operation of public service facilities for such periods and upon such conditions as the board of conservation and development shall deem to be in the public interest. The department may make reasonable rules for the regulations of the use by the public of the public service facilities and conveniences herein authorized which regulations shall have the force and effect of law and any violation of such regulations shall constitute a misdemeanor and shall be punishable by a fine of not more than fifty dollars ($50.00) or by imprisonment for not exceeding thirty days. (1931, c. 111; 1947, c. 697.)

Editor's Note.—The 1947 amendment added the above

paragraph at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

Art. 4. Protection against Forest Fires.

§ 113-54. Duties of forest wardens; payment of expenses by state and counties.—Forest wardens shall have charge of measures for controlling forest fires; shall make arrests for violation of forest laws; shall post along highways and in other conspicuous places copies of the forest fire laws and warnings against fires, which shall be supplied by the state forester; shall patrol and man lookout towers and other points during dry and dangerous seasons under the direction of the state forester, and shall perform such other acts and duties as shall be considered necessary by the state forester for the protection of the forested area of each of the counties within the state from fire. No county may be held liable for any part of the expenses thus incurred unless specifically authorized by the board of county commissioners under prior written agreement with the state forester; appropriations for meeting the county's share of such expenses so authorized by the board of county commissioners shall be provided annually in the county budget. For each county in which financial participation by the county is authorized, the state forester shall keep or cause to be kept an itemized account of all expenses thus incurred and shall send such accounts periodically to the board of county commissioners of said county; upon approval by the board of the correctness of such accounts, the county commissioners shall issue or cause to be issued a warrant on the county treasury for the payment of the county's share of such expenditures, said payment to be made within one month after receipt of such statement from the state forester. Appropriations made by a county for this coöperative forest fire control work are not to replace state and federal funds which may be available to the state forester for the work in said county, but are to serve as a supplement thereto. (1915, c. 243, s. 4; 1925, c. 106, s. 1; 1927, c. 150, s. 3; 1935, c. 178, s. 2; 1943, c. 660; 1947, c. 56, s. 1; C. S. 6136.)

Editor's Note.—
The 1947 amendment rewrote this section.

§ 113-56. Compensation of forest wardens. — Forest wardens shall receive compensation from the board of conservation and development at a reasonable rate to be fixed by said board for the time actually engaged in the performance of their duties; and reasonable expenses for equipment, transportation, or food supplies incurred in fighting or extinguishing any fire, according to an itemized statement to be rendered the state forester every month, and approved by him.
(1947, c. 56, s. 2.)

Editor's Note.—The 1947 amendment struck out the words "not to exceed the sum of thirty cents per hour" formerly appearing after the word "board" in line three of the first sentence. As the rest of the section was not affected by the amendment it is not set out.

§ 113-59. Cooperation between counties and state in forest fire protection.—The board of county commissioners of any county are hereby authorized and empowered to coöperate with the department of conservation and development in the protection from fire of the forests within their respective counties, and to appropriate and pay out of the funds under their control such amount as is provided in § 113-54. (1921, c. 26; 1925, c. 122, s. 22; 1945, c. 635; C. S. 6140(a).)

Editor's Note.—The 1945 amendment struck out the words "in their discretion" formerly appearing after the word "empowered" in line three. It also inserted the words "their control such amount as is provided in § 113-54" in lieu of the last ten lines of the section as formerly appearing.

Art. 6. Coöperation for Development of Federal Parks, Parkways and Forests.

§§ 113-78 to 113-81: Repealed by Session Laws 1947, c. 422, §§ 1, 9.

As to transfer of properties and interests formerly held by the committee established under the repealed section, see § 143-255.

Art. 6A. Forestry Services and Advice for Owners and Operators of Forest Land.

§ 113-81.1. Authority to render scientific forestry services.—The North Carolina department of conservation and development is hereby authorized to designate, upon request, forest trees of forest landowners and forest operators for sale or removal, by blazing or otherwise, and to measure or estimate the volume of same under the terms and conditions hereinafter provided. (1947, c. 384, s. 1.)

§ 113-81.2. Services under direction of state forester; compensation; when services without charge.—The administration of the provisions of this article shall be under the direction of the state forester. The state forester, or his authorized agent, upon receipt of a request from a forest landowner or operator for technical forestry assistance or service, may designate forest trees for removal for lumber, veneer, poles, piling, pulpwood, cordwood, ties, or other forest products, by blazing, spotting with paint or otherwise designating in an approved manner; he may measure or estimate the commercial volume contained in the trees designated; he may furnish the landowner or operator with a statement of the volume of the trees so designated and estimated; he may assist in finding a suitable market for the products so designated, and he may offer general forestry advice concerning the management of the forest.

For such designating, measuring or estimating services the state forester may make a charge, on behalf of the department of conservation and development, in an amount not to exceed five per cent (5%) of the sale price or fair market value of the stumpage so designated and measured or estimated. Upon receipt from the state forester of a statement of such charges, the landowner or operator or his agent shall make payment to the state forester within thirty days.

In those cases where the state forester deems it desirable to so designate and measure or estimate trees without charge, such services shall be given for the purpose of encouraging the use of approved scientific forestry principles on the private or other forest lands within the state, and to establish practical demonstrations of said principles. (1947, c. 384, s. 2.)

§ 113-81.3. Deposit of receipts with state treasury.—All monies paid to the state forester for services rendered under the provisions of this article shall be deposited into the state treasury to the credit of the department of conservation and development. (1947, c. 384, s. 3.)

SUBCHAPTER III. GAME LAWS.

Art. 7. North Carolina Game Law of 1935.

§ 113-82. Title of article.

For subsequent law affecting this subchapter, see §§ 143-237 to 143-254.

§ 113-91. Powers of commissioner.

(d) To Execute Warrants. The commissioner and each of his deputies shall have power to execute all warrants issued for violation of this article, and to serve subpoenas issued for examination, investigation, or trial of offenders against any of the provisions of this article; to make search, after having first obtained proper warrant therefor, of any place or thing which such deputies have cause to believe contains wild birds or animals, or any part thereof, or the nest or eggs of birds possessed in violation of law; to seize wild birds or animals, or parts thereof, or nests, or eggs of birds killed, captured, or possessed in violation of law or showing evidence of illegal killing; to arrest without warrant any persons committing a violation of this article in his presence, and to take such person immediately before a court having jurisdiction for trial or hearing; and to exercise such other powers of peace officers in the enforcement of the provisions of this article, or of judgments obtained for violation thereof, as are not herein specifically conferred.

(e) To Dispose of Seized Game and Devices. All game birds and the edible portions of game animals seized under the provisions of this article shall be disposed of by the commissioner, or under his direction, by gift to hospitals, charitable institutions or almshouses in the county taken within the State. Non-game birds or parts thereof and the plumes or skins of wild birds or birds of foreign species shall be disposed of by the commissioner by gift to scientific educational institutions within the state, or may be retained by him for use of the board, or in his discretion they may be destroyed. The commissioner shall take a receipt from the donee for any such gift, and file such receipt in his office, and he shall keep a permanent record of such gifts. The heads, antlers, horns, hides, skins, or feet, or parts of any game or fur-bearing animal, seized under the provisions of this article, if the person from whom the same were seized is convicted of violating any of the provisions of this article, or if the owner thereof is unknown, may be sold for cash by the commissioner, or under his direction, at public auction to the highest bidder. Notice of the time and place of such sale, together with a description of the articles to be sold, shall be given by the commissioner or under his direction in such manner as he may determine to be best calculated to bring the best price therefor: Provided, that if the property seized is perishable, that same may be disposed of by the commissioner immediately. The commissioner or his deputies authorized to make the sale shall issue to the purchaser a certificate stating that the purchaser has the legal right to be in possession of the articles bought, and anyone so acquiring said article or articles from the state, other than the person from whom they were seized, shall have the right to possess the same. If the person from whom any of said articles were seized be acquitted of the charge of violating any of the provisions of this article, the article so seized shall be returned to him. It shall be, and is hereby made, the duty of each deputy to make a full and complete report to the commissioner of all property by him confiscated because of a violation of the game laws of this state, showing in detail a description of the property, the person from whom it was confiscated, the price received therefor upon public sale, and the disposition of the money. The commissioner shall keep in his office a permanent record showing all property confiscated by him or any of his deputies, and the disposition made thereof under the provisions of this article.

(f) To Seize Certain Devices in Certain Cases. In all cases of violation of any law relating to the unlawful taking of, or unlawful attempt to take any animals, birds, or fish, during the hours after sunset and before sunrise; or taking of or attempt to take, without a permit, deer or wild turkeys in closed season; or the unlawful taking of any doe deer; or the taking of or attempt to take any animals, birds or fish by means or use of dynamite or other explosive; or by the use of any silencer on any weapon; or by the unlawful use of any artificial light, or by means of any trap, net, snare, or other device, the use of which in taking or attempting to take animals, birds, or fish, is prohibited by law; or in case of transportation of game or game fish illegally so taken; or the unlawful taking or transportation of any doe deer; or in case of the unlawful sale of game or game fish, whether taken legally or illegally, all officers, whose duty it is to enforce the game and game fish laws, are hereby empowered to seize all devices, instruments, weapons, air and water craft, and vehicles used in the unlawful taking of or unlawful attempt to take animals, birds, or fish, at the times or by the means herein mentioned, or used in the transportation of any birds, animals, or fish so taken, or used in the unlawful taking or transportation of any doe deer, or used in the unlawful sale of game or game fish, whether taken legally or illegally. The devices, instruments, weapons, craft, and vehicles so seized shall be delivered to the sheriff of the county in which such offense is committed, or placed under said sheriff's constructive possession, if delivery of actual possession is impracticable; and the same shall be held by said sheriff pending the trial of the person or persons arrested for any of the offenses herein mentioned; and upon conviction of such person or persons of any of said offenses, the court may in its discretion, and subject to the rights of any third person in the property seized, adjudge the property so seized forfeited, and order the same sold in the manner provided by law for the sale of personal property under execution; the net proceeds of such sale shall be paid into the school fund of said county as other fines and forfeitures; the forfeiture and sale of such property when ordered shall be in addition to such fine or imprisonment as may be imposed by the court.

(g) To Seize Weapons and Devices to Be Used in Evidence. At the time of making arrests for any violation of any law relating to the unlawful taking of or unlawful attempt to take animals, birds, or fish, the officer making the arrest is hereby empowered to seize any weapon or device unlawfully used in the violation for which the arrest is made; the weapons or devices so seized shall be delivered to the sheriff of the county in which the offense is committed, to be held and used in

evidence for the state upon the trial of the person or persons arrested for such violation. After the trial, any weapon or device so seized shall be returned to the owner thereof unless the offense shall be one of the offenses mentioned in subsection (f) hereof, in which case the same may be returned to the owner thereof in such manner as the court may direct, unless the same be adjudged forfeited and ordered sold by the court upon conviction of the owner thereof for one of the offenses mentioned in said subsection (f) hereof.

(h) Whenever any devices, instruments, weapons, air or water craft, or vehicles are seized and placed in the possession of the sheriff pursuant to subsections (f) or (g) of this section, any person who establishes ownership in any such property to the satisfaction of the court or the sheriff shall be entitled to possession of the same upon furnishing the sheriff a bond in the amount of the value of such property, as fixed by the sheriff, conditioned on such person's producing such property in court on the day of the trial for the offense with respect to which such property was seized. (1935, c. 486, s. 8; 1949, c. 489.)

Editor's Note.—The 1949 amendment struck out of subsection (d) the former provision relating to seizure and confiscation of devices illegally used in taking wild birds or animals, and rewrote the sentence of subsection (e) relating to return of seized devices to acquitted persons. Subsections (f), (g) and (h) are new with the amendment. As the rest of the section was not affected by the amendment only subsections (d) through (h) are set out.

§ 113-95. Licenses required.—No person shall at any time take any wild animals or birds without first having procured a license as provided by this article, which license shall authorize him to take game only during the periods of the year when it shall be lawful. The applicant for a license shall fill out a blank application in the form prescribed and furnished by the commissioner. Said application shall be subscribed and sworn to by the applicant before an officer authorized to administer oaths in this state, and the persons hereby authorized to issue licenses are hereby authorized to administer oaths to applicants for such licenses. Licenses may be issued by the clerk of the superior court for each county, the commissioner, game protectors and such other persons as the commissioner may authorize in writing:

License Fees

Non-resident hunting license	$15.75
State resident hunting license	3.10
Combination hunting and fishing license	4.10
County hunting license	1.10

Said applicant, if a resident of this state, shall pay to the officer or person issuing the license the sum of one ($1.00) dollar as a license fee, and the sum of ten (10c) cents as a fee to the officer or person, other than the commissioner, for issuing the same, and shall obtain a county resident hunting license, which shall entitle him to take game birds and animals in the county of his residence, or shall pay to the officer or person issuing the license the sum of three dollars ($3.00) as a license fee and the sum of ten (10c) cents as a fee to the officer or person other than the commissioner for issuing the same and shall obtain a resident state hunting license, which shall entitle him to take game birds and animals in any county of the state at large, as authorized by this article. All persons who have lived in this state for at least six months immediately preceding the making of such application shall be deemed resident citizens for the purposes of this article. Said applicant, if a non-resident of this state, or a resident for less than six months, or an alien, shall pay to the officer or person issuing the license fifteen dollars and fifty cents ($15.50) as a license fee and the sum of twenty-five (25c) cents as a fee to the officer or person other than the commissioner for issuing the same and shall obtain a non-resident hunting license, which shall entitle him to take game birds and game animals as authorized by this article. The commissioner is hereby authorized and empowered to issue combination licenses for hunting and fishing which said combination license may be for an amount less than the total of the hunting and fishing license when purchased separately. For a state resident hunting and fishing license the applicant shall pay to the officer or person issuing the license the sum of four ($4.00) dollars as a license fee and ten (10c) cents as a fee for issuing same, which shall entitle him to hunt and fish in any county of the state at large according to the law: Provided, that twenty-five cents (25c) of the fee received for the sale of each resident state hunting license, each nonresident hunting license, and each state resident hunting and fishing license as set forth above shall be set aside as a special fund which shall be expended by the North Carolina wildlife resources commission, in its discretion, for the purpose of purchase, lease, development and management of lands and waters in North Carolina, or for the purpose of securing federal funds for wildlife conservation projects through means of matching federal funds in such proportion as federal laws may require, and that twenty-five cents (25c) of each state fee herein described shall be expended by such commission, in its discretion, for the purpose of enlarging, expanding and making more effective the work of the education and enforcement divisions of the North Carolina wildlife resources commission. Any lands and waters acquired as above provided are to be used for the propagation of game birds, game animals and fish for public hunting and fishing.

(1945, c. 617; 1949, c. 1203, s. 1.)

Editor's Note.—The 1945 amendment made changes in the fees specified under the heading "License Fees" and in the paragraph following such heading. It also added the proviso at the end of the paragraph and struck out a former proviso relating to Northampton county. The 1949 amendment rewrote the latter part of the second paragraph. As the last two paragraphs were not affected by the amendments they are not set out.

For temporary act authorizing resident members of armed forces to hunt without license, see Session Laws 1945, c. 647.

Use of Unexpended Funds.—Session Laws 1949, c. 1203, s. 3, provides that fifty per cent of the fund which has heretofore accumulated for the purchase, lease, development, and management of lands and waters, pursuant to §§ 113-95 and 113-144, and remains unexpended, may be expended by the North Carolina wildlife resources commission, in its discretion, to expand, enlarge and make more effective the work of the education and enforcement divisions of the commission.

§ 113-101. Bag limits.—It shall be unlawful to take a greater number of each species of birds or animals per day or per season than is enumerated in the following table. The Board of Conservation and Development may alter these bag limits as changes in the supply of wild life may justify.

	Per Day	Per Season
Bear	No limit	No limit
Deer	1	3
Mink, Muskrat, Otter	No limit	No limit
Opossum, Raccoons	No limit	No limit
Quail	10	150
Rabbit	No limit	No limit
Squirrel	10	No limit
Turkey	1	3
Ruffed Grouse	2	10

Woodcock—Federal regulations.

Dove, Ducks, Geese, Brant and other migratory waterfowl—Federal regulations.

Snipe, Sora, Marsh Hens, Rails, Gallinules—Federal regulations.

Wildcat, Weasel and Skunk—No limit.

Fox—County regulations.

Game birds and game animals lawfully taken may be possessed during the open season therefor and the first ten (10) days next succeeding the close of such open season, but a person may not have in possession at any one time more than two (2) deer, two (2) wild turkeys and two days' bag limit of other game animals or game birds.

Notwithstanding any other provisions of this section or any other section of law, it shall not be unlawful for any person to possess game birds and game animals for a period longer than ten (10) days next succeeding the close of the open season during which such birds or animals were lawfully taken, provided a written declaration of the kinds and amounts of birds or animals so possessed is filed with the county game and fish protector within ten (10) days of the close of the season during which such birds or animals were taken, but the amount and kinds of such birds and animals possessed at any one time shall not exceed the limitations imposed by law on the possession of any such birds or animals.

The bag limit, possession limit and open seasons on dove and all other migratory birds and wild fowl shall be the same as that prescribed by the United States biological survey legislation irrespective of bag limits, possession limits and seasons set forth by the North Carolina Game Law. (1935, c. 486, s. 17; 1949, c. 1205, s. 1.)

Editor's Note.—The 1949 amendment inserted the next to the last paragraph.

§ 113-102. Protected and unprotected game.

3. No person shall take squirrels at any time in any public park. It shall be unlawful at any time to buy, or sell, rabbits or squirrels for the purpose of resale. Rabbits may be box-trapped or hunted without gun at any time. The setting of steel traps for bear is unlawful. Foxes may be taken with dogs only, except during the open season, when they may be taken in any manner. It shall be unlawful at any time to take any wild deer while swimming or in water to its knees. (1935, c. 486, s. 18; 1949, c. 1205, s. 2.)

Editor's Note.—The 1949 amendment rewrote the second sentence of subsection 3. As the rest of the section was not changed, only this subsection is set out.

§ 113-104. Manner of taking game.—No person shall at any time of the year take in any manner, number, or quantity any wild bird or wild animal, or take the nests or eggs of any wild bird, or possess, buy, sell, offer or expose for sale, or transport at any time or in any manner any such bird, animal, or part thereof, or any birds' nests or eggs, except as permitted by this article; the possession of any game animals, or game birds or part of such animals or game birds, except those expressly permitted by the board, in any hotel, restaurant, café, market or store, or by any produce dealer in this state shall be prima facie evidence of the possession thereof for the purpose of sale in violation of the provisions of this article; but this provision shall not be construed to prohibit the person lawfully obtaining game from having it prepared in a public eating place and served to himself and guest: Provided, however, that for the purpose of this article any person hiring another to kill aforesaid game animals or game birds and receiving same shall be deemed buying same, and subject to the penalties of this article. Game birds and game animals shall be taken only in the daytime, between sunrise and sunset with a shot gun not larger than number ten (10) gauge, or a rifle, unless otherwise specifically permitted by this article. No person shall take any game animals or game birds or migratory game birds from any automobile, or by aid of or with the use of any jack-light, or other artificial light, net, trap, snare, fire, salt-lick or poison; nor shall any such jack-light, net, trap, snare, fire, salt-lick or poison be used or set to take any animals or birds; nor shall birds or animals be taken at any time from an airplane, power boat, sail boat, or any boat under sail, or any floating device towed by a power boat or sail boat or, during the hours between sunset and sunrise, from any other floating device; nor shall any person take any dove, wild turkey, or upland game bird on any field, or in any cover in which corn, wheat, or other grain has been deposited for the purpose of drawing such birds thereto. However, it shall be lawful to use an artificial light when hunting raccoons or opossum with dogs, or when hunting frogs. A person may take game birds and wild animals during the open season therefor with the aid of dogs, unless specifically prohibited by this article. It shall be lawful for individuals and organized field trial clubs or associations for the protection of game, to run trials or train dogs at any time: Provided, that no shot gun be used and that no game birds or game animals shall be taken during the closed season by reason thereof. The board shall have, and is hereby given, full power and authority to make regulations defining the manner of taking fur-bearing animals and to prohibit the use of steel traps in any county or districts of the state when it shall appear necessary and advisable to the said board. Any person who shall cut down den trees in taking game or fur-bearing animals shall be guilty of a misdemeanor. (1949, c. 1205, s. 3.)

Editor's Note.—The 1949 amendment made changes in the first paragraph by inserting the words "at any time" in the provision prohibiting the taking of birds or animals from an airplane, etc., and added to said provision the following words: "or, during the hours between sunset and sunrise, from any other floating device." It also made lawful the use of an artificial light when hunting raccoons, opossum, or frogs. As the second and third paragraphs were not changed, they are not set out.

§ 113-109. Punishment for violation of article.—Any person who takes, possesses, transports, buys, sells, offers for sale or has in possession for sale or transportation any wild bird, animal, or part thereof, or nest or egg of any bird, in violation of any of the provisions of this article, or who violates any other provisions of this article, or fails

to perform any duty imposed upon him by this article, or who violates any lawful order, rule or regulation promulgated by the board, shall be guilty of a misdemeanor and upon the first offense and conviction thereof shall be fined not less than ten dollars ($10.00) nor more than fifty dollars ($50.00) or imprisoned for not more than thirty days, and upon the second offense and conviction thereof shall be fined not less than twenty-five ($25.00) dollars nor more than two hundred ($200.00) dollars, or by imprisonment for not more than six months, or both, in the discretion of the court. And in all cases of conviction under this section, the court in which such conviction is had shall revoke any hunting license then held by the person so convicted, and the court shall require the surrender of said license, which shall be forwarded together with the record of such conviction to the board. Such revocation of license shall be mandatory for the remainder of the period for which the license was issued. Any person who shall swear or affirm to any false statement in any application for a hunting license shall be deemed guilty of perjury and on conviction shall be subject to the punishment provided for in the crime of perjury.

Any person who takes or attempts to take deer between sunset and sunrise with the aid of a spotlight or other artificial light on any highway or in any field, woodland, or forest, in violation of this article shall upon conviction be fined not less than one hundred dollars ($100.00) or imprisoned for not less than sixty (60) days or both fined and imprisoned in the discretion of the court. The following acts or circumstances shall constitute prima facie evidence of a violation of provisions of the preceding sentence: The flashing or display of any artificial light or device from any highway or public or private driveway so that the beam thereof is visible for a distance of as much as fifty (50) feet from such highway or public or private driveway, or such flashing or display of such artificial light or device at any place off such highway or driveway when such acts or circumstances are accompanied by the possession of firearms or bow and arrow during the hours between sunset and sunrise. Further, the use or possession of any artificial light or device under circumstances heretofore set forth in this article, except as authorized herein for the hunting of raccoons, opossums or frogs, shall constitute prima facie evidence of a violation of this article.

Provided further, that any person taking or having in possession doe (female) deer in violation of this article shall be fined not less than fifty dollars ($50.00) or imprisoned not less than thirty (30) days or both fined and imprisoned in the discretion of the court. Any person, firm or corporation who buys or sells, or offers to buy or sell, quail, grouse and wild turkeys in violation of the provisions of this article shall, upon conviction thereof, be fined not less than fifty dollars, ($50.00) or imprisoned for not more than sixty days, or both fined and imprisoned in the discretion of the court. (1935, c. 486, s. 25; 1939, c. 235, s. 2; c. 269; 1941, c. 231, s. 2; 1941, c. 288; 1945, c. 635; 1949, c. 1205, s. 4.)

Editor's Note.—The 1945 amendment rewrote the second sentence. The 1949 amendment inserted the words "less than ten dollars ($10.00) nor" in lines eleven and twelve. It also inserted the provisions as to prima facie evidence of violation.

Art. 8. Fox Hunting Regulations.

§ 113-110. Closed season.

Repeal.—This section was repealed by Session Laws 1945, c. 217, which provided: "The repeal of this section shall not affect the legal status of any local law listed thereunder as the same was prior to the adoption of the General Statutes of North Carolina by the general assembly of one thousand nine hundred and forty-three."

Session Laws 1945, c. 844, repealed the portion of this section relating to Duplin county.

§ 113-111. No closed season in certain counties.—It shall be lawful to hunt, take or kill foxes at any time in Ashe, Avery, Davidson, Iredell, Lenoir, Henderson, Pitt, Haywood, Harnett, Nash, Beaufort, Watauga and Davie counties. (1931, c. 143, s. 5; 1933, c. 428; 1939, c. 319; 1943, c. 615; 1947, cc. 333, 802; 1949, c. 263.)

Editor's Note.—The 1947 amendments made this section applicable to Davie, Nash and Beaufort counties.

The 1949 amendment made this section applicable to Davidson county.

Art. 10A. Trespassing upon "Posted" Property to Hunt, Fish or Trap.

§ 113-120.1. Trespass for purposes of hunting, etc., without written consent a misdemeanor.—Any person who wilfully goes on the lands, waters or ponds of another upon which notices, signs or posters, described in § 113-120.2, prohibiting hunting, fishing or trapping, or upon which "posted" notices, have been placed, to hunt, fish or trap without the written consent of the owner or his agent shall be guilty of a misdemeanor and punished by a fine of not more than fifty dollars ($50.00) or by confinement in jail for not more than thirty days: Provided that no arrest under authority of this section shall be made without the consent of the owner or owners of said land or their duly authorized agent. (1949, c. 887, s. 1.)

§ 113-120.2. Regulations as to posting of property.—The notices, signs or posters described in § 113-120.1 shall measure not less than ten inches by twelve inches and shall be conspicuously posted on private lands not less than 150 yards and not more than 500 yards apart close to and along the boundaries. At least one such notice, sign or poster shall be posted on each side of such land, and one at each corner thereof, provided said corner can be reasonably ascertained. (1949, c. 887, s. 2.)

§ 113-120.3. Mutilation, etc., of "posted" signs; posting signs without consent of owner or agent.—Any person who shall mutilate, destroy or take down any "posted", "no hunting" or similar notice, sign or poster on the lands or waters of another, or who shall post such sign or poster on the lands or waters of another, without the consent of the landowner or his agent, shall be deemed guilty of a misdemeanor and shall be punished by a fine of not more than fifteen dollars ($15.00). (1949, c. 887, s. 3.)

§ 113-120.4. Fishing on navigable waters, etc., not prohibited.—Nothing in this article shall be construed to prohibit the entrance of any person upon navigable waters and the bays and sounds adjoining such waters for the purpose of fishing. (1949, c. 887, s. 4.)

SUBCHAPTER IV. FISH AND FISHERIES.

Art. 12. General Provisions for Administration.

§ 113-127. Definitions.

As to subsequent statute affecting this subchapter, see §§ 143-237 to 143-254.

Art. 13. Powers and Duties of Board and Commissioners.

§ 113-136. Regulations as to fish, fishing, and fisheries made by board.—The board of conservation and development is hereby authorized to regulate, prohibit, or restrict in time, place, character, or dimensions, the use of nets, appliances, apparatus, or means employed in taking or killing fish; to regulate the seasons at which the various species of fish may be taken in the several waters of the state, and to prescribe the minimum sizes of fish which may be taken in the said several waters of the state, or which may be bought, sold, or held in possession by any person, firm, or corporation in the state; and to make such rules regulating the shipment and transportation of fish, oysters, clams, crabs, escallops, and other water products, and all types of marine vegetation which may grow in the waters or on the bottoms of any navigable waters, as it may deem necessary; and all regulations, prohibitions, restrictions, and prescriptions, after due publication, which shall be construed to be once a week for four consecutive weeks in some newspaper published in North Carolina, shall be of equal force and effect with the provisions of this section; and any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, at the discretion of the court. (1915, c. 84, s. 21; 1917, c. 290, s. 7; 1925, c. 168, s. 2; 1935, c. 35; 1945, c. 776; C. S. 1878.)

Editor's Note.—
The 1945 amendment inserted the provision as to marine vegetation near the middle of the section.

Art. 14. Licenses for Fishing in Inland Waters.

§ 113-143. Fishing licenses for persons above 16 years of age.—In order to raise revenue with which to maintain and operate the state fish hatcheries, provide additional nurseries and administer the inland fishing laws, a license is hereby required of all persons above the age of sixteen (16) years to fish by any and all methods of hook and line or rod and reel fishing in the waters of North Carolina. (1929, c. 335, s. 1; 1945, c. 567, s. 1.)

Editor's Note.—The 1945 amendment, effective Jan. 1, 1946, struck out the words "other than in waters of the county in which such person permanently resides or in waters abutting thereon, as hereinafter provided" formerly appearing at the end of this section.

§ 113-144. Resident state license.—Any person, upon application to the director of the department of conservation and development, his assistants, wardens, or agents, authorized in writing to issue licenses, and the presentation of satisfactory proof that he is a bona fide resident of the state of North Carolina, shall, upon the payment of a license fee of three ($3.00) dollars for the use of the department and a fee of ten (10c) cents for the use of the official authorized to issue licenses, be entitled to a "resident state license" which will authorize the licensee to fish in any of the waters of North Carolina as provided under the preceding section: Provided that twenty-five cents (25c) of this fee shall be set aside as a special fund for the purchase and lease of lands and waters, to be developed for the protection and propagation of fish or to be used for public fishing, or for the purpose of securing federal funds, if available, for the purposes described above through the means of matching federal funds in such proportion as the federal laws may require, and that twenty-five cents (25c) of each such fee shall be expended by such commission, in its discretion, for the purposes of enlarging, expanding and making more effective the work of the education and enforcement divisions of the North Carolina wildlife resources commission. (1929, c. 335, s. 2; 1945, c. 567, s. 2; 1949, c. 1203, s. 2.)

Editor's Note. — The 1945 amendment, effective Jan. 1, 1946, increased the fee in line eight from two to three dollars and added the proviso.

The 1949 amendment rewrote the proviso at the end of the section.

For temporary act authorizing resident members of armed forces to fish without license, see Session Laws 1945, c. 647.

Use of Unexpended Funds.—See note to § 113-95.

§ 113-145. Non-resident state licenses.—Any person, without regard to age or sex, upon application to the director of the department of conservation and development, his assistants, wardens or agents authorized in writing to issue licenses, and the presentation of satisfactory proof that he is a non-resident of the state, shall, upon the payment of six ($6.00) dollars for the use of the department and ten (10c) cents for the use of the official authorized in writing to issue licenses, be entitled to a "non-resident state fishing license" which will authorize the licensee to fish in any of the waters of North Carolina as provided under § 113-143: Provided that fifty (50c) cents of the "non-resident state fishing license" fee referred to above shall be set aside as a special fund for the purchase and lease of lands and waters to be developed for the protection and propagation of fish and for the acquisition by lease or purchase of waters for public fishing: Provided further, that any non-resident of the state desiring to fish for one day or more in the waters of the state of North Carolina may do so upon payment to the clerk of the court or game warden of the county in which the non-resident desires to fish the sum of one dollar and ten cents ($1.10) for each day, the sum of ten (10c) of said sum to go to the selling agent of said license or permit, and upon the payment of said sum of one dollar and ten cents ($1.10) the clerk of the court or game warden shall issue a permit allowing said non-resident to fish: Provided further, that any non-resident of the state desiring to fish for five days or less in any of the waters of North Carolina may do so upon payment to any authorized agent of the department the sum of two dollars and sixty cents ($2.60) for each such period, the sum of two dollars and fifty cents ($2.50) of said sum for the use of the department and the sum of ten cents (10c) for the use of the selling agent, and upon payment of the prescribed amount said non-resident shall be entitled to a "non-resident tourist license": Provided further, that any resident of the state desiring to fish for one day or more in the waters of any county in the state of North Carolina other than the county within which he resides may do so upon

payment to the clerk of the court or game warden of a county in which he desires to fish the sum of sixty cents (60c) for each day, the sum of ten cents (10c) of said sum to go to the selling agent of said license or permit, and upon the payment of said sum of sixty cents (60c), the clerk of the court or game warden shall issue a permit allowing said non-resident to fish: Provided further, that any non-resident twelve years of age or under regardless of sex shall be allowed to fish in the waters of North Carolina without paying any of the license or permit fees set forth in this section. (1929, c. 335, s. 3; 1931, c. 351; 1933, c. 236; 1935, c. 478; 1945, c. 529, ss. 1, 2; c. 567, s. 3.)

Editor's Note.—
The first 1945 amendment added the third and last provisos. The second 1945 amendment, effective Jan. 1, 1946, increased the fee in line eight from five to six dollars and inserted the first proviso.

§ 113-146. County licenses.—Any person who has lived in any county in North Carolina for a period of six months is deemed a resident of that county for the purpose of this section and upon application to the director of the department of conservation and development, his assistants, wardens, or agents authorized to issue licenses, and the presentation of satisfactory proof that he is a resident of the county, shall, upon the payment of one dollar ($1.00) for the use of the department and ten cents (10c) for the use of the official authorized to issue licenses, be entitled to a "resident county fishing license," which will authorize the licensee to fish in any of the waters of that county: Provided, that said resident county license shall be required only of those persons using lures or baits of an artificial type. Artificial lures or baits are defined as lures or baits which are made by hand or manufactured and which are not available as natural fish foods. (1929, c. 335, s. 4; 1945, c. 567, s. 4.)

Editor's Note.—The 1945 amendment, effective Jan. 1, 1946, rewrote this section. It formerly also related to daily fishing permits.

§ 113-148. Department to furnish forms; what licenses must show; signature of licensee; licenses to become void on December 31 of year issued.—All licenses shall be issued on forms prepared and supplied by the department of conservation and development, the cost of which shall be paid from any funds that may come into its hands from the sale of fishing licenses. The license shall show the name, age, occupation and residence of the licensee and the date of its issuance. It shall also contain the signature of the licensee and shall authorize the person named therein, in all cases where a resident county license is bought, to fish in any of the waters within the county in which the applicant permanently resides, under the restrictions and requirements of existing laws and the rules and regulations of the department during the year, the date of which is inscribed thereon. In all cases where either resident or non-resident state fishing licenses are bought, they shall also contain the signature of the licensee and shall authorize the person named therein to fish in any of the waters of the state of North Carolina under the restrictions and requirements of existing laws and regulations of the department during the year, the date of which is inscribed thereon. All licenses issued under and by virtue of this article shall become void on the thirty-first day of December next following the date of issuance. The licenses may contain such other information as the department may require. (1929, c. 335, s. 6; 1945, c. 567, s. 5.)

Editor's Note.—The 1945 amendment, effective Jan. 1, 1946, struck out the former provision relating to license buttons.

§ 113-152. Licenses to be kept about person of licensees.—No person shall fish as provided herein in any of the waters of North Carolina unless the license hereinbefore provided for be kept about the person of the licensee or exhibited upon the request of any official charged with the duty and responsibility of issuing licenses and enforcing the fishing law. (1929, c. 335, s. 10; 1945, c. 567, s. 6.)

Editor's Note.—The 1945 amendment, effective Jan. 1, 1946, struck out the former provision relating to license buttons.

§ 113-155. Fishing without landowner's permission.

Cross Reference.—As to trespassing upon posted lands or waters to hunt, fish or trap, see §§ 113-120.1 to 113-120.4.

Art. 15. Commercial Licenses and Regulations.

§ 113-158. Licenses to fish; issuance, terms, and enforcement.

All boats or vessels licensed to scoop, scrape, or dredge oysters shall display on the port side of the jib, above the reef and bonnet and on the opposite side of mainsail, above all reef points, in black letters not less than twenty inches long, the initial letter of the county granting the license and the number of said license, the number to be painted on canvas and furnished by the commissioner.

(1945, c. 1008, s. 1.)

Local Modification.—Onslow: 1949, c. 889.

Editor's Note.—The 1945 amendment struck out the words "for which he shall receive the sum of fifty cents" formerly appearing at the end of the fifth sentence. As the rest of the section was not affected by the amendment it is not set out.

§ 113-160. Licenses for oyster boats; schedule.—The commissioner of commercial fisheries, assistant commissioners, or inspectors, may grant a license for a boat to be used in catching oysters upon application made, according to law, and of payment of a license tax as follows: On any boat or vessel under custom-house tonnage, using scrapes or dredges, a tax of five dollars; on any boat or vessel using scoops, scrapes or dredges required to be registered in the custom-house, a tax of one dollar and fifty cents a ton on gross tonnage. No boat or vessel not the property absolutely of a citizen or citizens of this state, shall receive license or be permitted in any manner to engage in the catching of oysters anywhere in the waters of this state. (1915, c. 84, s. 11; 1933, c. 106; 1945, c. 1008, s. 2; C. S. 1889.)

Local Modification.—Onslow: 1949, c. 889.

Editor's Note.—
The 1945 amendment rewrote this section.

§ 113-161. Boats using purse seines or shirred nets; tax.—(a) All boats or vessels of any kind used in operating purse seines or shirred nets shall pay a license fee of one dollar and fifty cents ($1.50) per ton on gross tonnage, customhouse measurement, which shall be independent of and separate from the seine or net tax on the seines or nets used on said boats or vessels. This license fee shall be for one year from January first of each

year and shall not be issued for any period of less than one year.

(d) All operators of boats or vessels of any kind used in operating purse seines or shirred nets shall apply for and obtain a license for each such purse seine or shirred net, and shall pay for such license a tax in the amount of ten dollars ($10.00): Provided, that the tax herein levied on purse seines or shirred nets shall be in lieu of all other taxes levied by law against such seines or nets.

(1945, c. 1008, s. 3.)

Local Modification.—Onslow: 1949, c. 889.

Editor's Note.—

The 1945 amendment increased the license fee in subsection (a) from one dollar and twenty-five cents to one dollar and fifty cents, and the license tax in subsection (d) from five to ten dollars. As the other subsections were not affected by the amendment they are not set out.

§ 113-162. Licenses for various appliances and their users; schedule.—The following license tax is hereby levied annually upon the different fishing appliances used in the waters of North Carolina:

Anchor gill nets, one dollar for each hundred yards or fraction thereof.

State gill nets, fifty cents for each hundred yards or fraction thereof: Provided, that when any person uses more than one such net the tax shall be imposed upon the total length of all nets used and not upon each net separately.

Drift gill nets, one dollar for each hundred yards or fraction thereof.

Pound nets, two dollars on each pound; the pound is construed to apply to that part of net which holds and from which the fish are taken.

Submarine pounds, or submerged trap nets, two dollars for each trap or pound.

Seines, drag nets and mullet nets under one hundred yards, one dollar each.

Seines, drag nets and mullet nets over one hundred yards and under three hundred yards, one dollar per hundred yards or fraction thereof.

Seines, drag nets and mullet nets over three hundred yards and under one thousand yards, one dollar per one hundred yards or fraction thereof.

Seines, drag nets and mullet nets over one thousand yards, one dollar per one hundred yards or fraction thereof.

Fyke nets, one dollar each.

Resident motor boats used in taking shrimp, five dollars for each boat.

Motor boats used in hauling nets, five dollars for each boat.

Power boats used in sink net fishing in Atlantic Ocean, five dollars for each boat.

For each trawl used in taking fish or shrimp, five dollars.

And for other apparatus used in fishing, the license shall be the same as that for the apparatus or appliance which it most resembles for the purpose used. (1915, c. 84, s. 14; 1917, c. 290, s. 5; 1919, c. 333, s. 3; 1925, c. 168, s. 1; 1927, c. 59, ss. 5, 7; 1931, c. 117; 1933, c. 106, s. 3; 1933, c. 433; 1945, c. 1008, s. 4; C. S. 1891.)

Local Modification.—Onslow: 1949, c. 889.

Editor's Note.—

The 1945 amendment increased the license tax in each instance and omitted provisions relating to trot lines used in taking hard crabs and motor boats used in dredging crabs or escallops. It also omitted a provision relating to the issuance of licenses for nonresident anglers by superior court clerks.

§ 113-163. License tax on dealers and packers.—An annual license tax, for the year beginning January 1st in each year, to be collected by the commissioner of commercial fisheries, is imposed on all persons or dealers who purchase or carry on the business of canning, packing, shucking, or shipping the sea products enumerated below, as follows: On oysters, five dollars; escallops, five dollars; clams, five dollars; crabs, five dollars; fish, ten dollars; shrimp, five dollars: Provided, no license tax shall be imposed on fishermen who pay a license on nets to catch fish or shrimp, and who ship only the fish or shrimp caught in such licensed nets. (1917, c. 290, s. 5; 1919, c. 333, ss. 1, 2; 1933, c. 106, s. 4; 1945, c. 1008, s. 5; C. S. 1892.)

Local Modification.—Onslow: 1949, c. 889.

Editor's Note.—

The 1945 amendment doubled the license tax in each instance.

§ 113-164. Purchase tax on dealers; schedule; collection.—All dealers in and all persons who purchase, catch, or take for canning, packing, shucking, or shipping the sea products enumerated below shall be liable to a tax to be collected by the commissioner of commercial fisheries as follows: On—

Oysters, four cents a bushel, except coon oysters, two cents a bushel; escallops, five cents a gallon; clams, six cents a bushel; soft crabs, two cents a dozen; hard crabs, ten cents a barrel; shrimp, cooked or green, fifteen cents per one hundred pounds: Provided, however, no license tax shall be imposed or required for trot lines used for taking hard crabs from public grounds: Provided, further, that no license tax shall be imposed or required for power boats used for dredging escallops or crabs: Provided, further, that no license shall be required of any person who takes oysters for shucking and sells such oysters at retail on local markets: Provided, further, that two cents (2c) per bushel of the amount collected from the tax levied on each bushel of oysters shall be used for the purpose of improving, replenishing or spreading oyster shells on the oyster bottoms of Pamlico Sound, its bays, and its tributaries or any other oyster bottoms found to be necessary.

But none of these products shall be twice taxed, and no tax shall be imposed on oysters or escallops taken from private beds or gardens. Upon failure to pay said tax, the license provided in the preceding section shall at once be null and void and no further license shall be granted during the current year; and it shall be the duty of the commissioner, assistant commissioner, or inspector to institute suit for the collection of said tax. Such suit shall be in the name of the state of North Carolina on relation of the commissioner or inspector at whose instance such suit is instituted, and the recovery shall be for the benefit and for the use of the commercial fisheries fund. Any person failing or refusing to pay said tax shall be guilty of a misdemeanor. (1915, c. 84, s. 13; 1917, c. 290, s. 4; 1919, c. 333, s. 1; 1921, c. 194, s. 2; Ex. Sess. 1921, c. 42, ss. 2-4; 1923, c. 170; 1925, c. 168, s. 3; 1927, c. 59, ss. 1, 2; 1929, c. 113; 1933, c. 106, s. 5; 1935, c. 151; 1939, c. 304; 1945, c. 1008, s. 6; C. S. 1893.)

Local Modification.—Onslow: 1949, c. 889.

Editor's Note.—

The 1945 amendment increased the tax on oysters, clams

and crabs and added the proviso at the end of the second paragraph.

§ 113-165. License tax on trawl boats.—There shall be levied annually upon each trawl boat, or boat used for trawling purposes, documented in the customs house, a license tax of one dollar and fifty cents per gross ton, and on each trawl boat, or boat used for trawling purposes, not documented in the customs house a license tax of five dollars, and a tax of five dollars for each net. (1933, c. 106, s. 6; 1945, c. 1008, s. 7.)

Local Modification.—Onslow: 1949, c. 889.

Editor's Note.—The 1945 amendment increased the license tax in each instance.

§ 113-172. Discharge of deleterious matter into waters prohibited.

Section Is Unconstitutional.—The proviso of this section exempting corporations chartered prior to 4 March, 1915, from the proscription against emptying into streams of the state deleterious or poisonous substances inimical to fish, creates a distinction having no relation to the evil sought to be remedied and renders the statute unconstitutional for failure to apply alike to all corporations or persons similarly situated. State v. Glidden Co., 228 N. C. 664, 46 S. E. (2d) 860.

However, the contention that this section is offensive to the constitution in that without due process of law it deprives or may deprive any person of property rights is not well taken. No matter how long the practice of polluting the waters by waste products from mining or manufacturing has been practiced, there is no proscription against the state when it sees fit to remedy the evil. Id.

Art. 16A. Development of Oyster and Other Bivalve Resources.

§ 113-216.1. Statement of purpose.—The purpose of this article is to authorize the department of conservation and development, through the division of commercial fisheries, to manage, restore, develop, cultivate, conserve, and rehabilitate the oyster, clam, scallop, and other bivalve resources in the waters of Eastern North Carolina by qualified, specialized personnel. (1947, c. 1000, s. 1.)

§ 113-216.2. Powers of board of conservation and development; oyster rehabilitation program.—I. The department of conservation and development shall conduct, through the division of commercial fisheries, a large oyster rehabilitation program consisting of large-scale operations for the planting of shells and seed oysters on natural oyster beds and other areas found to be suitable for oyster growth or reproduction, and subject to budgetary provisions, may procure suitable and adequate boats, barges, and the other suitable materials, and for collecting and transplanting seed and adult oysters, and for the proper and adequate enforcement of the statutes and regulations adopted pursuant thereto for the protection of marine bivalve resources.

II. The board of conservation and development is authorized and empowered to adopt rules and regulations to enforce the provisions of this article and to carry out its true purpose and intent, and in particular, dealing with and controlling the following subjects:

A. To limit the number of bushels of marketable oysters which may be taken from public beds in any one day and the number, weight, and size of dredges, but no one boat may take more than seventy-five (75) bushels in one day.

B. To close any or all portions of the public oyster beds when it is determined that such action will be beneficial to the shellfish industry or for the protection and propagation of oysters or because of prevailing marketing conditions.

C. To levy licenses, taxes, and fees not in excess of the following:

1. A tax not exceeding eight cents (8c) per bushel on oysters.

2. An annual license of fifteen dollars ($15.00) on each oyster dredge boat.

3. A license of twenty-five dollars ($25.00) on each packer, shucker, and canner, and to require the contribution of not more than fifty per cent (50%) of their oyster shells accumulated annually for planting on public beds.

D. To require persons dredging oysters from public beds to obtain a license and to deny the issuance of licenses to nonresidents, or to boats owned by nonresidents, or on which a lien is held by a nonresident.

E. To regulate, control, or prohibit the importation of new species of mollusks such as the Pacific oyster, Ostrea gigas.

F. To regulate, control, or prohibit the shipment of oysters in the shell out of the state of North Carolina and the sale of the oysters in the shell for shipment out of the state. If the board permits the sale of such oysters to nonresidents or for the purpose of shipment out of the state the purchasers shall pay a tax of fifty cents (50c) per bushel in addition to any other tax or fee levied. (1947, c. 1000, s. 2.)

§ 113-216.3. Appropriation for use by division of commercial fisheries.—There is hereby appropriated out of the general fund of the state to the department of conservation and development, for the use and benefit of the division of commercial fisheries, the sum of one hundred thousand dollars ($100,000.00) to serve as a revolving fund to carry out the provisions of this article; and any portions of said fund remaining unexpended at the end of any fiscal year shall be carried over into the next fiscal year until otherwise directed by the general assembly of North Carolina. (1947, c. 1000, s. 3.)

§ 113-216.4. Use of proceeds from licenses, taxes and fees.—To make the program herein authorized self-supporting in so far as possible, all licenses, taxes, and fees imposed by this article or by other statutes applicable to shellfish shall be deposited with the state treasurer to be used solely to effectuate the purposes and requirements of this article. (1947, c. 1000, s. 4.)

Art. 21. Commercial Fin Fishing; General Regulations.

§ 113-238. Taking of shrimp by nonresidents prohibited.—It shall be unlawful for a person, who has not in good faith resided in the state of North Carolina for a period of twelve months to take shrimp within the territorial waters of the state. Provided, that the board of conservation and development may enter into reciprocal agreements with neighboring coastal states. (1931, c. 117, s. 2; 1947, c. 256.)

Editor's Note.—The 1947 amendment added the proviso.

Cited in Toomer v. Witsell, 334 U. S. 385, 68 S. Ct. 1156, 92 L. Ed. 1460.

§ 113-242. Menhaden fishing forbidden to nonresidents.—It is unlawful for any person, firm, or corporation, not a citizen or resident of the state

of North Carolina, to catch, capture, or otherwise take any menhaden or fatbacks within the waters of the state of North Carolina to the extreme limits of the state's jurisdiction in and over said waters; and for the purpose of this section the following boundaries are hereby declared to be the boundaries to which the waters of the said state extended, to wit: a distance of three nautical miles, measured from the outer beach shores of the state of North Carolina out and into waters of the Atlantic ocean; and any portions or portion of any water within a distance of three nautical miles from said waters of the Atlantic ocean to any beach or shore of said state shall be deemed, for the purposes of this section, within the waters of said state: Provided, that any citizen or resident of the state of North Carolina, whether person, firm or corporation, may take, capture, or catch any menhaden or fatbacks at any time, subject to existing laws; provided, it shall be lawful for non-residents of the state to catch, or capture menhaden (fat-backs) from the waters of North Carolina, north of Cape Hatteras, on the payment to the commissioner of commercial fisheries of one dollar per ton on gross tonnage of such boats as they may operate and five dollars on each purse seine, licenses issued under this proviso to expire December thirty-first of each year.

(1945, c. 1008, s. 8.)

Editor's Note.—As the 1945 amendment changed only the proviso at the end of the first paragraph the other paragraphs are not set out.

§ 113-244. Poisoning streams.

Protection of Riparian Owners.—This section and § 113-287 were enacted, in part at least, for the protection of riparian owners and those similarly situated. Hampton v. North Carolina Pulp Co., 223 N. C. 535, 543, 27 S. E. (2d) 538.

In an action by plaintiff, a riparian proprietor on a navigable river, who was the owner of a long established fishery upon the shores of his property along such stream wherein it was alleged that plaintiff had suffered damages by the interference of defendant in polluting the waters of the river with toxic chemicals and other matter deleterious to fish life, discharged into said river as waste from defendant's recently established pulp mill, causing a public nuisance and seriously interrupting the migratory passage of fish, it was held error to sustain a demurrer to the complaint as not stating a cause of action. Hampton v. North Carolina Pulp Co., 223 N. C. 535, 27 S. E. (2d) 538.

Art. 25. Commercial Fin Fishing; Local Regulations.

§ 113-287. Pamlico sound: Nets to be set north and south.

See annotations under § 113-244.

§§ 113-291 to 113-295: Repealed by Session Laws 1945, c. 1013.

Editor's Note.—The above and other repealed sections under this article conflicted with the rules and regulations now in force and which may be promulgated by the state board of conservation and development relating to fishing in certain waters of the following counties: Beaufort, Bladen, Brunswick, Clay, Columbus, Cumberland, Dare, Greene, Harnett, Hertford, Hoke, New Hanover, Northampton, Pender, Robeson, Sampson, Scotland and Wayne. Session Laws 1945, c. 1013.

§ 113-297: Repealed by Session Laws 1945, c. 1013.

See note under repealed sections 113-291 to 113-295.

§ 113-299: Repealed by Session Laws 1945, c. 1013.

See note under repealed sections 113-291 to 113-295.

§§ 113-303, 113-304: Repealed by Session Laws 1945, c. 1013.

See note under repealed sections 113-291 to 113-295.

§ 113-323: Repealed by Session Laws 1945, c. 1013.

See note under repealed sections 113-291 to 113-295.

§ 113-326: Repealed by Session Laws 1945, c. 1013.

See note under repealed sections 113-291 to 113-295.

§§ 113-331, 113-332: Repealed by Session Laws 1945, c. 1013.

See note under repealed sections 113-291 to 113-295.

§§ 113-345, 113-346: Repealed by Session Laws 1945, c. 1013.

See note under repealed sections 113-291 to 113-295.

§§ 113-352 to 113-354: Repealed by Session Laws 1945, c. 1013.

See note under repealed sections 113-291 to 113-295.

§ 113-361: Repealed by Session Laws 1945, c. 1013.

See note under repealed sections 113-291 to 113-295.

§§ 113-372 to 113-374: Repealed by Session Laws 1945, c. 1013.

See note under repealed sections 113-291 to 113-295.

§ 113-376: Repealed by Session Laws 1945, c. 1013.

See note under repealed sections 113-291 to 113-295.

Art. 26. Marine Fisheries Compact and Commission.

§ 113-377.1. Atlantic states marine fisheries compact and commission.—The governor of this state is hereby authorized and directed to execute a compact on behalf of the state of North Carolina with any one or more of the states of Maine, New Hampshire, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, South Carolina, Georgia, and Florida and with such other states as may enter into the compact, legally joining therein in the form substantially as follows:

Atlantic States Marine Fisheries Compact

The contracting states solemnly agree:

Article I

The purpose of this compact is to promote the better utilization of the fisheries, marine, shell and anadromous, of the Atlantic seaboard by the development of a joint program for the promotion and protection of such fisheries, and by the prevention of the physical waste of the fisheries from any cause. It is not the purpose of this compact to authorize the states joining herein to limit the production of fish or fish products for the purpose of establishing or fixing the price thereof, or creating and perpetuating monopoly.

Article II

This agreement shall become operative immediately as to those states executing it whenever any two or more of the states of Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Delaware, Maryland, Virginia, South Carolina, North Carolina, Georgia and Florida have executed it in the form

that is in accordance with the laws of the executing state and the congress has given its consent. Any state contiguous with any of the aforementioned states and riparian upon waters frequented by anadromous fish, flowing into waters under the jurisdiction of any of the aforementioned states, may become a party hereto as hereinafter provided.

Article III

Each state joining herein shall appoint three representatives to a commission hereby constituted and designated as the Atlantic states marine fisheries commission. The board of the North Carolina department of conservation and development shall designate either the director of the department, the chairman of the committee on commercial fisheries, or the commissioner of commercial fisheries as one member of the commission, and the commission on interstate cooperation of the state shall designate a member of the North Carolina legislature as one of the members of said commission, and the third member of said commission, who shall be a citizen of the state having a knowledge of and interest in marine fisheries, shall be appointed by the governor. This commission shall be a body corporate, with the powers and duties set forth herein.

Article IV

The duty of the said commission shall be to make inquiry and ascertain from time to time such methods, practices, circumstances and conditions as may be disclosed for bringing about the conservation and the prevention of the depletion and physical waste of the fisheries, marine, shell and anadromous, of the Atlantic seaboard. The commission shall have power to recommend the coordination of the exercise of the police powers of the several states within their respective jurisdictions to promote the preservation of those fisheries and their protection against overfishing, waste, depletion or any abuse whatsoever and to assure a continuing yield from the fisheries resources of the aforementioned states.

To that end the commission shall draft and, after consultation with the advisory committee hereinafter authorized, recommend to the governors and legislatures of the various signatory states legislation dealing with the conservation of the marine, shell and anadromous fisheries of the Atlantic seaboard. The commission shall more than one month prior to any regular meeting of the legislature in any signatory state, present to the governor of the state its recommendations relating to enactments to be made by the legislature of that state in furthering the intents and purposes of this compact.

The commission shall consult with and advise the pertinent administrative agencies in the states party hereto with regard to problems connected with the fisheries and recommend the adoption of such regulations as it deems advisable.

The commission shall have power to recommend to the states party hereto the stocking of the waters of such states with fish and fish eggs, or joint stocking by some or all of the states party hereto, and when two or more of the states shall jointly stock waters the commission shall act as the coordinating agency for such stocking.

Article V

The commission shall elect from its number a chairman and a vice chairman and shall appoint and at its pleasure remove or discharge such officers and employees as may be required to carry the provisions of this compact into effect, and shall fix and determine their duties, qualifications and compensation. Said commission shall adopt rules and regulations for the conduct of its business. It may establish and maintain one or more offices for the transaction of its business and may meet at any time or place but must meet at least once a year.

Article VI

No action shall be taken by the commission in regard to its general affairs except by the affirmative vote of a majority of the whole number of compacting states present at any meeting. No recommendation shall be made by the commission in regard to any species of fish except by the affirmative vote of a majority of the compacting states which have an interest in such species. The commission shall define what shall be an interest.

Article VII

The fish and wildlife service of the department of the interior of the government of the United States shall act as the primary research agency of the Atlantic states marine fisheries commission, cooperating with the research agencies in each state for that purpose. Representatives of the said fish and wildlife service shall attend the meetings of the commission.

An advisory committee to be representative of the commercial fishermen and the salt water anglers and such other interests of each state as the commission deems advisable shall be established by the commission as soon as practicable for the purpose of advising the commission upon such recommendations as it may desire to make.

Article VIII

When any state other than those named specifically in Article II of this compact shall become a party thereto for the purpose of conserving its anadromous fish in accordance with the provisions of Article II the participation of such state in the action of the commission shall be limited to such species of anadromous fish.

Article IX

Nothing in this compact shall be construed to limit the powers of any signatory state or to repeal or prevent the enactment of any legislation or the enforcement of any requirement by any signatory state imposing additional conditions and restrictions to conserve its fisheries.

Article X

Continued absence of representation or of any representative on the commission from any state party hereto shall be brought to the attention of the governor thereof.

Article XI

The states party hereto agree to make annual appropriations to the support of the commission in proportion to the primary market value of the products of their fisheries, exclusive of cod and haddock, as recorded in the most recently published reports of the fish and wildlife service of the United States department of the interior, provided no state shall contribute less than two hundred dollars ($200.00) per annum and the annual

contribution of each state above the minimum shall be figured to the nearest one hundred dollars ($100.00).

The compacting states agree to appropriate initially the annual amounts scheduled below, which amounts are calculated in the manner set forth herein, on the basis of the catch record of 1938. Subsequent budgets shall be recommended by a majority of the commission and the cost thereof allocated equitably among the states in accordance with their respective interests and submitted to the compacting states.

Schedule of Initial Annual State Contributions

Maine	$ 700
New Hampshire	200
Massachusetts	2300
Rhode Island	300
Connecticut	400
New York	1300
New Jersey	800
Delaware	200
Maryland	700
Virginia	1300
North Carolina	600
South Carolina	200
Georgia	200
Florida	1500

Article XII

This compact shall continue in force and remain binding upon each compacting state until renounced by it. Renunciation of this compact must be preceded by sending six months' notice in writing of intention to withdraw from the compact to the other states party hereto. (1949, c. 1086, s. 1.)

§ 113-377.2. Amendment to compact to establish joint regulation of specific fisheries. — The governor is authorized to execute on behalf of the state of North Carolina an amendment to the compact set out in § 113-377.1 with any one or more of the states of Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, South Carolina, Georgia, and Florida or such other states as may become party to that compact for the purpose of permitting the states that ratify this amendment to establish joint regulation of specific fisheries common to those states through the Atlantic states marine fisheries commission and their representatives on that body. Notice of intention to withdraw from this amendment shall be executed and transmitted by the governor and shall be in accordance with Article XII of the Atlantic states marine fisheries compact and shall be effective as to this state with those states which similarly ratify this amendment. This amendment shall take effect as to this state with respect to such other of the aforesaid states as take similar action.

Amendment No. 1 of the Atlantic States Marine Fisheries Compact

The states consenting to this amendment agree that any two or more of them may designate the Atlantic states marine fisheries commission as a joint regulatory agency with such powers as they may jointly confer from time to time for the regulation of the fishing operations of the citizens and vessels of such designating states with respect to specific fisheries in which such states have a common interest. The representatives of such states on the Atlantic states marine fisheries commission shall constitute a separate section of such commission for the exercise of the additional powers so granted, provided that the states so acting shall appropriate additional funds for this purpose. The creation of such section as a joint regulatory agency shall not deprive the states participating therein of any of their privileges or powers or responsibilities in the Atlantic states marine fisheries commission under the general compact. (1949, c. 1086, s. 2.)

§ 113-377.3. North Carolina members of commission. — In pursuance of Article III of said compact there shall be three members (hereinafter called commissioners) of the Atlantic states marine fisheries commission (hereinafter called commission) from the state of North Carolina. The first commissioner from the state of North Carolina shall be either the director of the department of conservation and development, the chairman of the committee on commercial fisheries, or the commissioner of commercial fisheries of the state of North Carolina ex officio, and the term of any such ex officio commissioner shall terminate at the time he ceases to hold said office and his successor as commissioner shall be his successor as either the director of the department of conservation and development, the chairman of the committee on commercial fisheries, or the commission of commercial fisheries, as the case may be. The second commissioner from the state of North Carolina shall be a legislator and member of the commission on interstate cooperation of the state of North Carolina, ex officio, designated by said commission on interstate cooperation, and the term of any such ex officio commissioner shall terminate at the time he ceases to hold said legislative office or said office as commissioner on interstate cooperation, and his successor as commissioner shall be named in like manner. The governor (by and with the advice and consent of the senate) shall appoint a citizen as a third commissioner who shall have a knowledge of and interest in the marine fisheries problem. The term of said commissioner shall be three years and he shall hold office until his successor shall be appointed and qualified. Vacancies occurring in the office of such commissioner from any reason or cause shall be filled by appointment by the governor (by and with the advice and consent of the senate) for the unexpired term. The director of the department of conservation and development, the chairman of the committee on commercial fisheries, or the commissioner of commercial fisheries appointed pursuant to Article III as ex officio commissioner may delegate, from time to time, to any deputy or other subordinate in his department or office, the power to be present and participate, including voting, as his representative or substitute at any meeting of or hearing by or other proceeding of the commission. The terms of each of the initial three members shall begin at the date of the appointment of the appointive commissioner, provided the said compact shall then have gone into effect in accordance with Article II of the compact; otherwise they shall begin upon the date upon

which said compact shall become effective in accordance with said Article II.

Any commissioner may be removed from office by the governor upon charges and after a hearing. (1949, c. 1086, s. 3.)

§ 113-377.4. Powers of commission and commissioners.—There is hereby granted to the commission and the commissioners thereof all the powers provided for in the said compact and all the powers necessary or incidental to the carrying out of said compact in every particular. All officers of the state of North Carolina are hereby authorized and directed to do all things falling within their respective provinces and jurisdiction necessary or incidental to the carrying out of said compact in every particular; it being hereby declared to be the policy of the state of North Carolina to perform and carry out the said compact and to accomplish the purposes thereof. All officers, bureaus, departments and persons of and in the state government or administration of the state of North Carolina are hereby authorized and directed at convenient times and upon request of the said commission to furnish the said commission with information and data possessed by them or any of them and to aid said commission by loan of personnel or other means lying within their legal rights respectively. (1949, c. 1086, s. 4.)

§ 113-377.5. Powers herein granted to commission are supplemental. — Any powers herein granted to the commission shall be regarded as in aid of and supplemental to and in no case a limitation upon any of the powers vested in said commission by other laws of the state of North Carolina or by the laws of the states of Maine, New Hampshire, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, South Carolina, Georgia and Florida or by the congress or the terms of said compact. (1949, c. 1086, s. 5.)

§ 113-377.6. Report of commission to governor and legislature; recommendations for legislative action; examination of accounts and books by comptroller.—The commission shall keep accurate accounts of all receipts and disbursements and shall report to the governor and the legislature of the state of North Carolina on or before the tenth day of December in each year, setting forth in detail the transactions conducted by it during the twelve months preceding December 1st of that year and shall make recommendations for any legislative action deemed by it advisable, including amendments to the statutes of the state of North Carolina which may be necessary to carry out the intent and purposes of the compact between the signatory states.

The comptroller of the state of North Carolina is hereby authorized and empowered from time to time to examine the accounts and books of the commission, including its receipts, disbursements and such other items referring to its financial standing as such comptroller may deem proper and to report the results of such examination to the governor of such state. (1949, c. 1086, s. 6.)

§ 113-377.7. Appropriation by state; disbursement.—The sum of six hundred dollars ($600.00), or so much thereof as may be necessary, is hereby appropriated out of any moneys in the state treasury not otherwise appropriated, for the expenses of the commission created by the compact authorized by this article. The moneys hereby appropriated shall be paid out of the state treasury on the audit and warrant of the comptroller upon vouchers certified by the chairman of the commission in the manner prescribed by law. (1949, c. 1086, s. 7.)

SUBCHAPTER V. OIL AND GAS CONSERVATION.

Art. 27. Oil and Gas Conservation.

Part I. General Provisions.

§ 113-378. Persons drilling for oil or gas to register and furnish bond.—Any person, firm or corporation before making any drilling exploration in this state for oil or natural gas shall register with the department of conservation and development or such other state agency as may hereafter be established to control the conservation of oil or gas in this state. To provide for such registration, the drilling operator must furnish the name and address of such person, firm or corporation, and the location of the proposed drilling operations, and file with the aforesaid department of conservation and development a bond in the amount of two thousand five hundred dollars ($2,500.00) running to the state of North Carolina, conditioned that any well opened by the drilling operator upon abandonment shall be plugged in accordance with the rules and regulations of said department of conservation and development. (1945, c. 765, s. 2.)

§ 113-379. Filing log of drilling and development of each well.—Upon the completion or shutting down of any abandoned well, the drilling operator shall file with the department of conservation and development or other state agency, or with any division thereof hereinafter created for the regulation of drilling for oil or natural gas, a complete log of the drilling and development of each well. (1945, c. 765, s. 3.)

§ 113-380. Violation a misdemeanor.—Any person, firm or officer of a corporation violating any of the provisions of §§ 113-378 or 113-379 shall upon conviction thereof be guilty of a misdemeanor and shall be fined not less than five hundred dollars ($500.00) nor more than two thousand dollars ($2,000.00) and may in the discretion of the court be imprisoned for not more than two years. (1945, c. 765, s. 4.)

Part II. Provisions Dependent upon Action of Governor.

§ 113-381. Title.—This law shall be designated and known as the Oil and Gas Conservation Act. (1945, c. 702, s. 1.)

Editor's Note.—As to discussion of this act, see 23 N. C. Law Rev. 332.

§ 113-382. Declaration of policy.—If and when there should be discovered natural oil and/or natural gas within this state as a result of prospecting therefor by the drilling of wells, and where the discovery thereof in commercial quantities has been called to the attention of the governor and council of state, the governor shall there-

upon, with the advice of the council of state, proclaim and declare this law to be in full force and effect, and shall proceed with the necessary action to see that the provisions of this law are carried out.

The general assembly, in recognition of imminent evils that can occur in the production and use and waste thereof in the absence of coequal or correlative rights of owners of crude oil or natural gas in a common source of supply to produce and use the same, this law is enacted for the protection of public and private interests against such evils by prohibiting waste and compelling ratable production. (1945, c. 702, s. 2.)

§ 113-383. Petroleum division created; members; terms of office; compensation and expenses.—Subject to the provisions of § 113-382, there is hereby established in the department of conservation and development a division thereof to be known as the "petroleum division," hereinafter in this law called "the division," which division shall be composed of the director of the department of conservation and development and the state geologist as ex officio members thereof, and three members of the board of conservation and development, to be designated by the governor, the members so designated to serve on said division for a term of two years, or until their successors are designated. The successors of said members of said division shall be designated biennially by the governor. Any vacancies of said division may be filled by the governor. The said division shall designate one of its members, or such other person as it may select, to act as secretary thereof, unless a director of production and conservation is appointed as hereinafter provided. The members of the aforesaid petroleum division, other than the ex officio members thereof, shall receive the same per diem compensation for attending meetings thereof, and shall be allowed the same expenses, as are allowed to members of the board of conservation and development at meetings thereof. (1945, c. 702, s. 3.)

§ 113-384. Quorum.—A majority of said division shall constitute a quorum, and three affirmative votes shall be necessary for adoption or promulgation of any rules, regulations or orders. (1945, c. 702, s. 4.)

§ 113-385. Power to administer oaths.—Any member of the division, or the secretary thereof, shall have power to administer oaths to any witness in any hearing, investigation or proceeding contemplated by this law or by any other law of this state relating to the conservation of oil or gas. (1945, c. 702, s. 5.)

§ 113-386. Director of production and conservation and other employees; duties of secretary; attorney general to furnish legal services.—The division may with the approval of the governor appoint one director of production and conservation at a salary to be fixed by the governor, and such other assistants, petroleum and natural gas engineers, bookkeepers, auditors, gaugers and stenographers, and other employees as may be necessary properly to administer and enforce the provisions of this law.

The director of production and conservation, when appointed, shall be ex officio secretary of the division, and shall keep all minutes and records of said division and, in addition thereto, shall collect and remit to the state treasurer all moneys collected. He shall, as such secretary, give bond in such sum as the division may direct with corporate surety to be approved by the division, conditioned that he will well and truly account for all funds coming into his hands as such secretary.

The attorney general shall furnish the required legal services and shall be given such additional assistants as he may deem to be necessary therefor. (1945, c. 702, s. 6.)

§ 113-387. Production of crude oil and gas regulated; tax assessments.—All common sources of supply of crude oil discovered after January first, one thousand nine hundred and forty-five, if so found necessary by the division, shall have the production of oil therefrom controlled or regulated in accordance with the provisions of this law, and the division is hereby authorized to assess from time to time against each barrel of oil produced and saved a tax not to exceed five (5) mills on each barrel. All moneys so collected shall be used solely to pay the expenses and other costs in connection with the administration of this law.

All common sources of supply of natural gas discovered after January first, one thousand nine hundred and forty-five, if so found necessary by the division, shall have the production of gas therefrom controlled or regulated in accordance with the provisions of this law, and the division is hereby authorized to assess from time to time against each thousand cubic feet of gas produced and saved from a gas well a tax not to exceed one half (½) mill on each one thousand cubic feet of gas. All moneys so collected shall be used solely to pay the expenses and other costs in connection with the administration of this law. (1945, c. 702, s. 7.)

§ 113-388. Collection of assessments.—Any person purchasing oil or gas in this state at the well, under any contract or agreement requiring payment for such production to the respective owners thereof, in respect of which production any sums assessed under the provisions of § 113-387 are payable to the division, is hereby authorized, empowered and required to deduct from any sums so payable to any such person the amount due the division by virtue of any such assessment and remit that sum to the division.

Further, any person taking oil or gas from any well in this state for use or resale, in respect of which production any sums assessed under the provisions of § 113-387 are payable to the division, shall remit any sums so due to the division in accordance with those rules and regulations of the division which may be adopted in regard thereto. (1945, c. 702, s. 8.)

§ 113-389. Definitions.—Unless the context otherwise requires, the words defined in this section shall have the following meaning when found in this law:

(A) "Division" shall mean the "petroleum division," as created by this law.

(B) "Person" shall mean any natural person, corporation, association, partnership, receiver, trustee, guardian, executor, administrator, fiduciary or representative of any kind.

(C) "Oil" shall mean crude petroleum oil, and other hydrocarbons, regardless of gravity, which are produced at the well in liquid form by ordinary production methods, and which are not the result of condensation of gas after it leaves the reservoir.

(D) "Gas" shall mean all natural gas, including casinghead gas, and all other hydrocarbons not defined as oil in subsection "C" above.

(E) "Pool" shall mean an underground reservoir containing a common accumulation of crude petroleum oil or natural gas or both. Each zone of a general structure which is completely separated from the other zone in the structure is covered by the term "pool" as used herein.

(F) "Field" shall mean the general area which is underlaid or appears to be underlaid by at least one pool; and "field" shall include the underground reservoir or reservoirs containing crude petroleum oil or natural gas, or both. The words "field" and "pool" mean the same thing when only one underground reservoir is involved; "field," unlike "pool," may relate to two or more pools.

(G) "Owner" shall mean the person who has the right to drill into and to produce from any pool, and to appropriate the production either for himself or for himself and others.

(H) "Producer" shall mean the owner of a well or wells capable of producing oil or gas, or both.

(I) "Waste" in addition to its ordinary meaning, shall mean "physical waste" as that term is generally understood in the oil and gas industry. It shall include:

(1) The inefficient, excessive or improper use or dissipation of reservoir energy; and the locating, spacing, drilling, equipping, operating or producing of any oil or gas well or wells in a manner which results, or tends to result, in reducing inefficiently the quantity of oil or gas ultimately to be recovered from any pool in this state.

(2) The inefficient storing of oil, and the locating, spacing, drilling, equipping, operating or producing of any oil or gas well or wells in a manner causing, or tending to cause, unnecessary or excessive surface loss or destruction of oil or gas.

(3) Abuse of the correlative rights and opportunities of each owner of oil and gas in a common reservoir due to nonuniform, disproportionate, and unratable withdrawals causing undue drainage between tracts of land.

(4) Producing oil or gas in such manner as to cause unnecessary water channeling or coning.

(5) The operation of any oil well or wells with an inefficient gas-oil ratio.

(6) The drowning with water of any stratum or part thereof capable of producing oil or gas.

(7) Underground waste however caused and whether or not defined.

(8) The creation of unnecessary fire hazards.

(9) The escape into the open air, from a well producing both oil and gas, of gas in excess of the amount which is necessary in the efficient drilling or operation of the well.

(10) Permitting gas produced from a gas well to escape into the air.

(J) "Product" means any commodity made from oil or gas and shall include refined crude oil, crude tops, topped crude, processed crude petroleum, residue from crude petroleum, cracking stock, uncracked fuel oil, fuel oil, treated crude oil, residuum, gas oil, casing-head gasoline, natural gas gasoline, naphtha, distillate, gasoline, kersone, benzine, wash oil, waste oil, blended gasoline, lubricating oil, blends or mixtures of oil with one or more liquid products or by-products derived from oil or gas, and blends or mixtures of two or more liquid products or by-products derived from oil gas, whether hereinabove enumerated or not.

(K) "Illegal oil" shall mean oil which has been produced within the state of North Carolina from any well during any time that that well has produced in excess of the amount allowed by rule, regulation or order of the division, as distinguished from oil produced within the state of North Carolina from a well not producing in excess of the amount so allowed, which is "legal oil."

(L) "Illegal gas" shall mean gas which has been produced within the state of North Carolina from any well during any time that well has produced in excess of the amount allowed by any rule, regulation or order of the division, as distinguished from gas produced within the state of North Carolina from a well not producing in excess of the amount so allowed, which is "legal gas."

(M) "Illegal product" shall mean any product of oil or gas, any part of which was processed or derived, in whole or in part, from illegal oil or illegal gas or from any product thereof, as distinguished from "legal product," which is a product processed or derived to no extent from illegal oil or illegal gas.

(N) "Tender" shall mean a permit or certificate of clearance for the transportation of oil, gas or products, approved and issued or registered under the authority of the division. (1945, c. 702, s. 9.)

§ 113-390. Waste prohibited.—Waste of oil or gas as defined in this law is hereby prohibited. (1945, c. 702, s. 10.)

§ 113-391. Jurisdiction and authority of petroleum division; rules, regulations and orders.—The division shall have jurisdiction and authority of and over all persons and property necessary to administer and enforce effectively the provisions of this law and all other laws relating to the conservation of oil and gas.

The division shall have the authority and it shall be its duty to make such inquiries as it may think proper to determine whether or not waste over which it has jurisdiction exists or is imminent. In the exercise of such power the division shall have the authority to collect data; to make investigations and inspections; to examine properties, leases, papers, books and records; to examine, check, test and gauge oil and gas wells, tanks, refineries, and means of transportation; to hold hearings; and to provide for the keeping of records and the making of reports; and to take such action as may be reasonably necessary to enforce this law.

The division shall have authority to make, after hearing and notice as hereinafter provided, such reasonable rules, regulations and orders as may be necessary from time to time in the proper administration and enforcement of this law, including rules, regulations or orders for the following purposes:

A. To require the drilling, casing and plugging of wells to be done in such maner as to prevent

the escape of oil or gas out of one stratum to another; to prevent the intrusion of water into an oil or gas stratum from a separate stratum; to prevent the pollution of fresh water supplies by oil, gas or salt water; and to require reasonable bond condition for the performance of the duty to plug each dry or abandoned well.

B. To require directional surveys upon application of any owner who has reason to believe that a well or wells of others has or have been drilled into the lands owned by him or held by him under lease. In the event such surveys are required, the costs thereof shall be borne by the owners making the request.

C. To require the making of reports showing the location of oil and gas wells, and the filing of logs and drilling records.

D. To prevent the drowning by water of any stratum or part thereof capable of producing oil or gas in paying quantities, and to prevent the premature and irregular encroachment of water which reduces, or tends to reduce, the total ultimate recovery of oil or gas from any pool.

E. To require the operation of wells with efficient gas-oil ratios, and to fix such ratios.

F. To prevent "blow-outs," "caving" and "seepage" in the sense that conditions indicated by such terms are generally understood in the oil and gas business.

G. To prevent fires.

H. To identify the ownership of all oil or gas wells, producing leases, refineries, tanks, plants, structures and all storage and transportation equipment and facilities.

I. To regulate the "shooting," perforating, and chemical treatment of wells.

J. To regulate secondary recovery methods, including the introduction of gas, air, water or other substances into producing formations.

K. To limit and prorate the production of oil or gas, or both, from any pool or field for the prevention of waste as herein defined.

L. To require, either generally or in or from particular areas, certificates of clearance or tenders in connection with the transportation of oil or gas.

M. To regulate the spacing of wells and to establish drilling units.

N. To prevent, so far as is practicable, reasonably avoidable drainage from each developed unit which is not equalized by counter-drainage.

O. To prevent where necessary the use of gas for the manufacture of carbon black. (1945, c. 702, s. 11.)

§ 113-392. Protecting pool owners; drilling units in pools; location of wells; shares in pools.—A. Whether or not the total production from a pool be limited or prorated, no rule, regulation or order of the division shall be such in terms or effect (1) that it shall be necessary at any time for the producer from, or the owner of, a tract of land in the pool, in order that he may obtain such tract's just and equitable share of the production of such pool, as such share is set forth in this section, to drill and operate any well or wells on such tract in addition to such well or wells as can produce without waste such share, or (2) as to occasion net drainage from a tract unless there be drilled and operated upon such tract a well or wells in addition to such well or wells thereon as can produce without waste such tract's just and equitable share, as set forth in this section, of the production of such pool.

B. For the prevention of waste and to avoid the augmenting and accumulation of risks arising from the drilling of an excessive number of wells, the division shall, after a hearing, establish a drilling unit or units for each pool. The division may establish drainage units of uniform size for the entire pool or may, if the facts so justify, divide into zones any pool, establish a drainage unit for each zone, which unit may differ in size from that established in any other zone; and the division may from time to time, if the facts so justify, change the size of the unit established for the entire pool or for any zone or zones, or part thereof, establishing new zones and units if the facts justify their establishment.

C. Each well permitted to be drilled upon any drilling unit shall be drilled approximately in the center thereof, with such exception as may reasonably be necessary where it is shown, after notice and upon hearing, and the division finds that the unit is partly outside the pool or, for some other reason, a well approximately in the center of the unit would be nonproductive or where topographical conditions are such as to make the drilling approximately in the center of the unit unduly burdensome. Whenever an exception is granted, the division shall take such action as will offset any advantage which the person securing the exception may have over producers by reason of the drilling of the well as an exception, and so that drainage from developed units to the tract with respect to which the exception is granted will be prevented or minimized and the producer of the well drilled as an exception will be allowed to produce no more than his just and equitable share of the oil and gas in the pool, as such share is set forth in this section.

D. Subject to the reasonable requirements for prevention of waste, a producer's just and equitable share of the oil and gas in the pool (also sometimes referred to as a tract's just and equitable share) is that part of the authorized production for the pool (whether it be the total which could be produced without any restriction on the amount of production, or whether it be an amount less than that which the pool could produce if no restriction on the amount were imposed) which is substantially in the proportion that the quantity of recoverable oil and gas in the developed area of his tract in the pool bears to the recoverable oil and gas in the total developed area of the pool, in so far as these amounts can be ascertained practically; and to that end, the rules, regulations, permits and orders of the division shall be such as will prevent or minimize reasonably avoidable net drainage from each developed unit (that is, drainage which is not equalized by counter-drainage), and will give to each producer the opportunity to use his just and equitable share of the reservoir energy. (1945, c. 702, s. 12.)

§ 113-393. Development of lands as drilling unit by agreement or order of division.—A. Integration of Interests and Shares in Drilling Unit.—When two or more separately owned tracts of land are embraced within an established drilling unit, the

owners thereof may agree validly to integrate their interests and to develop their lands as a drilling unit. Where, however, such owners have not agreed to integrate their interests, the division shall, for the prevention of waste or to avoid drilling of unnecessary wells, require such owners to do so and to develop their lands as a drilling unit. All orders requiring such integration shall be made after notice and hearing, and shall be upon terms and conditions that are just and reasonable, and will afford to the owner of each tract the opportunity to recover or receive his just and equitable share of the oil and gas in the pool without unnecessary expense, and will prevent or minimize reasonably avoidable drainage from each developed unit which is not equalized by counter-drainage. The portion of the production allocated to the owner of each tract included in a drilling unit formed by an integration order shall, when produced, be considered as if it had been produced from such tract by a well drilled thereon.

In the event such integration is required, and provided also that after due notice to all the owners of tracts within such drilling unit of the creation of such drilling unit, and provided further that the division has received no protest thereto, or request for hearing thereon, whether or not ten days have elapsed after notice has been given of the creation of the drilling unit, the operator designated by the division to develop and operate the integrated unit shall have the right to charge to each other interested owner the actual expenditures required for such purpose not in excess of what are reasonable, including a reasonable charge for supervision, and the operator shall have the right to receive the first production from the well drilled by him thereon, which otherwise would be delivered or paid to the other parties jointly interested in the drilling of the well, so that the amount due by each of them for his shares of the expense of drilling, equipping, and operating the well may be paid to the operator of the well out of production, with the value of the production calculated at the market price in the field at the time such production is received by the operator or placed to his credit. After being reimbursed for the actual expenditures for drilling and equipping and operating expenses incurred during the drilling operations and until the operator is reimbursed, the operator shall thereafter pay to the owner of each tract within the pool his ratable share of the production calculated at the market price in the field at the time of such production less the reasonable expense of operating the well. In the event of any dispute relative to such costs, the division shall determine the proper costs.

B. When Each Owner May Drill.—Should the owners of separate tracts embraced within a drilling unit fail to agree upon the integration of the tracts and the drilling of a well on the unit, and should it be established that the division is without authority to require integration as provided for in subdivision A of this section, then, subject to all other applicable provisions of this law, the owner of each tract embraced within the drilling unit may drill on his tract, but the allowable production from each tract shall be such proportion of the allowable for the full drilling unit as the area of such separately owned tract bears to the full drilling unit.

C. Cooperative Development Not in Restraint of Trade.—Agreements made in the interests of conservation of oil or gas, or both, or for the prevention of waste, between and among owners or operators, or both, owning separate holdings in the same oil or gas pool, or in any area that appears from geological or other data to be underlaid by a common accumulation of oil or gas, or both, or between and among such owners or operators, or both, and royalty owners therein, of a pool or area, or any part thereof, as a unit for establishing and carrying out a plan for the cooperative development and operation thereof, when such agreements are approved by the division, are hereby authorized and shall not be held or construed to violate any of the statutes of this state relating to trusts, monopolies, or contracts and combinations in restraining of trade.

D. Variation from Vertical.—Whenever the division fixes the location of any well or wells on the surface, the point at which the maximum penetration of such wells into the producing formation is reached shall not unreasonably vary from the vertical drawn from the center of the hole at the surface, provided, that the division shall prescribe rules, regulations and orders governing the reasonableness of such variation. (1945, c. 702, s. 13.)

§ 113-394. Limitations on production; allocating and prorating "allowables."—A. Whenever the total amount of oil, including condensate, which all the pools in the state can produce, exceeds the amount reasonably required to meet the reasonable market demand for oil, including condensate, produced in this state, then the division shall limit the total amount of oil, including condensate, which may be produced in the state by fixing an amount which shall be designated "allowable" for this state, which will not exceed the reasonable market demand for oil, including condensate, produced in this state. The division shall then allocate or distribute the "allowable" for the state among the pools on a reasonable basis and in such manner as to avoid undue discrimination, and so that waste will be prevented. In allocating the "allowable" for the state, and in fixing "allowables" for pools producing oil or hydrocarbons forming condensate, or both oil and such hydrocarbons, the division shall take into account the producing conditions and other relevant facts with respect to such pools, including the separate needs for oil, gas and condensate, and shall formulate rules setting forth standards or a program for the distribution of the "allowable" for the state, and shall distribute the "allowable" for the state in accordance with such standards or program, and where conditions in one pool or area are substantially similar to those in another pool or area, then the same standards or program shall be applied to such pools and areas so that as far as practicable a uniform program will be followed; provided, however, the division shall permit the production of a sufficient amount of natural gas from any pool to supply adequately the reasonable market demand for such gas for light and fuel purposes if such production can be obtained without waste, and the condensate "allowable" for such pool shall not be less than the total amount of condensate produced or obtained in connection with

the production of the gas "allowable" for light and fuel purposes, and provided further that, if the amount allocated to pool as its share of the "allowable" for the state is in excess of the amount which the pool should produce to prevent waste, then the division shall fix the "allowable" for the pool so that waste will be prevented.

B. The division shall not be required to determine the reasonable market demand applicable to any single pool except in relation to all pools producing oil of similar kind and quality and in relation to the demand applicable to the state, and in relation to the effect of limiting the production of pools in the state. In allocating "allowables" to pools, the division shall not be bound by nominations or desires of purchasers to purchase oil from particular fields or areas, and the division shall allocate the "allowable" for the state in such manner as will prevent undue discrimination against any pool or area in favor of another or others which would result from selective buying or nominating by purchasers of oil, as such term "selective buying or nominating" is understood in the oil business.

C. Whenever the division limits the total amount of oil or gas which may be produced in any pool in this state to an amount less than that which the pool could produce if no restrictions were imposed (which limitation may be imposed either incidental to, or without, a limitation of the total amount of oil or gas which may be produced in the state), the division shall prorate or distribute the "allowable" production among the producers in the pool on a reasonable basis, and so that each producer will have the opportunity to produce or receive his just and equitable share, as such share is set forth in subsection I of section nine of this law [§ 113-392, subsec. D], subject to the reasonable necessities for the prevention of waste.

D. Whenever the total amount of gas which can be produced from any pool in this state exceeds the amount of gas reasonably required to meet the reasonable market demand therefrom, the division shall limit the total amount of gas which may be produced from such pool. The division shall then allocate or distribute the allowable production among the developed areas in the pool on a reasonable basis, so that each producer will have the opportunity to produce his just and equitable share, as such share is set forth in subsection one of section nine of this law whether the restriction for the pool as a whole is accomplished by order or by the automatic operation of the prohibitory provisions of this law [§ 113-392, subsec. D]. As far as applicable, the provisions of subsection A of this section shall be followed in allocating any "allowable" of gas for the state.

E. After the effective date of any rule, regulation, or order of the division fixing the "allowable" production of oil or gas, or both, or condensate, no person shall produce from any well, lease, or property more than the "allowable" production which is fixed, nor shall such amount be produced in a different manner than that which may be authorized. (1945, c. 702, s. 14.)

Editor's Note.—Subsections C and D of this section refer to "subsection I" and "subsection one" of section nine. Apparently the reference should have been to subsection D of section twelve, codified herein as § 113-392.

§ 113-395. Notice and payment of fee to division before drilling or abandoning well; plugging abandoned well.—Before any well, in search of oil or gas, shall be drilled, the person desiring to drill the same shall notify the division upon such form as it may prescribe and shall pay a fee of fifty dollars ($50.00) for each well. The drilling of any well is hereby prohibited until such notice is given and such fee has been paid and permit granted.

Each abandoned well and each dry hole promptly shall be plugged in the manner and within the time required by regulations to be prescribed by the division, and the owner of such well shall give notice, upon such form as the division may prescribe, of the abandonment of each dry hole and of the owner's intention to abandon, and shall pay a fee of fifteen dollars ($15.00). No well shall be abandoned until such notice has been given and such fee has been paid. (1945, c. 702, s. 15.)

§ 113-396. Wells to be kept under control.—In order to protect further the natural gas fields and oil fields in this state, it is hereby declared to be unlawful for any person to permit negligently any gas or oil well to go wild or to get out of control. The owner of any such well shall, after twenty-four (24) hours' written notice by the division given to him or to the person in possession of such well, make reasonable effort to control such well.

In the event of the failure of the owner of such well within twenty-four (24) hours after service of the notice above provided for, to control the same, if such can be done within the period, or to begin in good faith upon service of such notice, operations to control such well, or upon failure to prosecute diligently such operations, then the division shall have the right to take charge of the work of controlling such well, and it shall have the right to proceed, through its own agents or by contract with a responsible contractor, to control the well or otherwise to prevent the escape or loss of gas or oil from such well all at the reasonable expense of the owner of the well. In order to secure to the division the payment of the reasonable cost and expense of controlling or plugging such well, the division shall retain the possession of the same and shall be entitled to receive and retain the rents, revenues and incomes therefrom until the costs and expenses incurred by the division shall be repaid. When all such costs and expenses have been repaid, the division shall restore possession of such well to the owner; provided, that in the event the income received by the division shall not be sufficient to reimburse the division as provided for in this section, the division shall have a lien or privilege upon all of the property of the owner of such well, except such as is exempt by law, and the division shall proceed to enforce such lien or privilege by suit brought in any court of competent jurisdiction, the same as any other civil action, and the judgment so obtained shall be executed in the same manner now provided by law for execution of judgments. Any excess over the amount due the division which the property seized and sold may bring, after payment of court costs, shall be paid over to the owner of such well. (1945, c. 702, s. 16.)

§ 113-397. Hearing before division; notice; rules, regulations or orders; public records and copies as evidence.—A. The division shall pre-

scribe its rules of order or procedure in hearings or other proceedings before it under this law, but in all hearings the rules of evidence as established by law shall be applied; provided, however, that the procedure before the division shall be summary.

B. No rule, regulation or order, including change, renewal, or extension thereof, shall, in the absence of an emergency, be made by the division under the provisions of this law except after a public hearing upon at least seven days' notice given in such form as may be prescribed by the division. Such public hearing shall be held at such time, place, and in such manner as may be prescribed by the division, and any person having any interest in the subject matter of the hearing shall be entitled to be heard.

C. In the event an emergency is found to exist by the division which in its judgment requires the making, changing, renewal or extension of a rule, regulation or order without first having a hearing, such emergency rule, regulation or order shall have the same validity as if a hearing with respect to the same had been held after due notice. The emergency rule, regulation or order permitted by this section shall remain in force no longer than ten days from its effective date, and, in any event, it shall expire when the rule, regulation or order made after due notice and hearing with respect to the subject matter of such emergency rule, regulation or order becomes effective.

D. Should the division elect to give notice by personal service, such service may be made by any officer authorized to serve process or by any agent of the division in the same manner as is provided by law for the service of summons in civil actions in the superior courts of this state. Proof of the service by such agent shall be by the affidavit of the person making personal service.

E. All rules, regulations and orders made by the division shall be in writing and shall be entered in full by the director of production and conservation in a book to be kept for such purpose by the division, which book shall be a public record and be open to inspection at all times during reasonable office hours. A copy of such rule, regulation or order, certified by such director of production and conservation, shall be received in evidence in all courts of this state with the same effect as the original.

F. Any interested person shall have the right to have the division call a hearing for the purpose of taking action in respect of any matter within the jurisdiction of the division by making a request therefor in writing. Upon the receipt of any such request, the division shall promptly call a hearing thereon, and, after such hearing, and with all convenient speed and in any event within thirty days after the conclusion of such hearing, shall take such action with regard to the subject matter thereof as it may deem appropriate. (1945, c. 702, s. 17.)

§ 113-398. Procedure and powers in hearings by division.—In the exercise and enforcement of its jurisdiction, the said division is authorized to summon witnesses, administer oaths, make ancillary orders and require the production of records and books for the purpose of examination at any hearing or investigation conducted by it. In connection with the exercise and enforcement of its jurisdiction, the division shall also have the right and authority to certify as for contempt, to the court of any county having jurisdiction, violations by any person of any of the provisions of this article or of the rules, regulations or orders of the division, and if it be found by said court that such person has knowingly and wilfully violated same, then such person shall be punished as for contempt in the same manner and to the same extent and with like effect as if said contempt had been of an order, judgment or decree of the court to which said certification is made. (1945, c. 702, s. 18.)

§ 113-399. Suits by division.—The said division shall have the right to maintain an action in any court of competent jurisdiction within this state to enforce by injunction, mandatory injunction, and any other appropriate or legal or equitable remedy, any valid rule, order or regulation made by the division or promulgated under the provisions of this article, and said court shall have the authority to make and render such judgments, orders and decrees as may be proper to enforce any such rules, orders and regulations made and promulgated by the division. (1945, c. 702, s. 19.)

§ 113-400. Assessing costs of hearings.—The said division is hereby authorized and directed to tax and assess against the parties involved in any hearing the costs incurred therein. (1945, c. 702, s. 20.)

§ 113-401. Party to hearings; review.—The term "party" as used in this article shall include any person, firm, corporation or association. In proceedings for review of an order or decision of said division, the division shall have all rights and privileges granted by this article to any other party to such proceedings. (1945, c. 702, s. 21.)

§ 113-402. Rehearings.—Any party being dissatisfied with any order or decision of the said division may, within ten (10) days from the date of the service of such order or decision, apply for a rehearing in respect to any matter determined therein; the application shall be granted or denied by the division within ten (10) days from the date same shall be filed, and if the rehearing be not granted within (10) ten days, it shall be taken as denied. If a rehearing be granted, the matter shall be determined by the division within thirty (30) days after the same shall be submitted. No cause of action arising out of any order or decision of the division shall accrue in any court to any party unless such party makes application for a rehearing as herein provided. Such application shall set forth specifically the ground or grounds on which the applicant considers such order or decision to be unlawful or unreasonable. No party shall, in any court, urge or rely upon any ground not set forth in said application. An order made after a rehearing, abrogating, changing or modifying the original order or decision, shall have the same force and effect as an original order. (1945, c. 702, s. 22.)

§ 113-403. Application for court review; copy served on director who shall notify parties.—Within thirty (30) days after the application for a rehearing is denied, or if the application is granted, then within thirty (30) days after the rendition of the decision on rehearing, the applicant may apply

to the court of the county in which the order of the division is to become effective for a review of such order or decision; if the order of the division is to become effective in more than one county, the application for review shall be filed in the office of the clerk of the superior court of the county mentioned above, and shall specifically state the grounds for review upon which the applicant relies and shall designate the order or decision sought to be reviewed. The clerk of the superior court shall immediately send a certified copy thereof, by registered mail, to the director of production and conservation. The director shall immediately notify all parties who appeared in the proceedings before the division by registered mail, that such application for review has been filed. (1945, c. 702, s. 23.)

§ 113-404. Transcript transmitted to clerk of superior court; scope of review; procedure in superior court and upon appeal to supreme court.—The director of production and conservation, upon receipt of said copy of the application for review, shall forthwith transmit to the clerk of the superior court in which the application has been filed, a certified transcript of all pleadings, applications, proceedings, orders or decisions of the division and of the evidence heard by the division on the hearings of the matter or cause; provided, that the parties, with the consent and approval of the division, may stipulate in writing that only certain portions of the record be transcribed. Said proceedings for review shall be for the purpose of having the lawfulness or reasonableness of the original order or decision, or the order or decision on rehearing, inquired into and determined, and the superior court hearing said cause shall have the power to vacate or set aside such order or decision on the ground that such order or decision is unlawful or unreasonable. After the said transcript shall be filed in the office of the clerk of the superior court of the county in which the application is filed, the judge of said superior court may, on his motion, or on application of any parties interested therein, make an order fixing a time for the filing of abstracts and briefs and shall fix a day for the hearing of such cause. All proceedings under this section shall have precedence in any court in which they may be pending, and the hearing of the cause shall be by the court without the intervention of a jury. An appeal shall lie to the supreme court of this state from orders, judgments and decisions made by the superior court. The procedure upon the trial of such proceedings in the superior court and upon appeal to the supreme court of this state shall be the same as in other civil actions, except as herein provided. No court of this state shall have power to set aside, modify or vacate any order or decision of the division except as herein provided. (1945, c. 702, s. 24.)

§ 113-405. Introduction of new or additional evidence in superior court; hearing of additional material evidence by division.—No new or additional evidence may be introduced upon the trial of any proceedings for review under the provisions of this article, but the cause shall be heard upon the questions of fact and law presented by the evidence and exhibits introduced before the division and certified to it: Provided, that if it shall be shown to the satisfaction of the court that any party to said proceeding has additional material evidence which could not, by the exercise of due diligence, have been produced at the hearing before the division, or which for some good reason it was prevented from producing at such hearing, or if upon the trial of the proceeding the court shall find that the division has erroneously refused to admit or consider material evidence offered by any party at the hearing before the division, the court may, in its discretion, stay the proceedings and make an order directing the division to hear and consider such evidence. In such cases, it shall be the duty of the division immediately to hear and consider such evidence and make an order modifying, setting aside or affirming its former decision. The division after hearing and considering such additional evidence shall vacate, modify, or affirm its decision and a transcript of the additional evidence and the order or decision of the division shall be certified and forwarded to the clerk of the superior court in which such proceeding is pending and said superior court shall on the motion of any interested party, order the trial to proceed upon the transcript as supplemented, so as to enable the court to properly determine if the order or decision of the division as originally made or as modified is in any respect unlawful or unreasonable. (1945, c. 702, sec. 25.)

§ 113-406. Effect of pendency of review; stay of proceedings.—The filing or pendency of the application for review provided for in this article shall not in itself stay or suspend the operation of any order or decision of the division, but, during the pendency of such proceeding the court, in its discretion, may stay or suspend, in whole or in part, the operation of the order or decision of the division. No order so staying or suspending an order or decision of the division shall be made by any court of this state otherwise than on five (5) days' notice and, after a hearing, and if a stay or suspension is allowed the order granting the same shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that great or irreparable damage would otherwise result to the petitioner and specifying the nature of the damage. (1945, c. 702, s. 26.)

§ 113-407. Stay bond.—In case the order or decision of the division is stayed or suspended, the order or judgment of the court shall not become effective until a bond shall have been executed and filed with and approved by the court, payable to the division, sufficient in amount and security to secure the prompt payment, by the party petitioning for the stay, of all damages caused by the delay in the enforcement of the order or decision of the division. (1945, c. 702, s. 27.)

§ 113-408. Enjoining violation of laws and regulations; service of process; application for drilling well to include residence address of applicant.—Whenever it shall appear that any person is violating, or threatening to violate, any statute of this state with respect to the conservation of oil or gas, or both, or any provision of this law, or any rule, regulation or order made thereunder by any act done in the operation of any well producing oil or gas, or by omitting any act required to be done thereunder, the division, through the attorney general, may bring suit against such person in the

superior court in the county in which the well in question is located, to restrain such person or persons from continuing such violation or from carrying out the threat of violation. In such suit the division may obtain injunctions, prohibitory and mandatory, including temporary restraining orders and temporary injunctions, as the facts may warrant, including, when appropriate, an injunction restraining any person from moving or disposing of illegal oil, illegal gas or illegal product, and any or all such commodities may be ordered to be impounded or placed under the control of an agent appointed by the court if, in the judgment of the court, such action is advisable.

If any such defendant cannot be personally served with summons in that county, personal jurisdiction of that defendant in such suit may be obtained by service made on any employee or agent of that defendant working on or about the oil or gas well involved in such suit, and by the division mailing a copy of the complaint in the action to the defendant at the address of the defendant then recorded with the director of production and conservation.

Each application for the drilling of a well in search of oil or gas in this state shall include the address of the residence of the applicant or each applicant, which address shall be the address of each person involved in accordance with the records of the director of production and conservation, until such address is changed on the records of the division after written request. (1945, c. 702, s. 28.)

§ 113-409. Punishment for making false entries, etc.—Any person who, for the purpose of evading this law, or of evading any rule, regulation, or order made thereunder, shall intentionally make or cause to be made any false entry or statement of fact in any report required to be made by this law or by any rule, regulation, or order made hereunder; or who, for such purpose, shall make or cause to be made any false entry in any account, record, or memorandum kept by any person in connection with the provisions of this law or of any rule, regulation or order made thereunder; or who, for such purpose, shall omit to make, or cause to be omitted, full, true and correct entries in such accounts, records, or memoranda, of all facts and transactions pertaining to the interest or activities in the petroleum industry of such person as may be required by the division under authority given in this law or by any rule, regulation, or order made hereunder; or who, for such purpose shall remove out of the jurisdiction of the state, or who shall mutilate, alter, or by any other means falsify, any book, record, or other paper, pertaining to the transactions regulated by this law, or by any rule, regulations, or order made hereunder, shall be deemed guilty of a misdemeanor and shall be subject, upon conviction in any court of competent jurisdiction, to a fine of not more than five hundred ($500.00) dollars, or imprisonment for a term of not more than six months, or both such fine and imprisonment. (1945, c. 702, s. 29.)

§ 113-410. Penalties for other violations.—Any person who knowingly and wilfully violates any provision of this law, or any rule, regulation, or order of the division made hereunder, shall, in the event a penalty for such violation is not otherwise provided for herein, be subject to a penalty of not to exceed one thousand dollars ($1,000.00) a day for each and every day of such violation, and for each and every act of violation, such penalty to be recovered in a suit in the superior court of the county where the defendant resides, or in the county of the residence of any defendant if there be more than one defendant, or in the superior court of the county where the violation took place. The place of suit shall be selected by the division, and such suit, by direction of the division, shall be instituted and conducted in the name of the division by the attorney general. The payment of any penalty as provided for herein shall not have the effect of changing illegal oil into legal oil, illegal gas into legal gas, or illegal product into legal product, nor shall such payment have the effect of authorizing the sale or purchase or acquisition, or the transportation, refining, processing, or handling in any other way, of such illegal oil, illegal gas or illegal product, but, to the contrary, penalty shall be imposed for each prohibited transaction relating to such illegal oil, illegal gas or illegal product.

Any person knowingly and wilfully aiding or abetting any other person in the violation of any statute of this state relating to the conservation of oil or gas, or the violation of any provision of this law, or any rule, regulation, or order made thereunder, shall be subject to the same penalties as prescribed herein for the violation by such other person. (1945, c. 702, s. 30.)

§ 113-411. Dealing in or handling of illegal oil, gas or product prohibited.—A. The sale, purchase or acquisition, or the transportation, refining, processing or handling in any other way of illegal oil, illegal gas or illegal product is hereby prohibited. All persons purchasing any petroleum product must first be licensed to do so by the petroleum division.

B. Unless and until the division provides for certificates of clearance or tenders, or some other method, so that any person may have an opportunity to determine whether any contemplated transaction of sale, purchase or acquisiton, or transportation, refining, processing or handling in any other way, involves illegal oil, illegal gas or illegal product, no penalty shall be imposed for the sale, purchase or acquisition, or the transportation, refining, processing or handling in any other way of illegal oil, illegal gas or illegal product, except under circumstances hereinafter stated. Penalties shall be imposed for the commission of each transaction prohibited in this section when the person committing the same knows that illegal oil, illegal gas or illegal product is involved in such transaction, or when such person could have known or determined such fact by the exercise of reasonable diligence or from facts within his knowledge. However, regardless of lack of actual notice or knowledge, penalties as provided in this law shall apply to any sale, purchase or acquisition, and to the transportation, refining, processing or handling in any other way, of illegal oil, illegal gas or illegal product, where administrative provision is made for identifying the character of the commodity as to its legality. It shall likewise be a violation for which penalties shall be imposed for

any person to sell, purchase or acquire, or to transport, refine, process or handle in any other way any oil, gas or any product without complying with any rule, regulation or order of the division relating thereto. (1945, c. 702, s. 31.)

§ 113-412. Seizure and sale of contraband oil, gas and product.—Apart from, and in addition to, any other remedy or procedure which may be available to the division, or any penalty which may be sought against or imposed upon any person with respect to violations relating to illegal oil, illegal gas, or illegal product, all illegal oil, illegal gas and illegal product shall, except under such circumstances as are stated herein, be contraband and shall be seized and sold, and the proceeds applied as herein provided. Such sale shall not take place unless the court shall find, in the proceeding provided for in this paragraph, that the commodity involved is contraband. Whenever the division believes that illegal oil, illegal gas or illegal product is subject to seizure and sale, as provided herein, it shall, through the attorney general, have issued a warrant of attachment and bring a civil action in rem for that purpose in the superior court of the county where the commodity is found, or the action may be maintained in connection with any suit or crossbill for injunction or for penalty relating to any prohibited transaction involving such illegal oil, illegal gas or illegal product. Any interested person who may show himself to be adversely affected by any such seizure and sale shall have the right to intervene in such suit to protect his rights.

The action referred to above shall be strictly in rem and shall proceed in the name of the state as plaintiff against the illegal oil, illegal gas or illegal product mentioned in the complaint, as defendant, and no bond or bonds shall be required of the plaintiff in connection therewith. Upon the filing of the complaint, the clerk of the court shall issue a summons directed to the sheriff of the county, or to such other officer or person as the court may authorize to serve process, requiring him to summon any and all persons (without undertaking to name them) who may be interested in the illegal oil, illegal gas, or illegal product mentioned in the complaint to appear and answer within thirty days after the issuance and service of such summons. The summons shall contain the style and number of the suit and a very brief statement of the nature of the cause of action. It shall be served by posting one copy thereof at the courthouse door of the county where the commodity involved in the suit is alleged to be located and by posting another copy thereof near the place where the commodity is alleged to be located. Copy of such summons shall be posted at least five days before the return day stated therein, and the posting of such copy shall constitute constructive possession of such commodity by the state. A copy of the summons shall also be published once each week for four weeks in some newspaper published in the county where the suit is pending and having a bona fide circulation therein. No judgment shall be pronounced by any court condemning such commodity as contraband until after the lapse of five days from the last publication of said summons. Proof of service of said summons, and the manner thereof, shall be as provided by general law.

Where it appears by a verified pleading on the part of the plaintiff, or by affidavit, or affidavits, or by oral testimony, that grounds for the seizure and sale exist, the clerk, in addition to the summons or warning order, shall issue a warrant of attachment, which shall be signed by the clerk and bear the seal of the court. Such warrant of attachment shall specifically describe the illegal oil, illegal gas or illegal product, so that the same may be identified with a reasonable certainty. It shall direct the sheriff to whom it is addressed to take into his custody, actual or constructive, the illegal oil, illegal gas or illegal product, described therein, and to hold the same subject to the orders of the court. Said warrant of attachment shall be executed as a writ of attachment is executed. No bond shall be required before the issuance of such warrant of attachment, and the sheriff shall be responsible upon his official bond for the proper execution thereof.

In a proper case, the court may direct the sheriff to deliver the custody of any illegal oil, illegal gas or illegal product seized by him under a warrant of attachment, to a commissioner to be appointed by the court, which commissioner shall act as the agent of the court and shall give bond with such approved surety as the court may direct, conditioned that he will faithfully conserve such illegal oil, illegal gas or illegal product, as may come into his custody and possession in accordance with the orders of the court; provided, that the court may in its discretion appoint any member of the division or any agent of the division as such commissioner of the court.

Sales of illegal oil, illegal gas or illegal product seized under the authority of this law, and notices of such sales, shall be in accordance with the laws of this state relating to the sale and disposition of attached property; provided, however, that where the property is in custody of a commissioner of the court, the sale shall be held by said commissioner and not by the sheriff. For his services hereunder, such commissioner shall receive a reasonable fee to be paid out of the proceeds of the sale or sales to be fixed by the court ordering such sale.

The court may order that the commodity be sold in specified lots or portions, and at specified intervals, instead of being sold at one time. Title to the amount sold shall pass as of the date of the law which is found by the court to make the commodity contraband. The judgment shall provide for payment of the proceeds of the sale into the general fund of the state treasurer, after first deducting the costs in connection with the proceedings and the sale. The amount sold shall be treated as legal oil, legal gas or legal product, as the case may be, in the hands of the purchaser, but the purchaser and the commodity shall be subject to all applicable laws, and rules, regulations and orders with respect to further sale or purchase or acquisition, and with respect to the transportation, refining, processing, or handling in any other way, of the commodity purchased.

Nothing in this section shall deny or abridge any cause of action a royalty owner, or a lien holder, or any other claimant, may have, because of the forfeiture of the illegal oil, illegal gas, or illegal product, against the person whose act resulted in such forfeiture. No illegal oil, illegal gas

or illegal product shall be sold for less than the average market value at the time of sale of similar products of like grade and character. (1945, c. 702, s. 32.)

§ 113-413. Funds for administration.—If the governor shall proclaim and declare this law to be in full force and effect prior to March first, one thousand nine hundred and forty-seven, the funds necessary for the administration of this law shall be provided by the governor from the contingency and emergency fund. (1945, c. 702, s. 33.)

§ 113-414. Filing list of renewed leases in office of register of deeds.—On December thirty-first of each year, or within ten days thereafter, every person, firm or corporation holding petroleum leases shall file in the office of the register of deeds of the county within which the land covered by such leases is located, a list showing the leases which have been renewed for the ensuing year. (1945, c. 702, s. 34.)

Chapter 114. Department of Justice.

Art. 2. Division of Legislative Drafting and Codification of Statutes.

Sec.
114-9.1. Revisor of statutes.

Art. 1. Attorney General.

§ 114-4. Assistants; compensation; assignments.—The attorney general shall be allowed to appoint five assistant attorneys general, and each of such assistant attorneys general shall receive a salary to be fixed by the director of the budget. Two assistant attorneys general shall be assigned to the state department of revenue. The other assistant attorneys general shall perform such duties as may be assigned by the attorney general: Provided, however, the provisions of this section shall not be construed as preventing the attorney general from assigning additional duties to the assistant attorneys general assigned to the state department of revenue. (1925, c. 207, s. 1; 1937, c. 357; 1945, c. 786; 1947, c. 182.)

Editor's Note.—
The 1945 amendment increased the number of assistant attorneys general from three to four.

The 1947 amendment increased the number of assistant attorneys general from four to five, and made other changes in this section.

§ 114-7. Salary of attorney general.—The attorney general shall receive an annual salary of seven thousand five hundred dollars ($7,500.00), payable monthly: Provided, that from and after the first day of January, 1949, the attorney general shall receive an annual salary of eight thousand four hundred dollars ($8,400.00), payable monthly. (1929, c. 1, s. 2; 1947, c. 1043.)

Editor's Note.—The 1947 amendment added the proviso. Session Laws 1949, c. 1278, provides that the attorney general shall receive ten thousand and eighty dollars ($10,080.00) per year, payable in equal monthly installments.

Art. 2. Division of Legislative Drafting and Codification of Statutes.

§ 114-9.1. Revisor of statutes.—The member of the staff of the attorney general who is assigned to perform the duties prescribed by § 114-9 (c) shall be known as the revisor of statutes and shall receive a salary to be fixed by the governor with the approval of the council of state. (1947, c. 114, s. 1.)

Editor's Note.—For comment on this section, see 25 N. C. Law Rev. 459.

Art. 4. State Bureau of Investigation.

§ 114-15. Investigations of lynchings, election frauds, etc.; services subject to call of governor; witness fees and mileage for director and assistants.

All records and evidence collected and compiled by the director of the bureau and his assistants shall not be considered public records within the meaning of § 132-1, and following, of the General Statutes of North Carolina and may be made available to the public only upon an order of a court of competent jurisdiction. Provided that all records and evidence collected and compiled by the director of the bureau and his assistants shall, upon request, be made available to the solicitor of any district if the same concerns persons or investigations in his district.

(1947, c. 280.)

Editor's Note.—The 1947 amendment directed that the above paragraph be inserted between the first and last paragraphs of this section which are not set out here.

For brief comment on the amendment, see 25 N. C. Law Rev. 403.

Chapter 115. Education.

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115-16. [Repealed.]

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115-31-22. Public school insurance fund; decrease of premiums when fund reaches 5% of total insurance in force.

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115-31.28. Operating expenses.

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115-255.3. When board to begin functioning; succeeds to powers and authority of former board.

SUBCHAPTER XIV. TEXTBOOKS AND PUBLIC LIBRARIES.

Art. 37. Textbooks for Elementary Grades.

115-263. [Repealed.]

115-265. [Repealed.]

Art. 38. Textbooks for High Schools.

Art. 38A. Selection and Adoption of Textbooks.

SUBCHAPTER XXII. SCHOOL LAW OF 1939.

Art. 50. The School Machinery Act.

SUBCHAPTER I. THE PUBLIC SCHOOL SYSTEM.

Art. 1. Interpretations and General Consideration.

§ 115-3. Schools provided for both races; taxes.

Cited in Coggins v. Board of Education, 223 N. C. 763, 28 S. E. (2d) 527.

§ 115-8. Administrative units classified.

Cited in Coggins v. Board of Education, 223 N. C. 763, 28 S. E. (2d) 527.

§ 115-9. The term "district" defined.

Cited in Coggins v. Board of Education, 223 N. C. 763, 28 S. E. (2d) 527.

§ 115-15.1. Majority vote in elections on bond issues, etc.—Wherever in chapter 115, General Statutes, or in any other statute, general, public or local, requirement is made that the levy of a tax or the issuance of bonds or the change of any boundary of school taxing districts is made to depend upon the vote of the majority of the qualified voters or a majority of the registered voters or any similar phrase, said law shall be and hereby is amended to require a majority of the qualified voters voting at such election on such propositions, the purpose hereof being to make all of said laws correspond to requirements of article 7, section 7, of the constitution of North Carolina, as amended. (1949, c. 1033, s. 2.)

Cross Reference.—For similar provision relating to majority vote in bond elections, see § 153-92.1.

Editor's Note.—For brief comment on this section, see 27 N. C. Law Rev. 454.

SUBCHAPTER II. ADMINISTRATIVE ORGANIZATION.

Art. 2. The State Board of Education.

§ 115-16: Repealed by Session Laws 1945, c. 721, s. 2.

Editor's Note.—The repealed section related to the incorporation and general corporate powers of the state board of education. Session Laws 1945, c. 804, restoring the corporate existence of the board, was repealed by Session Laws 1945, c. 1026.

§ 115-16.1. Educational districts.—The state of North Carolina is divided into eight educational districts as follows:

First District

Beaufort County, Bertie County, Camden County, Chowan County, Currituck County, Dare County, Gates County, Hertford County, Hyde County, Martin County, Pasquotank County, Perquimans County, Pitt County, Tyrell County, Washington County.

Second District

Brunswick County, Carteret County, Craven County, Duplin County, Greene County, Jones County, Lenoir County, New Hanover County, Onslow County, Pamlico County, Pender County, Sampson County, Wayne County.

Third District

Durham County, Edgecombe County, Franklin County, Granville County, Halifax County, Nash County, Northhampton County, Vance County, Wake County, Warren County, Wilson County, Johnston County.

Fourth District

Bladen County, Columbus County, Cumberland County, Harnett County, Hoke County, Lee County, Montgomery County, Moore County, Richmond County, Robeson County, Scotland County.

Fifth District

Alamance County, Caswell County, Chatham County, Davidson County, Forsyth County, Guilford County, Orange County, Person County, Randolph County, Rockingham County, Stokes County.

Sixth District

Anson County, Cabarrus County, Cleveland County, Gaston County, Lincoln County, Mecklenburg County, Stanly County, Union County.

Seventh District

Alexander County, Alleghany County, Ash County, Avery County, Burke County, Caldwell County, Catawba County, Davie County, Iredell County, Rowan County, Surry County, Watauga County, Wilkes County, Yadkin County.

Eighth District

Buncombe County, Cherokee County, Clay County, Graham County, Haywood County, Henderson County, Jackson County, Macon County, Madison County, McDowell County, Mitchell County, Polk County, Rutherford County, Swain

County, Transylvania County, Yancey County. (1945, cc. 622, 923.)

§ 115-19. Powers and duties of the board.

Editor's Note.—

For subsequent law affecting this section, see §§ 115-31.1 et seq. As to authority of board to alter or dissolve city school administrative units, see § 115-361.1. As to authority of board to advertise for public school teachers, see Session Laws 1949, c. 1264. As to authority of board to continue study of public school system, as undertaken by state education commission established by chapter 724 of 1947 Session Laws, codified as §§ 143-261 to 143-266, see Session Laws 1949, c. 1116, s. 6.

For comment on the 1943 amendment, see 21 N. C. Law Rev. 362.

§ 115-19.1. Succeeds to property, powers, functions and duties of abolished commissions and boards; power to take, hold and convey property.

For authority of state board of education to convey or lease marsh and swamp lands to department of conservation and development, see §§ 146-99 to 146-101.

§ 115-20. Administration of public school system and educational funds; membership of board; officers; vacancies; quorum; compensation and expenses.

Editor's Note.—

For subsequent law affecting this section, see §§ 115-31.1 et seq.

For comment on the 1943 amendment, see 21 N. C. Law Rev. 362.

§ 115-21. Record of proceedings.

See § 115-31.7, par. 8.

§ 115-25.1. Revolving fund for counties receiving federal aid for school lunches.

1. Fund Provided for.—In order that the school administrative units of the state may participate in grants in aid and allotments in kind made by the federal government to provide low cost lunches for the school children of the state and in order that funds may be made quickly available to supply the casual deficits incurred by the school administrative units of the state while waiting payments of claims filed for approved federal aid the director of the budget is authorized to advance out of the general fund of this state a sum not exceeding three hundred thousand dollars ($300,000.00) to be used as a revolving special fund by the state board of education to pay the counties of the state the amount of requisitions for funds approved by the state board of education that have been expended for school lunches in the schools of the counties and in the city school administrative units within the counties. These funds so advanced shall be returned to the general fund at the close of each school year.

2. Counties to Give Liens on Federal Funds.—The county boards of education and the tax levying authorities of the counties of the state are hereby authorized and required to give the state board of education liens on all federal funds received by the state board of education for payment to counties and in anticipation of which advances have been made to these counties by the state board of education.

3. Period for Advancement of Funds.—No advancement of funds shall be made to any county of the state for a longer period than that of the approved federal application on the basis of which the advancement of funds was made; provided, no funds shall be advanced to any county or city administrative school unit to cover the amount of the reimbursement due the school unit by the federal government covering the last month's lunch room operation in any school year. This period is construed to mean until final payment is made on the approved application.

4. Counties Authorized to Pledge Their Credit.—Since moneys advanced under the provisions of this section are for the purpose of supplying casual deficits incurred in anticipation of funds that have been approved for payment by the federal government upon the submission of properly prepared requisitions, it is the intent and purpose of the general assembly to authorize the counties of the state to pledge their faith and credit in accordance with section four of article V, of the constitution of the state of North Carolina.

5. Regulations.—Rules and regulations for advancing funds to the counties of the state under the provisions of this section and in addition to those recited in this section may be made by the state board of education.

6. Restrictions.—The advancement of funds to the counties of the state by the state board of education shall be made only to those counties receiving part payment of the cost of school lunches from the federal government. Should the federal government withdraw aid from the school lunch program or if for any reason the counties of the state do not participate in federal aid to school lunches or if changes are made in the distribution of federal funds for school lunches that make it unnecessary for further advances to be made to the counties of the state, all funds advanced under the provisions of this section shall be returned to the general fund of this state. (1945, c. 777.)

§ 115-25.2. Acceptance and administration of federal aid to public education.—In the event of the enactment by the congress of the United States of legislation now pending in said congress, known as Senate Bill No. 246, or any legislation designed for the same purpose, to authorize the appropriation of funds to assist the states and territories in financing a minimum education program of elementary and secondary schools and for other purposes relating thereto, and in the event funds become available under appropriations made by congress for this purpose, in order to qualify for receiving the funds so appropriated, the governor of this state is hereby authorized and empowered to take such action and to authorize and empower any state officer, department, or agency to take such action and perform such service as may be required by the federal law for the acceptance and administration of said funds, which authority shall remain in effect until the adjournment if the first regular session of the legislature of this state after such federal legislation is enacted or until the legislature of this state takes the action required under the federal law to qualify and receive such federal funds, whichever first occurs, and, in the event federal funds become available to the states for elementary and secondary public schools by act of congress, then in that event, the state treasurer is designated to receive such funds for the state of North Carolina; the state board of education is designated as the state educational authority to administer these funds. These two agencies shall make all necessary audits, reports, and regulations required by the acts of congress in order for

the state of North Carolina to receive its share of funds.

In the event such federal funds are provided, the state board of education is authorized and empowered to provide aid to the county and city administrative units for maintenance of plant and for all other purposes in the public schools of the state as may meet the requirements set forth for the use of such federal funds, to the end that the state may profit maximally from the use of such funds. The state board of education is also authorized, with the approval of the director of the budget, to provide for such additional personnel in the department of public instruction and the state board of education as may be necessary for adequate and necessary supervision and administration at state level, and the cost of such personnel, including administration, supervision, clerical help, travel expense, and other necessary expense shall be provided from such federal funds in accordance with federal rules and regulations pertaining thereto. Funds provided by federal appropriations shall be distributed by the state board of education on a just and equitable basis among the separate schools operated in this state. (1949, c. 1116, s. 4.)

Art. 3. State Superintendent of Public Instruction.

§ 115-27. Salary of state superintendent of public instruction.

Editor's Note.—Session Laws 1947, s. 1041, increased the salary of the state superintendent of public instruction to $7,500.00 per year. And Session Laws 1949, c. 1278, effective April 23, 1949, provides that the salary, from and after the expiration of the present term of office of said officer, shall be $9,000.00 per year, payable in equal monthly installments.

§ 115-28. Powers and duties.

For subsequent law relating to duties of superintendent, see § 115-31.7.

Art. 3A. Fiscal Control of School Funds; Administrative Agencies; Controller.

§ 115-31.1. Purpose of article.—The purpose of this article is to provide for adequate and efficient fiscal control of all funds committed to the state board of education which might be used by the public schools; to define and clarify the duties and responsibilities of the state board of education and the state superintendent of public instruction in connection with the handling of the fiscal affairs of the board and such other duties and responsibilities as are set forth in this article. (1945, c. 530, s. 2.)

§ 115-31.2. Powers and duties of the state board of education.—The powers and duties of the state board of education are defined as follows:

1. To have the general supervision and administration of the free public school system, and of the educational funds provided for the support thereof, except those mentioned in section five of article IX of the state constitution.

2. The state board of education shall succeed to all the powers and trusts of the president and directors of the literary fund of North Carolina and the state board of education as heretofore constituted.

3. The state board of education shall have power to divide the state into a convenient number of school districts. Such a school district may be entirely in one county or may consist of contiguous parts of two or more counties. The term "school district" as used in this section includes city administrative units and all other kinds of school districts referred to in this chapter.

4. To regulate the grade, salary and qualifications of teachers.

5. To provide for the selection and adoption of the textbooks to be used in the public schools.

6. To apportion and equalize the public school funds over the state.

7. And generally to supervise and administer the free public school system of the state and make all needful rules and regulations in relation thereto.

8. The board may employ one or more attendance officers for each educational district, determine their duties, and fix their compensation, such compensation to be paid from the nine months school fund, subject to the provisions of the personnel act.

9. The state board of education is hereby directed to fully comply with each and every provision of § 115-63 relating to the instruction on alcoholism and narcoticism in the public school system of the state of North Carolina. (1945, c. 530, s. 3; 1949, c. 597, s. 1.)

Editor's Note.—The 1949 amendment added the second and third sentences of subsection 3.

Section 2 of the 1949 amendatory act provides: "In all cases where the state school commission or the state board of education has heretofore created or enlarged a school district embracing contiguous portions of two or more counties, such action is hereby ratified and confirmed, and all enlargements of such school district made pursuant to G. S. § 115-361 are likewise hereby ratified and confirmed."

§ 115-31.3. Appointment of controller. — The board shall appoint a controller, subject to the approval of the governor, who shall serve at the will of the board and who, under the direction of the board, shall have supervision and management of the fiscal affairs of the board. The salary of the controller shall be fixed by the board, subject to the approval of the director of the budget, and shall be paid from board appropriations. (1945, c. 530, s. 4.)

§ 115-31.4. Division of duties.—The board shall divide its duties into two separate functions, in so far as may be practical, as follows:

1. Those relating to the supervision and administration of the public school system, of which the superintendent shall be the administrative head, except as they relate to the supervision and management of the fiscal affairs of the board.

2. Those relating to the supervision and administration of the fiscal affairs of the public school funds committed to the administration of the state board of education, of which the controller shall have supervision and management. (1945, c. 530, s. 5.)

§ 115-31.5. General principles basic to policies and procedures.—The following general principles shall be considered as basic to the policies and procedures to be adopted:

1. The state board of education is the central educational authority. The board and its officials are charged with the responsibility of administering the public school system of North Carolina.

2. The present plan of the state supported public school system calls for a maximum of cooperative effort on the part of all school officials.

3. The state board of education is responsible for the planning and promotion of the educational system.

4. Programs of investigation and a well designed interpretation on a state-wide basis are a basic part of the duties of the state board of education. (1945, c. 530, s. 6.)

§ 115-31.6. Definition of terms.—The following words and references shall have the following meanings and interpretations:

1. "Board" means the state board of education.

2. "Superintendent" means superintendent of public instruction.

3. "Funds" means any moneys, administration of which is by law committed to the state board of education, whether derived from state or federal appropriation or allocation, private gift or donation, or acquired from any other source.

4. "Machinery Act" has reference to the school machinery act, being article 50 of this chapter.

5. "Administrative unit" shall include both county and city administrative units as defined in machinery act. (1945, c. 530, s. 7.)

§ 115-31.7. Duties of the state superintendent of public instruction as secretary of the state board of education.—It shall be the duty of the state superintendent of public instruction, under the direction of the board:

1. To organize and administer a department of public instruction for the execution of the instructional policies established by the board.

2. To keep the board informed regarding developments in the field of public education.

3. To make recommendations to the board with regard to the problems and needs of education in North Carolina.

4. To make available to the public schools a continuous program of comprehensive supervisory services.

5. To collect and organize information regarding the public schools, on the basis of which he shall furnish the board such tabulations and reports as may be required by the board.

6. To communicate to the public school administrators all information and instructions regarding instructional policies and procedures adopted by the board.

7. As secretary of the board, he shall be custodian of the corporate seal of the board and shall attest all deeds, leases, or written contracts to be executed in the name of the board.

8. The secretary, unless officially or otherwise prevented, shall attend all meetings of the board and shall keep a minute record of the proceedings of the board in a well bound and suitable book, which minutes shall be approved by the board prior to its adjournment; and as soon thereafter as possible, he shall furnish to each member of the board and the controller a copy of said minutes.

9. All deeds of conveyance, leases, and contracts affecting real estate, title to which is held by the board, and all contracts of the board required to be in writing and/or under seal, shall be executed in the corporate name of the board by the chairman and attested by the secretary; and proof of the execution, if required or desired, may be had as provided by law for the probate of corporate instruments.

10. Such other duties as the board may assign to him from time to time. (1945, c. 530, s. 8.)

§ 115-31.8. Controller to be administrator of fiscal affairs.—1. Executive Administrator.—The controller is constituted the executive administrator of the board in the supervision and management of the fiscal affairs of the board.

2. Fiscal Affairs of Board Defined.—All matters pertaining to the budgeting, allocation, accounting, auditing, certification, and disbursing of public school funds, now or hereafter committed to the administration of the state board of education, are included within the meaning of the term "fiscal affairs of the board" and, under the direction of the board, shall be supervised and managed by the controller. The fiscal affairs of the board shall also include:

a. The preparation and administration of the state school budget, including all funds appropriated for the maintenance of the nine months public school term.

b. The allotment of teachers.

c. The protection of state funds by appropriate bonds.

d. Workmen's compensation as applicable to school employees.

e. Sick leave.

f. And all matters embraced in the objects of expenditure referred to in section IX, "Public School," in the act entitled "An Act to Make Appropriations for the Maintenance of the State's Departments, Bureaus, Institutions, and Agencies, and for Other Purposes," including therein:

(1) Support of nine months term public schools.

(2) State board of education.

(3) Vocational education.

(4) Purchase of free textbooks.

(5) Vocational textile training school.

(6) Purchase of school buses.

(7) Including such federal funds as may be made available by acts of congress for the use of public schools.

(8) And including also the administration of all funds derived from the sale and rental of textbooks in the public schools.

(9) Including the operation and administration of the transportation system; the operation of plant; and the other auxiliary agencies under the administration of the board. (1945, c. 530, s. 9.)

§ 115-31.9. Duties of the controller defined.—1. The controller, under the direction of the board, shall have supervision and management of the fiscal affairs of the board.

2. The controller shall maintain a record or system of bookkeeping which shall reflect at all times the status of all educational funds committed to the administration of the board and particularly the following:

a. State appropriation for maintenance of the nine months public school term, which shall include all the objects of expenditure enumerated in § 115-356.

b. State appropriation and any other funds provided for the purchase and rental of public school textbooks.

c. State literary and building funds and such

other building funds as may be hereafter provided by the general assembly for loans to county boards of education for school building and repair purposes.

d. State and federal funds for vocational education and/or other funds as may be provided by act of congress for assistance to the general secondary educational program.

e. Vocational rehabilitation funds.

f. State appropriation for the maintenance of the board and its office personnel and including all employees serving under the board.

g. Any miscellaneous funds within the jurisdiction of the board not included in the above.

3. The controller shall prepare all forms and questionnaires necessary to furnish information and data for the consideration of the board in preparing the state budget estimates required to be determined by the board as to each administrative unit.

4. The controller shall certify to each administrative unit the teacher allotment as determined by the board under § 115-355. The superintendents of the administrative units shall then certify to the superintendent the names of the persons employed as teachers and principals, by districts and by races. The superintendent shall then determine the certificate ratings of the teachers and principals and shall certify such ratings to the controller, who shall then determine, in accordance with the state standard salary schedule for teachers and principals, the salary rating of each person so certified. The controller shall then determine, in accordance with the schedule of salaries established, the total cost of salaries in each county and city administrative unit for teachers and principals to be included in the state budget for the current fiscal year.

5. The controller, before issuing any requisition upon the state auditor for payment out of the state treasury of any funds placed to the credit of any administrative unit, under the provisions of § 115-367, shall satisfy himself:

a. That funds are lawfully available for the payment of such requisition; and

b. Where the order covers salary payment to any employee or employees, that the amount thereof is within the salary schedule or salary rating of the particular employee.

6. The controller, under the direction of the board, shall purchase, through the division of purchase and contract, all school buses to be used as replacements of old publicly owned buses, both as to chassis and bodies, under the provisions of § 115-377. He shall allocate all replacement buses so purchased to the various administrative units.

7. Under the direction of the board, the controller shall procure, through the division of purchase and contract, a contract or contracts for the purchase of the estimated needs and requirements of the several administrative units covering the items of fuel, gasoline, grease, tires, tubes, motor oil, janitor's supplies, instructional supplies including supplies used by the state board of education, textbooks, and all other supplies the payment for which is made from funds committed to the administration of the board.

8. The controller, under the direction of the board, shall have jurisdiction in all school bus transportation matters and in the establishment of all school bus routes, under the provisions of § 115-376.

9. The controller, in cooperation with the state auditor, shall have jurisdiction in the auditing of all school funds, under the provisions of § 115-369, and also in the auditing of all other funds which by law are committed to the administration of the board.

10. The controller shall attend all meetings of the board and shall furnish all such information and data concerning the fiscal affairs of the board as the board may require.

11. The controller, subject to the approval of the board, shall employ all necessary employees who work under his direction in the administration of the fiscal affairs of the board.

12. Upon all matters coming within the supervision and management of the controller, he shall report directly to the board.

13. The controller shall perform such other duties as may be assigned to him by the board from time to time.

14. The controller shall furnish to the superintendent such information relating to fiscal affairs as may be necessary in the administration of his official duties. (1945, c. 530, s. 10.)

§ 115-31.10. General regulations.—(1) Adoption of Textbooks.—A majority vote of the whole membership of the board shall be required to adopt textbooks, and a roll call vote shall be had on each motion for such adoption or adoptions. A record of all such votes shall be kept in the minute book.

(2) Regular Meetings of Board.—The regular meetings of the board shall be held each month on a day certain, as determined by the board, in the Education Building at Raleigh. The hour of meeting and the meetings may be continued from day to day, or to a day certain, until the business before the board has been disposed of.

(3) Special Meetings.—Special meetings of the board may be set at any regular meeting or may be called by the secretary upon the approval of the chairman. In case of regular meetings and special meetings, the secretary shall give notice to each member, in writing, of the time and purpose of the meeting, by letter directed to each member at his home post office address. Such notice must be deposited in the Raleigh Post Office at least five days prior to the date of meeting.

(4) Presiding Officer.—The chairman of the board shall preside at all meetings of the board. In the absence of the chairman, the vice chairman shall preside; and in the absence of both the chairman and the vice chairman, the board shall name one of its own members as chairman pro tempore.

(5) Voting.—No voting by proxy shall be permitted. Except in voting on textbook adoptions, all voting shall be viva voce unless a record vote or secret ballot is demanded by any member. The chairman shall not vote except in cases when his vote is necessary to break a tie. The secretary, as a board member, is entitled to vote on all matters before the board.

(6) Other Regulations.—The board shall make all other rules and regulations necessary to carry out the purpose and intent of this article. (1945, c. 503, s. 11.)

Art. 3B. Division of Special Education for Handicapped Persons.

§ 115-31.11. Creation and purpose. — There is created within the state department of public instruction a division of special education for the promotion, operation, and supervision of special courses of instruction for handicapped, crippled, and other classes of individuals requiring special types of instruction. (1947, c. 818, s. 1.)

§ 115-31.12. Division administered by director; appointment and qualifications.—The division of special education shall be administered by a director under the general supervision of the state department of public instruction. The director shall be appointed by the state board of education on the recommendation of the state superintendent. The director shall be qualified for his duties on the basis of education, training and experience. (1947, c. 818, s. 2.)

§ 115-31.13. Powers and duties of director.—In carrying out the functions of the division of special education the director, with the approval of the state board, shall have and perform the following powers and duties:

A. To aid school districts in the organization of special schools, classes and instructional facilities for handicapped children, and to supervise the system of special education for handicapped children in the several districts of the state.

B. To employ instructors and establish special courses of instruction for adult handicapped individuals.

C. To establish standards for teachers to be employed under the provisions of this article, to give examinations for teachers who qualify to teach handicapped individuals and to issue certificates to teachers who qualify for such teaching.

D. To adopt plans for the establishment and maintenance of day classes in schools, home instruction and other methods of special education for handicapped individuals.

E. To prescribe courses of study and curriculum for special schools, special classes and special instruction of handicapped individuals, including physical and psychological examinations and to prescribe minimum requirements for handicapped persons to be admitted to any such special schools, classes, or instruction.

F. To provide for recommendation by competent medical and psychological authorities of the eligibility of handicapped persons for admission to, or discharge from, special schools, classes, schools or instruction.

G. To cooperate with school districts in arranging for a handicapped child to attend school in a district other than the one in which he resides when there is no available special school, classes or instruction in the district in which he resides.

H. To cooperate with existing agencies such as the state department of public welfare, the state department of public health, the state schools for the blind and deaf, the state tuberculosis sanatoria, the children's hospitals, or other agencies concerned with the welfare and health of handicapped individuals, in the coordination of their educational activities.

I. To investigate and study the needs, methods, and costs of special education for handicapped persons.

J. To make rules and regulations to carry out the foregoing powers and duties. (1947, c. 818, s. 3.)

§ 115-31.14. Duties of state board of education.—The state board of education, subject to available appropriations for carrying out the purpose of this article, shall:

A. Adopt plans for equitable reimbursement of school districts for costs in carrying out programs of special education as provided for herein.

B. Provide for the purchase and otherwise acquire special equipment, appliances, and other aides for use in special education and to loan or lease same to school districts under such rules and regulations as the department may prescribe.

C. Establish and operate special courses of instruction for handicapped individuals and in proper case provide bedside training in hospitals, sanatoria, and such other places as the director finds proper. (1947, c. 818, s. 4.)

Editor's Note.—The word "aides" in line three of subsection B appears in the authenticated copy of the act. However, it seems that the word "aids" must have been intended by the general assembly.

§ 115-31.15. Eligibility for special instruction; definition of handicapped person.—Any person with a physical or mental handicap shall be eligible for appropriate special instruction provided for in accordance with this article. For the purpose of this article a handicapped individual shall be deemed to include any person with a physical or mental handicap. (1947, c. 818, s. 5.)

§ 115-31.16. Special classes or instruction for handicapped persons.—The board of education of any school district which has one or more handicapped individuals, with the approval of the superintendent of public instruction and the state board of education, may establish and organize suitable special classes or instruction in regular classes or in the homes and may provide special instruction as part of the school system for such handicapped individuals as are entitled to attend schools therein. In case of the deaf or the hard of hearing and speech defective children, if it is more economical to do so, the director of special education, under the direction of the state superintendent and with the approval of the state board of education, may set up facilities for a county-wide plan to provide itinerate lip reading or speech teachers. In the event there are not enough children of any special class, such children may be transferred to a school in a school district where such special classes have been established. Such transfers may be made by mutual agreement of the school authorities, subject to the approval of the director of special education. (1947, c. 818, s. 6.)

§ 115-31.17. Reimbursement of school districts having special education for handicapped persons.—Any school district which has maintained a previously approved program of special education for handicapped individuals during any school year shall be entitled to and receive reimbursement from the state as determined by the state board of education for the excess cost of instruction of the individuals in said program of special education above the cost of instruction of pupils in the regular curriculum of the district which shall be determined in the following manner:

Each board shall keep an accurate, detailed, and separate account of all monies paid out by it for the maintenance of each of the types of classes

and schools for the instruction and care of pupils attending them and for the cost of their transportation, and should annually report thereon, indicating the excess cost for each elementary or high school pupil for the school year ending in June, over the last ascertained average cost for the instruction of normal children in the elementary public schools or public high schools as the case might be, of the school district for a like period of time of attendance as such excess is determined and computed by the board and make claim for the excess as follows:

Applications for reimbursement for excess costs must first be submitted through the office of the director of special education to the superintendent of public instruction and the controller of the state board of education. If such applications are approved by them claims for excess cost shall be made as follows:

(a) To the county superintendent of schools, in triplicate, on or before July 15th, for approval on vouchers prescribed by the director of special education, the vouchers indicating the excess cost computed in accordance with rules prescribed by said director. The county superintendent of schools shall provide the director of special education with two copies of the vouchers on or before August 1st.

(b) The controller of the state board of education, before approving any such voucher, shall determine whether such claim is in fact eligible for the special educational service and whether the special educational services set forth in the application for state aid was in fact rendered him by the school board.

(c) Failure on the part of the school board to prepare and certify the report of claims for excess costs on or before July 15th, of any year, and if failure thereafter to prepare and certify such reports to the director of special education within ten days after receipt of notice of such delinquency sent to it by the director of special education by registered mail, shall constitute a forfeiture of the school district of its right to be reimbursed by the state for the excess cost of education of such children for such year. (1947, c. 818, s. 7.)

Editor's Note.—While the word "claim" in line three of subsection (b) appears in the authenticated copy of the act, it seems that the word "claimant" must have been intended by the general assembly.

§ 115-31.18. Contributions and donations.—The state board is hereby authorized to receive contributions and donations to be used in conjunction with any appropriations that may be made to carry out the provisions and requirements of this article. (1947, c. 818, s. 8.)

§ 115-31.19. Board authorized to use funds for program.—The state board of education is authorized to provide from funds available for public schools for a program of special education as provided for in this article in accordance with such rules and regulations as the board may prescribe. (1949, c. 1033, s. 1.)

Art. 3C. Division of Instructional Service.

§ 115-31.20. Supervisor of music education.—There is hereby established in the department of public instruction in the division of instructional service a position to be known as supervisor of music education in which shall be provided a person who shall give full time to the supervision and promotion of music education in the public schools of North Carolina and in the various communities in which said public schools are located. It shall also be the duty of said supervisor to work with the music departments of the colleges and universities of the state in which music education and other activities in music are carried on and to cooperate with the North Carolina Symphony Society, the North Carolina Recreation Commission, and other agencies, clubs, and organizations interested in the promotion of music in the state.

There is hereby appropriated of the general fund of the state the sum of seventy-five hundred dollars ($7,500) annually to provide for the salary, travel, and other expenses of the supervisor herein provided. (1949, c. 981.)

Art. 3D. Division of Insurance.

§ 115-31.21. Establishment of division of insurance; director; fire insurance safety inspectors and other employees.—The state board of education is hereby authorized, directed and empowered to establish a department to be known as "division of insurance of the state board of education" and shall appoint some person with suitable training and experience as the director thereof with such designation of his position as may be provided by the state board of education. The state board of education shall provide such fire insurance safety inspectors and engineers and other employees as shall be found necessary to carry out the provisions of this article and fix the compensation of such director and employees with the approval of the personnel department, all of said employees to serve at the will of the state board of education. (1949, c. 1182, s. 1.)

§ 115-31.22. Public school insurance fund; decrease of premiums when fund reaches 5% of total insurance in force.—There shall be set up in the books of the state treasurer a fund to be known and designated as the "public school insurance fund" which fund hereafter in this article is referred to as "the fund." In order to provide adequate reserves against losses which may be incurred on account of the risks insured against as provided in this article and to provide payment for such losses as may be incurred therein, there is hereby appropriated to "the fund" the sum of two million dollars ($2,000,000.00), which shall be paid from and charged to the state literary fund as set up and defined under subsection (a) of section 15 of article 1, chapter 115, General Statutes. When the reserves in "the fund" shall be increased by the payment of premiums by the governing boards of county and city administrative school units, or otherwise, to the extent of one million dollars ($1,000,000.00), there shall be transferred from "the fund" back to the state literary fund the sum of one million dollars ($1,000,000.00), and when "the fund" shall again be increased to the extent of another one million dollars ($1,000,000.00), there shall be transferred therefrom back to the state literary fund an additional sum of one million dollars ($1,000,000.00) in full reimbursement of the sum of two million dollars ($2,000,000.00), which is authorized to be transferred

from the state literary fund by the provisions hereof. All funds paid over to the state treasurer for premiums on insurance by the governing boards of county and city school administrative units and all money received from interest or from loans and deposits and from any other source connected with the insurance of the property hereinafter referred to shall be held by the state treasurer in "the fund" for the purpose of paying all fire, lightning, windstorm, hail and explosion losses for which the said fund shall be liable and the expenses necessary for the proper conduct of the insurance of said property as provided for in this article. Such part of the money in "the fund" as may not be needed for the payment of current demands thereon shall be invested by the state treasurer in such securities as constitute permissible investments for state sinking funds, and all of the earnings thereon shall be paid into "the fund." The state treasurer shall annually report to the state board of education and to the general assembly the status of "the fund" and a detailed statement of the investments therein and earnings therefrom.

When the fund herein provided for reaches the sum of five per cent (5%) of the total insurance in force, then annually thereafter the state board of education shall proportionately decrease the premiums on insurance to an amount which will be sufficient to maintain "the fund" at five per cent (5%) of the total insurance in force, and in the event in the judgment of the state board of education the income from the investments of "the fund" are sufficient to maintain the same at five per cent (5%) of the total insurance in force, no premiums shall be charged for the ensuing year, provided that no building or property insured shall cease to pay premiums until five annual payments of premiums have been made whether or not through such payments the fund shall be increased beyond five per cent (5%) of the total insurance in force, unless such building or property shall cease to be insurable within the meaning of this article within such five year period. (1949, c. 1182, s. 2.)

§ 115-31.23. Insurance of property by school governing boards; notice of election to insure and information to be furnished; outstanding policies. —From and after the first day of July, 1949, and before January 1, 1951, all county boards of education and all boards of trustees of city administrative units or other school governing boards may insure all school property within the unit against the direct loss or damage by fire, lightning, windstorm, hail or explosions resulting by reason of defects in equipment in public school buildings and other public school properties in "the fund" hereinbefore set up and provided for. Any property covered by an insurance policy in effect on the date when the property of a unit is insured in "the fund" shall be insured by "the fund" as of the expiration of the policy. Each school governing board shall give notice of its election to insure in "the fund" at least thirty days prior to such insurance becoming effective and shall furnish to the state board of education a full and complete list of all outstanding fire insurance policies, giving in complete detail the name of the insurers, the amount of the insurance and expirations thereof. While the said insurance policies remain in effect "the fund" shall act as coinsurer of the properties covered by such insurance to the same extent and in the same manner as is provided for coinsurance under the provisions of the standard form of fire insurance as provided by law, and in the event of loss shall have the same rights and duties as required by participating insurance companies. (1949, c. 1182, s. 3.)

§ 115-31.24. Inspections of insured public school properties.—The state board of education shall provide for periodic inspections of all public school properties in the state of North Carolina insured under the provisions hereof, the said inspections to be made by persons trained in making inspections for safety of buildings and particularly school buildings, against the loss or damage from fire and explosions. The inspections shall be the basis for offering such engineering advice as may be thought necessary to safeguard the children in the public schools from death and injury from school fires or explosions and to protect said school properties from loss, and the local school authorities shall be required, so far as possible, and reasonable, to carry out and put into effect such recommendations in respect thereto as may be made by the state board of education. (1949, c. 1182, s. 4.)

§ 115-31.25. Information to be furnished prior to insuring in the fund; providing for payment of premiums.—Governing boards of city and county administrative units shall at least thirty days before insuring in "the fund", furnish to the state board of education a complete and detailed list of all school buildings and contents thereof and other insurable school property, together with an estimate of the present value of the said property. Valuation for purposes of insuring in "the fund" shall be reached by agreement in accordance with the procedure hereinafter set up in § 115-31.27 for adjustment of losses. Each governing board of city and county administrative units and the tax levying authorities shall be required to provide for the payment of premiums for insurance on the school properties of each unit, respectively, to the extent of not less than seventy-five per cent (75%) of the present value of the said properties, including the insurance in fire insurance companies and the insurance provided by "the fund" as set out herein. (1949, c. 1182, s. 5.)

§ 115-31.26. Determination and adjustment of premium rates; certificate as to insurance carried; no lapsation; notice as to premiums required, and payment thereof. — The state board of education shall as soon as practical determine the annual premium rate to be charged for insurance of school properties as herein provided, which said rate shall not, however, be in excess of the rates fixed by law for insurance of such properties in effect on May 31st, 1948, and such rates shall be adjusted from time to time so as to provide insurance against damage or loss resulting from fires, lightning, windstorm, hail or explosions resulting from defects in equipment in public school buildings and properties for the local school units at the lowest cost possible in keeping with the payment of cost of administration of this article and the creation of adequate reserves to pay losses which may be incurred. The state board of edu-

cation shall furnish to each county and city administrative unit annually and, at such times as changes may require, a certificate showing the amount of insurance carried on each item of insurable property. The said insurance shall not lapse but shall remain in force until such property shall be abandoned for use as school property. From time to time the local school authorities shall be notified as to the amount of the premiums required to be paid for said insurance and the amounts thereof shall be provided for in the annual budget of such schools. The tax levying authorities shall provide by taxation or otherwise a sum sufficient to pay the required premiums thereon.

The local school authorities shall within thirty (30) days from notice thereof, pay to the state board of education the premiums on such insurance, and in the event that there are no funds on hand at such time with which to make said payment, the same shall be paid out of the first funds available to such school board. Delayed payments shall bear interest at the rate of six per cent (6%) per annum. (1949, c. 1182, s. 6.)

§ 115-31.27. Adjustment of losses; determination and report of appraisers; payment of amounts to treasurers of local units; disbursement of funds.—In the event of loss or damage by fire, lightning, windstorm, hail, or explosions resulting from defects in equipment in public school buildings and properties for the local school units, "the fund" shall pay the loss in the same proportion as the amount of insurance carried bore to the valuation of the property at the time it was insured, but not exceeding the amount which it would cost to repair or replace the property with material of like quality within a reasonable time after such loss, not in excess of the amount of insurance provided for said property, and not in excess of the amount of such loss which "the fund" is required to pay in participation with fire insurance companies having policies of insurance in force on said properties at the time of the loss or damage, and "the fund" shall not be liable for a greater proportion of any loss than the amount of insurance thereon shall bear to the whole insurance covering the property against the peril involved.

In the event of loss or damage by fire, lightning, windstorm, hail, or explosions resulting from defects in equipment in public school buildings and properties for the local school units, to the property insured, when an agreement as to the extent of such loss or damage cannot be arrived at between the state board of education and the local officials having charge of the said property, the amount of such loss or damage shall be determined by three appraisers; one to be named by the state board of education; one by the local governing board having charge of the property, and the two so appointed shall select a third—all of whom shall be disinterested persons, and qualified from experience to appraise and value such property. The appraisers so named shall file their written report with the state board of education, and with the local governing board having such property in charge. The costs of the appraisal shall be paid by "the fund". When approved by the state board of education, the amount of such loss or damage to school property in the control of the county administrative unit shall be paid to the county treasurer, and the amount of loss or damage to property of a city administrative unit shall be paid to the treasurer of said unit upon proper warrant of the state board of education. Said funds shall be paid out by the treasury of said units, as provided by this chapter for the disbursement of the funds of such unit. (1949, c. 1182, s. 7.)

§ 115-31.28. Operating expenses.—There is hereby appropriated to "the fund", to be expended by the state board of education for costs of operation under this article for the period of the next biennium, the sum of fifty thousand dollars ($50,000.00), but such additional necessary cost of operation shall be paid from "the fund" and thereafter all the costs of the operation of the said fund shall be provided from the premiums charged to the local school boards for insurance carried by "the fund" and earnings of "the fund" from investments thereof. (1949, c. 1182, s. 8.)

§ 115-31.29. Maintenance of inspection and engineering service; cancellation of insurance.—The state board of education is authorized and empowered to maintain an inspection and engineering service deemed by it appropriate and necessary to reduce the hazards of fire in public school buildings insured in "the fund", as hereinbefore provided, and to expend for such purpose not in excess of ten per cent (10%) of the annual premiums collected from the local school authorities. The state board of education is hereby authorized and empowered to cancel any insurance on any school property when, in its opinion, because of dilapidation and depreciation such property is no longer insurable. Before cancellation, the local school board shall be given at least thirty (30) days' notice, and in the event said property can be restored to insurable condition, the state board of education may make such orders with respect to the continuance of such coverage as may be deemed proper. (1949, c. 1182, s. 9.)

§ 115-31.30. Rules and regulations.—The state board of education is hereby authorized and empowered to adopt all such rules and regulations providing for the details for insurance of public school properties in "the fund" as in their opinion are necessary for effectuating the purposes of this article. (1949, c. 1182, s. 10.)

SUBCHAPTER III. DUTIES, POWERS AND RESPONSIBILITIES OF COUNTY BOARDS OF EDUCATION.

Art. 5. The Board: Its Corporate Powers.

§ 115-38. How nominated and elected.

Local Modification.—Brunswick: 1949, c. 895.

§ 115-46. Compensation of members.

Local Modification.—Lenoir: 1949, c. 749; Mecklenburg 1949, c. 383.

Art. 6. The Direction and Supervision of the School System.

§ 115-55. General powers.

Cited in Coggins v. Board of Education, 223 N. C. 763 28 S. E. (2d) 527.

§ 115-56. General control.

Cited in Coggins v. Board of Education, 223 N. C. 76 28 S. E. (2d) 527.

§ 115-57. Fixing time of opening and closing schools.

Cited in Coggins v. Board of Education, 223 N. C. 763, 28 S. E. (2d) 527.

§ 115-58. Determination of length of school day.

Cited in Coggins v. Board of Education, 223 N. C. 763, 28 S. E. (2d) 527.

§ 115-59. Duty to enforce the compulsory school law.

Cited in Coggins v. Board of Education, 223 N. C. 763, 28 S. E. (2d) 527.

§ 115-62. Subjects taught in the elementary schools.

Cited in Coggins v. Board of Education, 223 N. C. 763, 28 S. E. (2d) 527.

§ 115-65. Kindergartens may be established.—If a majority of the qualified voters voting on such proposition shall vote in favor of the tax, then it shall be the duty of the board of trustees or directors or school committee of said district to establish and provide for kindergartens for the education of the children in said district of not more than six years of age, and the county commissioners shall annually levy a tax for the support of said kindergarten departments not exceeding the amount specified in the order of election. Said tax shall be collected as all other taxes in the county are collected and shall be paid by the sheriff or tax collector to the treasurer of the said school district to be used exclusively for providing adequate quarters and for equipment and for the maintenance of said kindergarten department.

Such kindergarten schools as may be established under the provisions of this section, or established in any other manner, shall be subject to the supervision of the state department of public instruction and shall be operated in accordance with standards to be provided by the state board of education. (1923, c. 136, s. 40; 1945, c. 970, s. 1; 1949, c. 1033, s. 1; C. S. 5443.)

Editor's Note.—The 1945 amendment added the last or fourth paragraph of the section. And the 1949 amendment inserted in lines one and two of the third paragraph the words "voting on such proposition." As the first and second paragraphs were not affected by the amendments they are not set out.

For brief comment on the 1949 amendment, see 27 N. C. Law Rev. 454.

Cited in Coggins v. Board of Education, 223 N. C. 763, 28 S. E. (2d) 527.

Art. 9. Miscellaneous Provisions Regarding School Officials.

§ 115-73. Prescribing duties of superintendent not in conflict with law and constitution.

Cited in Coggins v. Board of Education, 223 N. C. 763, 28 S. E. (2d) 527.

§ 115-77. Authority of board over teachers, supervisors and principals.

Cited in Coggins v. Board of Education, 223 N. C. 763, 28 S. E. (2d) 527.

§ 115-78. Providing for training of teachers.

Cited in Coggins v. Board of Education, 223 N. C. 763, 28 S. E. (2d) 527.

Art. 10. Erection, Repair and Equipment of School Buildings.

§ 115-83. Provisions for school buildings and equipment.

County Commissioners to Determine What Expenditures Shall Be Made.—The board of commissioners of the county, and not the board of education is charged with the duty to determine what expenditures shall be made for the erection, repair and equipment of school buildings in the county. Johnson v. Marrow, 228 N. C. 58, 61, 44 S. E. (2d) 468.

The control of the board of county commissioners over the expenditure of funds for the erection, repair and equipment of school buildings by the board of county commissioners, will not be construed so as to interfere with the exclusive control of the schools vested in the county board of education or the trustees of an administrative unit. Atkins v. McAden, 229 N. C. 752, 51 S. E. (2d) 484.

All Expenditures Must Be Authorized.—All expenditures for the construction, repair and equipment of school buildings in a county must be authorized by the board of county commissioners, acting in good faith, pursuant to statutory and constitutional authority. Atkins v. McAden, 229 N. C. 752, 51 S. E. (2d) 484.

Commissioners May Reallocate Proceeds of Bond Issue.—A bond order issued under § 153-78 set out in detail the estimates and projects for which the funds were proposed to be used in discharge of the constitutional requirement of a six months' school term within the municipal administrative unit. It was held that § 153-107 did not preclude the board of county commissioners, upon its finding, after investigation, of changed conditions, from reallocating the proceeds of bonds to different projects upon further finding, after investigation provided for in § 115-83, that such reallocation of the funds was necessary to effectuate the purpose of the bond issue. Atkins v. McAden, 229 N. C. 752, 51 S. E. (2d) 484.

§ 115-85. Acquisition of sites.

The question of changing the location of a schoolhouse, as well as the selection of a site for a new one, is vested in the sound discretion of the school authorities, and their action cannot be restrained by the courts, unless it is in violation of some provision of the law, or the authorities have been influenced by improper motives, or there has been a manifest abuse of discretion on their part. Atkins v. McAden, 229 N. C. 752, 51 S. E. (2d) 484.

§ 115-91. Duty of board to provide equipment for school buildings.—It is the duty of the county board of education or the board of trustees of a city administrative unit to provide suitable supplies for school buildings under its jurisdiction, such as window shades, fuel, chalk, erasers, blackboards, and other necessary supplies, and to provide public schools with reference books, library, maps and equipment for teaching science, and the teachers and principal shall be held responsible for the proper care of the same during the school term. (1923, c. 136, s. 66; 1945, c. 970, s. 2; C. S. 5474.)

Editor's Note.—The 1945 amendment substituted "public schools" for "standard high schools" in line seven.

SUBCHAPTER IV. COUNTY SUPERINTENDENTS' POWERS, DUTIES AND RESPONSIBILITIES.

Art. 13. Duty of County Superintendent Toward Committeemen, Teachers and Principals.

§ 115-116. Holding teachers' meetings. — The county superintendent shall hold each year such teachers' meetings as in his judgment will improve the efficiency of the instruction in school. He may, with the cooperation of the supervisors or principals, outline reading courses for teachers and organize the teachers into special study groups.

If a superintendent shall fail to advise with his teachers and to provide for the professional growth of his teachers while in service, the state superintendent shall notify the county board of education, and, after due notice, if he shall fail to perform his duties in this respect, either the county board of education may remove him from

office or the state board of education may revoke his certificate. (1923, c. 136, s. 106; 1947, c. 1077, s. 5; C. S. 5512.)

Editor's Note.—The 1947 amendment struck out the words "and, if necessary, not exceeding three school days may be set apart for this purpose" formerly appearing at the end of the first paragraph.

SUBCHAPTER VI. TEACHERS AND PRINCIPALS.

Art. 16. Their Powers, Duties and Responsibilities.

§ 115-140. Health certificate required for teachers and other school personnel.—Any person serving as county superintendent, city superintendent, principal, teacher, or any other employee in the public schools of the state, shall file in the office of the county or city superintendent each year, before assuming his or her duties, a certificate from the county physician, health officer, or other reputable physician, certifying that the said person does not have tuberculosis in the communicable form, or other communicable disease, or any disease, physical or mental, which would impair the ability of the said person to perform effectively his or her duties.

The examining physician shall make the aforesaid certificate on an examination form supplied by the state superintendent of public instruction. The certificate shall be issued only after a physical examination has been made at the time of the certification, and such examination shall be in accordance with rules and regulations adopted by the state superintendent of public instruction, with the approval of the state health officer, and such rules and regulations may include the requirement of an X-ray chest examination.

Any person violating any of the provisions of this section shall be guilty of a misdemeanor and subject to a fine or imprisonment in the discretion of the court.

It shall be the duty of the county or city superintendent of the school in which the person is employed to enforce the provisions of this section. (1923, c. 136, s. 159; 1947, c. 387; C. S. 5556.)

Editor's Note.—The 1947 amendment rewrote this section.

SUBCHAPTER VII. REVENUE FOR THE PUBLIC SCHOOLS.

Art. 20. The Treasurer: His Powers, Duties and Responsibilities in Disbursing School Funds.

§ 115-165. Treasurer of school funds. — (1) County School Administrative Unit.—The county treasurer of each county shall be the treasurer of all county school funds and school district funds of county school administrative units. He shall receive and disburse all such school funds and shall keep the same separate and distinct from all other funds.

Before entering upon the duties of his office, the county treasurer shall furnish bond in some surety company authorized to do business in North Carolina in an amount to be fixed by the board of county commissioners, which bond shall be a separate bond, not including liability for other funds, and shall be conditioned for the faithful performance of his duties as treasurer of the county school funds and school district funds of the county administrative unit and for the payment to his successor in office of any unexpended balance of school moneys which may be in his hands. The board of county commissioners may from time to time, if necessary, require him to strengthen his bond.

In all counties in which the office of county treasurer has been abolished as authorized by General Statutes, § 155-3, or when by any other law a bank or trust company has been substituted therefor, such bank or trust company shall act as treasurer and depository of all county school funds and school district funds; provided, however, that such bank or trust company acting as treasurer of county school funds and district school funds shall not be required to maintain the system of bookkeeping and accounting imposed upon the county treasurer by General Statutes, § 155-7, but the duty and responsibility of keeping and maintaining the accounting system as to county and district school funds shall be the duty and responsibility of the county accountant or county auditor serving as such under the provisions of General Statutes, § 153-15; and, provided further, that nothing contained in this section shall relieve the superintendent of any county administrative unit from maintaining such accounting system and furnishing such reports as are now or may hereinafter be imposed upon him by law.

(2) City School Administrative Unit. — Unless otherwise provided by law, the board of trustees of a city administrative unit shall appoint a treasurer of all the school funds of such city administrative unit. The treasurer so appointed shall continue to fill such position at the will of the board of trustees of such city administrative unit. No person authorized to make the expenditures or draw vouchers therefor, or to approve the same, shall act as treasurer of such funds.

Before entering upon the duties of his office, the treasurer of such city administrative unit shall file with the trustees of such administrative unit a good and sufficient bond with surety by some surety company authorized to do business in North Carolina in an amount to be fixed by the board of trustees of such administrative unit, which shall be a separate bond, not including liability for any other funds, and shall be conditioned for the faithful performance of the duties of treasurer of the city administrative unit school funds and for the proper accounting for all such funds as may come into his possession by virtue of his office as treasurer and for payment to his successor in office of any unexpended balance of school moneys which may be in his hands.

The treasurer of city administrative unit school funds is hereby required to maintain and keep, with respect to said funds, like records and accounts and make such reports with respect to said funds as herein provided to be made, kept, and maintained by the treasurer of county and district school funds of county administrative units.

(3) Special Funds of Individual Schools.—The county board of education of all county administrative units and the board of trustees of all city administrative units shall, by proper resolution duly recorded, appoint a treasurer of all special school funds for each school in the respective administrative unit. In all individual schools a complete record shall be kept by the treasurer so

appointed and reports made of all money received and from what source and of all money disbursed and for what purpose; provided, however, that nothing in this subsection (3) shall prevent the handling of these special school funds under subsection (1) and subsection (2) of this section. The treasurer of all special funds so appointed and the principal of each school shall make a monthly report, and such other reports as may be required, to the superintendent of the administrative unit wherein such individual school is located, showing the status of each special school fund, upon forms to be supplied for that purpose. (1923, c. 136, s. 193; 1949, c. 1082, s. 1; C. S. 5614.)

Editor's Note.—The 1949 amendment rewrote this section.

§ 115-168. County board of education to have accounts of the board of education and the county treasurer of the public school fund audited.

Local Modification.—Currituck: 1945, c. 898.

SUBCHAPTER VIII. LOCAL TAX ELECTIONS FOR SCHOOLS.

Art. 22. School Districts Authorized to Vote Local Taxes.

§ 115-189. Levy and collection of taxes. — In case a majority of those who shall vote thereon shall vote at the election in favor of the tax, it shall be annually levied and collected in the manner prescribed for the levy and collection of other taxes, and the maximum rate so voted shall be levied, unless the county board of education or board of trustees shall request a levy at a lower rate, in which event the rate requested shall be levied and collected; and the superintendent of schools and the officer in charge of tax records shall keep records in their respective offices showing the valuation of the property, real and personal, in the district or unit, the rate of tax authorized annually to be levied, and the amount annually derived from the local tax, and it shall be illegal for any part of the local tax fund to be used for any purpose other than to supplement the funds for a nine months school term in the district or unit. (1923, c. 136, s. 222; 1943, c. 255, s. 2; 1949, c. 918, s. 1; C. S. 5642.)

Editor's Note.—Prior to the 1949 amendment this section referred to "a majority of the qualified voters" instead of to "a majority of those who shall vote." For brief comment on the amendment, see 27 N. C. Law Rev. 454.

As to subsequent statute affecting the majority of voters required, see § 153-92.1.

§ 115-191. Frequency of election.—In the event that a majority of those who shall vote thereon in a district or unit do not at the election cast their votes for the local tax, another election or elections under the provisions of this article may be held after the lapse of six months in the same district or unit. (1923, c. 136, s. 225; 1949, c. 918, s. 2; C. S. 5645.)

Editor's Note.—Prior to the 1949 amendment this section referred to "a majority of the qualified voters" instead of to "a majority of those who shall vote." For brief comment on the amendment, see 27 N. C. Law Rev. 454.

§ 115-192. Enlargement of local tax districts. —Upon a written petition of a majority of the governing board of any district, the county board of education, after approving the petition, shall present the same to the board of county commissioners and ask for an election on the question of the enlargement of the boundary lines of any such district so as to include any contiguous territory, and an election in such new territory may be ordered and held under rules governing elections for local taxes as provided in this article: Provided, the local tax rate specified in the petition and submitted to the qualified voters shall be a local tax of the same rate as that voted in the said district to which the territory is to be added. If a majority of those who shall vote thereon in such new territory shall vote in favor of such tax, the new territory shall become a part of said district, and the term "local tax of the same rate" herein used shall include, in addition to the usual local tax, any tax levied to meet the interest and sinking fund of any bonds heretofore issued by the district proposed to be enlarged. In case a majority of those who shall vote thereon at the election shall vote in favor of the tax, the district shall be deemed enlarged as so proposed. (1923, c. 136, s. 226; 1925, c. 151; 1927, c. 88; 1949, c. 918, s. 3; C. S. 5646.)

Editor's Note.—Prior to the 1949 amendment this section referred to "a majority of the qualified voters" instead of to "a majority of those who shall vote." For brief comment on the amendment, see 27 N. C. Law Rev. 454.

§ 115-193. Abolition of district upon election.— Upon petition of one-half of the qualified voters residing in any local tax district established under this article, the same shall be indorsed and approved by the county board of education, and the board of county commissioners shall order another election in the district for submitting the question of revoking the tax and abolishing the district, to be held under the provisions prescribed in this act for holding other elections. It shall be the duty of the board of education to indorse the petition when presented, containing the proper number of names of qualified voters, and this provision is made mandatory, and the board is allowed no discretion to refuse to indorse the same when so presented. If at the election a majority of those who shall vote thereon in the district shall vote "Against Local Tax," the tax shall be deemed revoked and shall not be levied, and the district shall be discontinued: Provided, that in Alexander, Anson, Beaufort, Buncombe, Carteret, Catawba, Chatham, Chowan, Cleveland, Craven, Currituck, Davidson, Duplin, Franklin, Gates, Greene, Henderson, Hoke, Hyde, Iredell, Jackson, Johnson, Lenoir, Martin, Mecklenburg, Moore, Nash, Onslow, Pamlico, Pitt, Randolph, Richmond, Robeson, Rockingham, Transylvania, Vance, Wake, Warren and Wilkes counties, petition of twenty-five per cent (25%) of the number of registered voters in the election creating said special tax district, said petition to be signed by qualified voters residing in such special tax district, shall be sufficient: Provided, further, that in said counties, this section shall not apply to that part of such tax, if any, in said district as may be necessary to pay the interest on or amortization of any bonded or other indebtedness incurred in consequence of the voting of said special tax district but to that extent, and to that extent only, shall said special tax district be maintained. (1923, c. 136, s. 227; 1931, c. 372; 1949, c. 918, s. 4; C. S. 5647.)

Editor's Note.—Prior to the 1949 amendment this section referred to "a majority of the qualified voters" instead of

to "a majority of those who shall vote." For brief comment on the amendment, see 27 N. C. Law Rev. 454.

§ 115-196. Enlarging boundaries of district within incorporated city or town.—The boundaries of a district situated entirely within the corporate limits of a city or town, but not coterminous with such city or town, may be enlarged so as to make the district coterminous with such city or town either in the manner prescribed by this section or in the manner prescribed by § 115-192. Provided, however, that no district shall be enlarged under this section if the new territory necessary to be added to such district, in order to make it coterminous with such city or town, has any bonded debt incurred for school purposes, other than debt payable by taxation of all taxable property in such district and such new territory. In cases where the local annual tax voted to supplement the funds of the nine months public school term is of the same rate in such district and in the new territory necessary to be added to such district in order to make the district coterminous with such city or town, the county board of education shall have power to enlarge the boundaries of the district as aforesaid. In cases where such tax rates are not the same, the boundaries of the district shall become so enlarged upon the adoption of a proposition for such enlargement by a majority of those who shall vote thereon in such new territory. The governing body of such city or town may at any time, upon petition of the board of education or other governing body of such district, or upon its own initiative if the governing body of the city or town is also the governing body of the district, submit the question of enlarging the district as aforesaid to the qualified voters of such new territory proposed to be added to such district at any general or municipal election or at a special election called for said purpose. Such an election may be ordered and held and a new registration for said election provided under the rules governing elections for local taxes as provided under the article, except that the election and registration shall be ordered by and held under the supervision of and the result of the election determined by the governing body of such city or town. The ballots to be used in said election shall have printed or written thereon the words: "For the enlargement of ..... school district, pursuant to section two hundred and thirty of chapter one hundred and thirty-six of the Public Laws of one thousand nine hundred and twenty-three, as amended," and "Against the enlargement of ..... school district, pursuant to section two hundred and thirty of chapter one hundred and thirty-six of the Public Laws of one thousand nine hundred and twenty-three, as amended." If a majority of those who shall vote thereon in such new territory proposed to be added to such district shall vote in favor of such enlargement, said district shall thereupon become coterminous with said city or town, and there shall be levied annually in such new territory all taxes previously voted in said district for the purpose of supplementing the funds for the nine months public school term for said district and for the purpose of paying the principal or interest of any bonds or other indebtedness previously issued or incurred by said district; and a vote in favor of such enlargement shall be deemed and held to be a vote in favor of the levying of such taxes. The validity of the said election and of the registration for said election and of the correctness of the determination of the result of said election shall not be open to question except in an action or proceeding commenced within thirty days after the determination of the result of said election. At the same time that said election is held, it shall be lawful to hold an election in the entire territory of said city or town on the question of issuing bonds of said city or town or of said school district as so enlarged, for school purposes, and levying sufficient tax for the payment of said bonds, or on the question of levying a local annual tax on all taxable property in said city or town or in said school district as so enlarged, to supplement the funds for the nine months public school term for said district, in addition to taxes for the payment of bonds, in the same manner that would be lawful if said district had been so enlarged prior to the submission of said questions. One registration may be provided for all of said simultaneous elections. (1923, c. 136, s. 230; 1925, c. 143, s. 3; 1943, c. 255, s. 2; 1949, c. 918, s. 5; C. S. 5650.)

Editor's Note.—Prior to the 1949 amendment this section referred to "a majority of the qualified voters" instead of to "a majority of those who shall vote." For brief comment on the amendment, see 27 N. C. Law Rev. 454.

§ 115-198. District already created out of portion of two or more counties.—Districts that have already been created out of portions of two or more counties may be incorporated in the following manner: Upon petition of the county board of education of each county, calling for an election, the commissioners of each county shall call an election which shall be conducted in all respects as an election for voting local taxes. The ballots to be used in said election shall have written or printed thereon the words, "For Incorporation," and, "Against Incorporation." If a majority of those who shall vote thereon in the portion in each county shall cast their ballots for incorporation, the district is thereby incorporated and shall possess all the authority of incorporated districts as provided in this article. (1923, c. 136, s. 233; 1949, c. 918, s. 6; C. S. 5652.)

Editor's Note.—Prior to the 1949 amendment this section referred to "a majority of the qualified voters" instead of to "a majority of those who shall vote." See 27 N. C. Law Rev. 454.

Art. 23. Special School Taxing Districts.

§ 115-204. Special school taxing districts.—If a majority of the qualified electors voting in the special school taxing district shall vote in favor of the special school tax, then it shall operate to repeal all school taxes theretofore voted in any local tax district located within said special school taxing district, except such taxes as may have been voted in said local tax district to pay the interest on bonds and to retire bonds outstanding. But the county board of education shall have the authority to assume all indebtedness, bonded and otherwise, of said local tax district and pay all or a part of the interest and installments out of the revenue derived from the rate voted in the special school taxing district: Provided, the revenue is sufficient to equalize educational advantages and pay all or a part of the interest and installments on said bonds. (1923, c. 136, s. 238; 1949, c. 1033, s. 1; C. S. 5659.)

Editor's Note.—The 1949 amendment inserted the wo

"voting" in line two. For brief comment on the amendment, see 27 N. C. Law Rev. 454.

Art. 24. County Tax for Supplement in Which Part of Local Taxes May Be Retained.

§ 115-209. Maximum tax levy. — In the event that a majority of the qualified voters voting at said election shall vote in favor of a special county tax, said tax shall be in addition to all taxes theretofore voted in any local tax district except as provided in § 115-210. The maximum rate voted shall be annually levied and collected each year in the same manner and at the same time as other taxes of the county are levied and collected, unless the county board of education shall petition for a lower rate. In that event the county commissioners shall levy the rate requested. (1923, c. 136, s. 244; 1949, c. 1033, s. 1; C. S. 5665.)

Editor's Note.—The 1949 amendment inserted the word "voting" in line two. For brief comment on the amendment, see 27 N. C. Law Rev. 454.

SUBCHAPTER IX. BONDS AND LOANS FOR BUILDING SCHOOLHOUSES.

Art. 26. Funding or Refunding Loans from State Literary and Special Building Funds.

§ 115-215. State board of education authorized to accept funding or refunding bonds of counties for loans; approval by local government commission.

Editor's Note.—For act validating notes evidencing loans from special building funds, see Session Laws 1945, c. 404.

Art. 28. Loans from State Literary Fund.

§ 115-220. Loans by state board from state literary fund.

Editor's Note.—For act validating notes evidencing loans from literary fund, see Session Laws 1945, c. 404.

§ 115-224. Appropriation from loan fund for free plans and inspection of school buildings.—The state board of education may annually set aside and use out of the funds accruing to the interest of said state loan fund a sum not exceeding seventeen thousand five hundred dollars ($17,500.00), to be used for providing plans for modern school buildings to be furnished free of charge to districts, for providing proper inspection of school buildings and the use of state funds, and for such other purposes as said board may determine, to secure the erection of a better type of school building and better administration of said state loan fund. (1923, c. 136, s. 277; 1947, c. 636; C. S. 5687.)

Editor's Note.—The 1947 amendment increased the amount in line five from $12,000 to $17,500.

SUBCHAPTER XII. SCHOOL DISTRICT TAXES AND SINKING FUNDS.

Art. 33. Transfer to County Treasurer.

§ 115-240. All sinking fund monies and securities likewise directed to county treasurers.

Legislature May Change Custodian of Fund.—Ordinarily the county treasurer is the proper custodian of all sinking fund securities, including school sinking funds and securities held for the retirement of term bonds where the county has assumed the payment of such bonds, but the general assembly may designate or change the custodian of sinking fund securities. Johnson v. Marrow, 228 N. C. 58, 44 S. E. (2d) 468.

SUBCHAPTER XIII. VOCATIONAL EDUCATION.

Art. 34. Duties, Powers and Responsibilities of State Board of Education.

§ 115-241. Acceptance of benefits of federal vocational education act.

As to trade school for veterans, see Session Laws 1947, c. 839.

§ 115-247.1. Vocational agricultural high schools authorized to acquire lands for forest study.— With the approval of the state board for vocational education and the county superintendent of public instruction, the principal of any vocational agricultural high school is hereby authorized and empowered to acquire by gift, purchase or lease for not less than twenty years, a parcel of woodland or open land suitable for forest planting, or comprising both types of land; such parcel of land to contain not more than twenty acres.

2. Each deed to such land shall be made to "The ..... County Board of Education" of the county in which the school concerned is located and the title shall be examined and approved by the county attorney.

3. Any school forest thus acquired shall be placed under the management of the department of vocational agriculture of the school, to be handled in accordance with plans approved by some available publicly employed forester. (1945, c. 1035.)

§ 115-247.2. Use of unexpended funds from sale of certain school bonds, by county authorities, for vocational education.—The boards of county commissioners and the county boards of education of the state now having on hand unexpended funds derived from the sale of school bonds issued without a vote of the people subsequent to August 1st, 1946, and prior to December 1st, 1946, are authorized in their discretion to expend such funds for the erection, construction, and equipping of vocational educational buildings for the teaching of vocational agriculture and allied subjects. Such buildings may be erected and constructed at such place or places in the county as the county board of education of such county may designate, notwithstanding that the bond ordinance adopted, authorizing the issuance of such bonds, may have designated the place or places for such new additional school buildings to be erected and equipped. (1947, c. 791.)

Art. 34A. Area Vocational Schools.

§ 115-248.1. Commission to study needs for area vocational schools.—The governor of North Carolina is hereby authorized to appoint a commission of eight persons, one of whom shall be designated as chairman. The state director of vocational education shall serve as ex officio member of said commission. The said commission shall investigate the feasibility of establishing one or more area vocational schools in North Carolina. (1945, c. 1011, s. 1.)

§ 115-248.2. Commission to report its findings and recommendations to governor.—The report of the commission shall include findings of fact as to the necessity of such school or schools, the probable cost of the establishment and maintenance; the availability of funds from all sources; the

types of courses of study needed and recommended; and all other information which will be helpful to the governor in determining whether or not such school or schools shall be established. The commission shall from time to time as it makes progress file its report with the governor of North Carolina, setting forth its findings, conclusions, and recommendations. (1945, c. 1011, s. 2.)

§ 115-248.3. Establishment of needed schools authorized; authority of state board of education.—If, from the reports filed by the commission, the governor finds that the need for such school or schools exists, he, in his discretion, may then authorize the state board of education acting as a state board for vocational education, to establish one or more such schools in accordance with the recommendations and conclusions of the commission. For this purpose, the state board of education acting as a state board for vocational education shall use such funds as the governor and council may make available from the vocational education funds, federal grants, private donations, or gifts of land, buildings and equipment which may be available for the establishment, operation and maintenance of said school or schools. The state board of education acting as a state board for vocational education, shall promulgate needful rules and regulations to establish and operate such school or schools in accordance with the state plans for vocational education, and may utilize the already established administrative units or may establish other administrative units as in its judgment seem necessary for meeting the needs of the situation. When such school or schools may be established, the state board of education acting as a state board for vocational education shall operate and manage the said school or schools, employ necessary personnel, fix salaries, and do all things necessary and needful to operate the said school or schools. (1945, c. 1011, s. 3.)

Art. 36. Textile Training School.

§ 115-255.1. Creation of board of trustees; members and terms of office; no compensation.—The affairs of the North Carolina vocational textile school, created under authority of this article, shall be managed by a board of trustees composed of six members, who shall be appointed by the governor, and the state director of vocational education as ex officio member thereof. The terms of office of the trustees appointed by the governor shall be as follows: two of said trustees shall be appointed for a term of two years; two for three years; and two for four years. At the expiration of such terms, the appointments shall be made for periods of four years. In the event of any vacancy on said board, the vacancy shall be filled by appointment by the governor for the unexpired term of the member causing such vacancy. The members of the said board of trustees appointed by the governor shall serve without compensation. (1945, c. 806, s. 1.)

§ 115-255.2. Powers of board.—The said board of trustees shall have the power to take over and receive all of the property of the North Carolina vocational textile school and shall have the authority to direct and manage the affairs of said school, and, within available appropriations therefor, appoint a managing head and such other officers, teachers and employees as shall be necessary for the proper conduct thereof. The board of trustees, on behalf of said school, shall have the right to accept and administer any and all gifts and donations from the United States government or from any other source which may be useful in carrying on the affairs of said school. (1945, c. 806, s. 2.)

§ 115-255.3. When board to begin functioning; succeeds to powers and authority of former board.—The board of trustees appointed under the authority of § 115-255.1 shall begin their term of office on the first day of July, one thousand nine hundred and forty-five, and shall succeed to all the powers and authority of the board created under authority of chapter 360 of the Public Laws of 1941. (1945, c. 806, s. 3.)

§ 115-256. Persons eligible to attend institute; subject taught.—Persons eligible for attendance upon this institution shall be at least sixteen years of age and legal residents of the state of North Carolina: Provided, that out of state students not to exceed ten per cent (10%) of total enrollment may be enrolled when vacancies exist, upon payment of tuition, the amount of the tuition to be determined by the board of trustees. The money thus collected is to be deposited in the treasury of the North Carolina vocational textile school, to be used as needed in the operation of the school. The institution shall teach the general principles and practices of the textile manufacturing and related subjects. (1941, c. 360, s. 3; 1947, c. 843.)

Editor's Note.—The 1947 amendment added the proviso at the end of the first sentence and inserted the second sentence.

SUBCHAPTER XIV. TEXTBOOKS AND PUBLIC LIBRARIES.

Art. 37. Textbooks for Elementary Grades.

§ 115-258. State board of education adopts textbooks.

For subsequent statute affecting this article, see §§ 115-278.1 et seq.

§ 115-263: Repealed by Session Laws 1945, c. 707, § 12.

§ 115-265: Repealed by Session Laws 1945, c. 707, § 12.

Art. 38. Textbooks for High Schools.

§ 115-272. State board of education may adopt textbooks.

For subsequent statute affecting this article, see §§ 115-278.1 et seq.

§ 115-273: Repealed by Session Laws 1945, c. 707, § 12.

Art. 38A. Selection and Adoption of Textbooks.

§ 115-278.1. State board of education to select and adopt textbooks; basal textbooks.—The state board of education is hereby authorized to "select and adopt" for the exclusive use in the public schools of North Carolina, textbooks and publications, instructional materials, needed for instructional purposes, in each grade and on each subject matter, in which instruction is required by law. It shall adopt for a period of not less than

five years, two basal primers, or readers for each of the first three grades, and one basal book or series of books on all other subjects required to be taught in the first eight grades, and two basal books for all subjects taught in the high school: Provided not more than three basal books may be adopted on the subject of North Carolina history. (1945, c. 707, s. 1.)

Editor's Note.—The act from which this article was codified become effective April 1, 1945.

§ 115-278.2. Continuance and discontinuance of contracts with publishers; procedure for change of textbook.—At the expiration of existing or future contracts, the board may, upon approval of the publisher, continue such contract in force from year to year for a period not exceeding five years. The superintendent may at any time recommend to the board that a given book is unsatisfactory for the schools whereupon the board may call for a new selection and adoption.

In the event a change of any textbook is required by vote of the board, the publisher shall be given ninety (90) days notice prior to the first day of May, at the expiration of which time the board is authorized to adopt a new book or books on said subject. The publisher desiring to terminate his contract which has been extended beyond the original contract period shall give notice to the board ninety (90) days prior to the first day of May. The board may then proceed to a new adoption. (1945, c. 707, s. 2.)

§ 115-278.3. Board to adopt standard courses of study.—Upon recommendation of the superintendent the board shall adopt a standard course of study for each grade in the elementary school and in the high school. These courses of study shall set forth what subjects shall be taught in each grade, and outline the number of basal and supplementary books on each subject to be used in each grade. (1945, c. 707, s. 3.)

§ 115-278.4. Appointment of textbook commission; members and chairman; compensation.—The governor and superintendent may appoint a textbook commission of twelve members who shall hold office for four years, or until their successors are elected and qualified. The governor shall fill all vacancies by appointment for the unexpired term. Seven of the members shall be outstanding teachers or principals in the elementary grades; five shall be outstanding teachers or principals in the high school grades: Provided one of the members may be a county or city superintendent. The commission shall elect a chairman, subject to the approval of the governor and the state superintendent. The members shall be paid a per diem and expenses as approved by the board. (1945, c. 707, s. 4.)

§ 115-278.5. Commission to evaluate books offered for adoption.—The members of the commission who are teachers or principals in the elementary grades shall evaluate all textbooks offered for adoption in the elementary grades. The members who are teachers or principals in the high schools shall evaluate all books offered for adoption in the high school grades.

Each member shall examine carefully and file a written evaluation of each book offered for adoption in the field in which the member teaches. Special consideration shall be given in the evaluation report as to the adaptability of the book to the grade for which it is offered, the content or subject matter, and other criteria prescribed by the board.

All evaluation reports shall be signed by the member making the report and filed alphabetically with the board not later than a day certain as fixed by the board when the call for adoption is made. (1945, c. 707, s. 5.)

§ 115-278.6. Selection of textbooks by board.—At the next meeting of the board following the filing of the reports the textbooks commission shall meet with the board and jointly they shall examine the reports. The board shall then select from the evaluated list all books which satisfy the board that such books will meet the teaching requirements of the North Carolina public schools in the grade or grades for which they are offered. The board shall then request sealed bids from the publishers of all books so selected. (1945, c. 707, s. 6.)

§ 115-278.7. Adoption of textbooks and contracts with publishers.—The sealed bids of the publishers shall be opened at the next regular meeting of the board in the presence of the board. The board may then adopt one of the books offered and enter into a contract with the publisher for such adopted book. The board may refuse to adopt any of the books offered at the prices bid and call for new bids. (1945, c. 707, s. 7.)

§ 115-278.8. Charge for rentals.—The board shall not charge a rental fee for books, supplies, and materials used in the public schools in excess of the actual cost to the state of the handling and administration of such rentals. (1945, c. 707, s. 8.)

§ 115-278.9. Board to regulate matters affecting validity of contracts; approval of attorney general.—The board shall make all needful rules and regulations with reference to asking for bids, notifying publishers as to calls for adoption, execution and delivery of contracts, requirement of performance bonds, cancellation clauses and such other material matters as may affect the validity of the contracts. All such contracts shall be subject to the approval of the attorney general as to its form and legality. (1945, c. 707, s. 9.)

§ 115-278.10. Purpose of article.—It is the purpose of this article to enable the board to secure the best textbooks obtainable within the limits of available funds for use in the public schools of North Carolina; that all books offered shall be carefully considered; and that records shall be kept of all books offered and an evaluation report of such books filed in a permanent record. (1945, c. 707, s. 10.)

§ 115-278.11. Definitions.—As used in this article, the word "board" shall mean the state board of education. "Superintendent" shall mean the state superintendent of public instruction. (1945, c. 707, s. 11.)

Art. 40. State Board of Education.

§ 115-293. Powers and duties of board.

(1) Acquire by contract and/or purchase such textbooks and instructional supplies which are or may be on the adopted list of the state of North

Carolina, and to purchase by contract as now provided by law material, supplies, and equipment which the board may find necessary to meet the needs of the public school system of the state and to carry out the provisions of this article.

(2) Provide a system of distribution of said textbooks and supplies to the children in the public schools of the state, and distribute such books as are provided under the rental system without the use of any depository other than some agency of the state; to use warehouse facilities for the distribution of all the supplies, materials, and equipment authorized to be purchased in subsection (1) hereof.

(3) Provide for the free use, including the proper care and return thereof, of elementary basal textbooks to such grades of the elementary public schools of North Carolina as may be determined by the state board of education. Title to said books shall be vested in the state. For the purposes of this article, the elementary grades shall be considered the grades from one to eight, inclusive. The basal elementary textbooks in the hands of the state board of education, when this measure is put in effect, shall become a part of the stock of books needed to carry out the provisions of this article. Provided, the state board of education may furnish basal elementary textbooks on a rental basis in any or all elementary grades if it is deemed necessary.

(1945, c. 581, ss. 1, 2; c. 655.)

Editor's Note.—
The first 1945 amendment made changes in paragraphs (1) and (2), and the second 1945 amendment substituted "eight" for "seven" in line eight of paragraph (3). As the rest of the section was not affected by the amendments it is not set out.

For subsequent statute affecting this section, see §§ 115-278.1 et seq.

§ 115-296. Rentals paid to state treasury; disinfecting books.—All sums of money collected as rentals under the provisions of this article shall be paid monthly as collected into the state treasury, to be entered as a separate item known as the "state textbook rental fund." Disbursement of said funds shall only be had by order of the council of state: Provided, that the state board of education in conjunction with the state board of health shall adopt rules and regulations governing the use and fumigation for the regular disinfection of all textbooks used in the public schools of the state.

The governor, with the approval of the council of state, may, upon request and certification of the state board of education that surplus funds in the state textbook rental fund herein provided for are needed for the purchase of rental textbooks, transfer so much of said surplus to the general fund of the state to be used for the purchase of free textbooks and operating expenses as, in their judgment, may be necessary for the operation of the free textbook system now provided by law: Provided, any funds used for the free textbook system shall be the funds advanced to the state board of education for the operation of the rental system as outlined in chapter four hundred and twenty-two, public laws of one thousand nine hundred and thirty-five, but payments made from the rental fund for the free textbook system shall not be in excess of the amount advanced under chapter four hundred and twenty-two.

All other revenues of the textbook rental system shall be used exclusively for providing textbooks, library books, and other instructional materials to the pupils that pay the rental fees, and to pay such expenses as are necessary in the operation of the rental system. (1935, c. 422, s. 4; 1937, c. 169, s. 1; 1943, cc. 391, 721, s. 9; 1945, c. 970, s. 13.)

Editor's Note.—
The 1945 amendment rewrote the second paragraph and added the third paragraph.

SUBCHAPTER XV. COMPULSORY ATTENDANCE IN SCHOOLS.

Art. 42. General Compulsory Attendance Law

§ 115-302. Parent or guardian required to keep child in school; exceptions.—Every parent, guardian or other person in the state having charge or control of a child between the ages of seven and fifteen years during the twelve months following July first, one thousand nine hundred and forty-five, and between the ages of seven and sixteen years thereafter, shall cause such child to attend school continuously for a period equal to the time which the public school in the district in which the child resides shall be in session. The principal, superintendent, or teacher who is in charge of such school shall have the right to excuse the child temporarily from attendance on account of sickness or distance of residence from the school, or other unavoidable cause which does not constitute truancy as defined by the state board of education. The term "school" as used in this section is defined to embrace all public schools and such private schools as have tutors or teachers and curricula that are approved by the county superintendent of public instruction or the State Board of Education.

All private schools receiving and instructing children of compulsory school age shall be required to keep such records of attendance and render such reports of the attendance of such children and maintain such minimum curriculum standards as are required of public schools; and attendance upon such schools, if the school or tutor refuses or neglects to keep such records or to render such reports, shall not be accepted in lieu of attendance upon the public school of the district, town or city which the child shall be entitled to attend: Provided, instruction in a private school or by private tutor shall not be regarded as meeting the requirements of the law unless the courses of instruction run concurrently with the term of the public school in the district and extend for at least as long a term. (1923, c. 136, s. 347; 1925, c. 226, s. 1; 1945, c. 826; 1949, c. 1033, s. 1; C. S. 5757.)

Editor's Note.—The 1945 amendment rewrote the first sentence of the first paragraph, and the 1949 amendment inserted in the fifth line of the second paragraph the words "and maintain such minimum curriculum standards."

§ 115-304. Attendance officers; reports; prosecutions.

Local Modification.—Polk: 1947, c. 348.

Art. 43. Compulsory Attendance of Deaf and Blind Children.

§ 115-309. Deaf and blind children to attend school; age limits; minimum attendance.—Every deaf and every blind child of sound mind in North Carolina who shall be qualified for admission in-

to a state school for the deaf or the blind shall attend a school for the deaf or the blind for a term of nine months each year between the ages of six and eighteen years. Parents, guardians, or custodians of every such blind or deaf child between the ages of six and eighteen years shall send, or cause to be sent, such child to some school for the instruction of the blind or deaf as is herein provided: Provided, that the board of directors of any school for the deaf or blind may exempt any such child from attendance at any session or during any year, and may discharge from their custody any such blind or deaf child whenever such discharge seems necessary or proper. Whenever a deaf or blind child shall reach the age of eighteen and is still unable to become self-supporting because of its defects, such a child shall continue in said school until it reaches the age of twenty-one, unless it becomes self-supporting sooner. (1923, c. 136, s. 354; 1945, c. 497, s. 1; C. S. 5764.)

Editor's Note.—The 1945 amendment substituted "six" for "seven" in lines six and nine.

§ 115-310. Parents, etc., failing to send deaf child to school guilty of misdemeanor; provisos. —The parents, guardians, or custodians of any deaf children between the ages of six and eighteen years failing to send such deaf child or children to some school for instruction, as provided in this article, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, at the discretion of the court, for each year said deaf child is kept out of school, between the ages herein provided: provided, that this section shall not apply to or be enforced against the parent, guardian, or custodian of any deaf child until such time as the superintendent of any school for the instruction of the deaf, by and with the approval of the executive committee of such institution, shall in his and their discretion serve written notice on such parent, guardian, or custodian, directing that such child be sent to the institution whereof they have charge. (1923, c. 136, s. 355; 1945, c. 497, s. 2; 1947, c. 388, s. 1; C. S. 5765.)

Editor's Note.—The 1945 amendment struck out the former provision "that parents, guardians, or custodians may elect two years between the ages of seven and eighteen years that a deaf child or children may remain out of school."

The 1947 amendment substituted "six" for "seven" in line two.

§ 115-311. Parents, etc., failing to send blind child to school, guilty of misdemeanor; provisos. —The parents, guardians, or custodians of any blind child or children between the ages of six and eighteen years failing to send such child or children to some school for the instruction of the blind shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, at the discretion of the court, for each year that such child or children shall be kept out of school between the ages specified: Provided, (1) that this section shall not be enforced against the parents, guardians, or custodians of any blind child until such time as the authorities of some school for the instruction of the blind shall serve written notice on such parents, guardians, or custodians directing that such child be sent to the school whereof they have charge; and (2) that the authorities of the state school for the blind and the deaf shall not be compelled to retain in their custody or under their instruction any incorrigible person or persons of confirmed immoral habits. (1923, c. 136, s. 356; 1947, c. 388, s. 2; C. S. 5766.)

Editor's Note.—The 1947 amendment substituted "six" for "seven" in line two.

SUBCHAPTER XXI. COMPENSATION TO CHILDREN INJURED IN SCHOOL BUSSES.

Art. 49. Certain Injuries to School Children Compensable.

§ 115-341. Payment of medical or funeral expenses to parents or custodians of children.—The state board of education is hereby authorized and directed to pay out of said sum provided for this purpose to the parent, guardian, executor, or administrator of any school child, who may be injured and/or whose death results from injuries received while such child is riding on a school bus to and from the public schools of the State, or from the operation of said bus on the school grounds or in transporting children to and from the public schools of the State, medical, surgical, hospital, and funeral expenses incurred on account of such injuries and/or death of such child in an amount not to exceed the sum of six hundred and no one-hundredths dollars ($600.00). (1935, c. 245, s. 2; 1943, c. 721, s. 7; 1945, c. 970, s. 3.)

Editor's Note.—

The 1945 amendment inserted the words "or from the operation of said bus on the school grounds or in transporting children to and from the public schools of the state."

SUBCHAPTER XXII. SCHOOL LAW OF 1939.

Art. 50. The School Machinery Act.

§ 115-347. Purpose of the law. — The purpose of this subchapter is to provide for the administration and operation of a uniform system of public schools of the state for the term of nine months without the levy of an ad valorem tax therefor, and it is the purpose of this general assembly to change the policy heretofore followed by previous general assemblies of re-enacting biennially the School Machinery Act, and this subchapter shall remain in force until repealed or amended by subsequent acts of the general assembly. It is also the purpose of this subchapter to establish a minimum program of education in order that substantial equality of educational opportunity may be available to all children of the state. (1939, c. 358, s. 1(a); 1943, c. 255, s. 2; 1949, c. 1116, s. 1.)

Editor's Note.—The 1949 amendment added the second sentence.

Session Laws 1945, c. 530, s. 12, substituted the word "controller" for the word "comptroller" wherever appearing in this article.

Cited in Coggins v. Board of Education, 223 N. C. 763, 28 S. E. (2d) 527.

§ 115-351. Length of school term; school month defined; payment of salaries.—The minimum six months' school term required by article IX of the Constitution is hereby extended to embrace a total of one hundred and eighty days of school in order that there shall be operated in every county and district in the state a uniform term of nine months: Provided, that the state

board of education or the governing body of any administrative unit, with the approval of the state board of education, may suspend the operation of any school or schools in such units, not to exceed a period of sixty days of said term of one hundred and eighty days, when in the sound judgment of the state board of education or the governing body of any administrative unit, with the approval of the state board of education, the low average of daily attendance in any school justifies such suspension, or when the state board of education or the governing body of any administrative unit, with the approval of the state board of education, shall find that the needs of agriculture, or any other condition, may make such suspension necessary within such unit or any district thereof: Provided further, that when the operation of any school is suspended no teacher therein shall be entitled to pay for any portion of the suspended term: Provided, that all schools served by the same school bus or busses shall have the same opening date.

Provided that for the one thousand nine hundred and forty-seven—one thousand nine hundred and forty-eight and one thousand nine hundred and forty-eight—one thousand nine hundred and forty-nine school terms the one hundred and eighty days (180) may be reduced to one hundred and seventy days (170) by the governor as director of the budget if in his opinion the revenues decrease to such an extent that such action would be justified.

A school month shall consist of twenty teaching days. Schools shall not be taught on Saturdays unless the needs of agriculture, or other conditions, in the unit or district make it desirable that schools be taught on such days. In order that the total term of one hundred and eighty days might be completed in a shorter time than nine calendar months, when the needs of agriculture require it, the governing body of any administrative unit may require that schools shall be taught on legal holidays, except Sundays, but nothing herein contained shall prevent the inclusion of teaching on any legal holiday in a school month in accordance with the custom and practice of any such district, or as may be otherwise ordered by the governing body of such administrative unit.

Salary warrants for the payment of all state teachers, principals, and others employed for the school term shall be issued each month to such persons as are entitled to same. The salaries of superintendents and others employed on an annual basis shall be paid per calendar month: Provided, that teachers may be paid in twelve equal monthly installments in such administrative units as shall request the same of the state board of education on or before October first of each school year. Before such request shall be filed, it shall be approved by the governing board, the superintendent, and a majority of the teachers in said administrative unit. The payment of the annual salary in twelve installments instead of nine shall not increase or decrease said annual salary nor in any other way alter the contract made between the teacher and the said administrative unit; nor shall such payment apply to any teacher who is employed for a period less than nine months.

(1) Principals in the public schools of the state shall be employed for a term of ten (10) months and shall be paid on the basis of ten (10) months' service.

(2) The state board of education is authorized to prescribe what portion of said extra month shall apply before the opening of the school term and after the closing of the school year and to fix and regulate the duties of principals during said extra month.

(3) The state board of education may, in its discretion and under such rules and regulations as it may prescribe, provide for the payment of the salaries of regular state allotted teachers in ten equal monthly payments. It shall also provide for the salaries of vocational teachers in such monthly payments as may be desirable and in accordance with rules and regulations prescribed for the operation of the vocational program and in accordance with federal laws and regulations relating to such funds.

Full authority is hereby given to the State Board of Education during any period of emergency to order general and, if necessary, extended recess or adjournment of the public schools in any section of the state where the planting or harvesting of crops or any other emergency conditions make such action necessary. (1939, c. 358, s. 4; 1943, c. 255, s. 1; 1945, c. 521; 1947, c. 1077, s. 2; 1949, c. 1116, s. 2.)

The 1945 amendment inserted paragraphs (1) and (2) following the fourth paragraph. The 1947 amendment struck out the words "which shall request the same" formerly appearing after the word "state" in line six of the first paragraph, and added the second proviso thereto. The amendment changed the years at the beginning of the second paragraph from 1943-1944 and 1944-1945 to 1947-1948 and 1948-1949.

The 1949 amendment inserted paragraph (3).

For comment on the 1943 amendment, see 21 N. C. Law Rev. 361.

§ 115-352. School organization.—All school districts, special tax, special charter, or otherwise, as constituted on May 15, 1933, are hereby declared non-existent as of that date; and it shall be unlawful for any taxes to be levied in said district for school operating purposes except as provided in this article. The state board of education, in making provision for the operation of the schools, shall classify each county as an administrative unit, and shall, with the advice of the county boards of education, make a careful study of the district organization as the same was constituted under the authority of § 4 of chapter 562 of the Public Laws of 1933, and as modified by subsequent school machinery act. The state board of education may modify such district organization when it is deemed necessary for the economical administration and operation of the state school system, and it shall determine whether there shall be operated in such district an elementary or a union school. Provisions shall not be made for a high school with an average daily attendance of less than sixty pupils, nor an elementary school with an average daily attendance of less than twenty-five pupils, unless a careful survey by the state superintendent of public instruction and the state board of education reveals that geographic or other conditions make it impracticable to provide for them otherwise. Funds shall not be made available for such schools until the said survey has been completed and such schools have been set up by the said board. School children shall attend school within the

district in which they reside unless assigned elsewhere by the state board of education.

It shall be within the discretion of the state board of education, wherever it shall appear to be more economical for the efficient operation of the schools, to transfer children living in one administrative unit or district to another administrative unit or district for the full term of such school without the payment of tuition: Provided, that sufficient space is available in the buildings of such unit or district to which the said children are transferred: Provided further, the provision as to the nonpayment of tuition shall not apply to children who have not been transferred as set out in this section.

City administrative units as now constituted shall be dealt with by the state school authorities in all matters of school administration in the same way and manner as are county administrative units: Provided, that the state board of education may, in its discretion, alter the boundaries of any city administrative unit and establish additional city administrative units when, in the opinion of the state board of education, such change is desirable for better school administration. Provided, that in all city administrative units as now constituted the trustees of the said special charter districts, included in said city administrative unit, and their duly elected successors, shall be retained as the governing body of such district; and the title to all property of the said special charter district shall remain with such trustees, or their duly chosen successors; and the title to all school property hereafter acquired or constructed within the said city administrative unit, shall be taken and held in the name of the trustees of the said city administrative unit; and the county board of commissioners of any county shall provide funds for the erection or repair of necessary school buildings on property, the title to which is held by the board of trustees as aforesaid, and the provisions of § 115-88, to the extent in conflict herewith, is hereby repealed: Provided, that nothing in this subchapter shall prevent city administrative units, as now established, from consolidating with the county administrative unit in which such city administrative unit is located, upon petition of the trustees of the said city administrative unit and the approval of the county board of education and the county board of commissioners in said county: Provided, further, that nothing in this subchapter shall affect the right of any special charter district, or special tax district which now exists for the purpose of retiring debt service, to have the indebtedness of such district taken over by the county as provided by existing law, and nothing herein shall be construed to restrict the county board of education and/or the board of county commissioners in causing such indebtedness to be assumed by the county as provided by existing law.

The board of trustees for any special charter district in any city administrative unit shall be appointed as now provided by law. If no provision is now made by law for the filling of vacancies in the membership of such board of trustees, such vacancy may be filled by the governing body of the city or town embraced by said administrative unit.

In all cases where title to property has been vested in the trustees of a special charter district which has been abolished and has not been reorganized, title to such property shall be vested in the county board of education of the county embracing such special charter district. (1939, c. 358, s. 5; 1943, c. 721, s. 8; 1945, c. 970, s. 4; 1947, c. 1077, ss. 3, 6.)

Cross Reference.—

As to authority of state board of education to alter or dissolve city school administrative units, see § 115-361.1.

Editor's Note.—

The 1945 amendment inserted the first proviso in the third paragraph. The 1947 amendment made changes in said proviso and added the last sentence of the first paragraph.

Cited in Coggins v. Board of Education, 223 N. C. 763, 28 S. E. (2d) 527.

§ 115-353. Administrative officers.

Local Modification.—Currituck: 1945, c. 899.

§ 115-354. School committees.

Provided, further, that such teacher or principal shall give notice to the superintendent of schools of the administrative unit in which said teacher or principal is employed, within ten days after notice of reelection, of his or her acceptance of employment for the following year: Provided, further, that the county board of education may appoint an advisory committee of three members for each school building in the said school district, who shall care for the school property and perform such other duties as may be defined by the county board of education. (1939, c. 358, s. 7; 1941, c. 267, s. 2; 1943, c. 721, s. 8; 1945, c. 970, s. 5.)

Editor's Note.—

The 1945 amendment substituted, in the next to the last proviso in the second paragraph, the words "notice of reelection" for the words "the close of school." As the rest of the section was not affected by the amendment only this proviso and the last one are set out.

§ 115-355. Organization statement and allotment of teachers.—On or before the twentieth day of May in each year, the several administrative officers shall present to the state board of education a certified statement showing the organization of the schools in their respective units, together with such other information as said board may require. The organization statement as filed for each administrative unit shall indicate the length of term the state is requested to operate the various schools for the following school year, and the state shall base its allotment of funds upon such request. On the basis of such organization statement, together with all other available information, and under such rules and regulations as the state board of education may promulgate, the state board of education shall determine for each administrative unit, by districts and races, the number of elementary and high school teachers to be included in the state budget on the basis of the average daily attendance figures of the continuous six months period of the first seven months of the preceding year during which continuous six months' period the average daily attendance was highest, provided that loss in attendance due to epidemics or apparent increase in attendance due to the establishment of army camps or other national defense activities shall be taken into consideration in the initial allotment of teachers: Provided, further, that the superintendent of an administrative unit shall not be included in the number of teachers and principals allotted on the basis of average daily attendance: Provided, further, that for the duration of the present war and

for the first school term thereafter, it shall be the duty of the state board of education to provide any school in the state of North Carolina having four high school teachers or less and/or four elementary teachers or less not less than the same number of teachers as were allotted to said school for the school year of one thousand nine hundred and forty-four—one thousand nine hundred and forty-five.

Provided, further, that in cases where there are less than twenty (20) pupils per teacher in any school a reduction in the number of teachers may be made.

The provisions of this section as to the allotment of teachers shall apply only to those schools where the reduction in enrollment is shown to be temporary as determined by the state board of education.

It shall be the duty of the governing body in each administrative unit, after the opening of the schools in said unit, to make a careful check of the school organization and to request the state board of education to make changes in the allocation of teachers to meet requirements of the said unit.

In order to provide for the enrichment and strengthening of educational opportunities for the children of the state, the state board of education is authorized in its discretion to make an additional allotment of teaching personnel to the county and city administrative units of the state, either jointly or separately as the state board of education may prescribe, and such persons may be used in said administrative units as librarians, attendance assistants, special teachers or supervisors of instruction and for other special instructional service, such as art, music, adult education, special education, or industrial arts as may be authorized and approved by the state board of education. The salaries of such personnel shall be determined in accordance with the state salary schedule adopted by the state board of education. In addition, the state board of education is authorized and empowered, in its discretion, to make allotments of funds for clerical assistants for classified principals. (1939, c. 358, s. 8; 1941, c. 267, s. 3; 1943, c. 255, s. 2¾; 1943, c. 720, s. 1; 1943, c. 721, s. 8; 1945, c. 970, ss. 6, 14; 1949, c. 1116, s. 3.)

Editor's Note.—

The 1945 amendment inserted in lines twenty-one and twenty-two the words "first seven months of the." It also rewrote the third proviso in the first paragraph and inserted the last proviso therein.

The 1949 amendment added the last paragraph.

For comment on the 1943 amendment, see 21 N. C. Law Rev. 361.

§ 115-356. Objects of expenditure. — The appropriation of state funds, as provided under the provisions of this subchapter, shall be used for meeting the costs of the operation of the public schools as determined by the state board of education, for the following items:

1. General Control:
   a. Salaries of superintendents
   b. Travel of superintendents
   c. Salaries of clerical assistants for superintendents
   d. Office expense of superintendents
   e. Per diem county boards of education in the sum of one hundred dollars ($100.00) to each county
   f. Audit of school funds
2. Instructional Service:
   a. Salaries for white teachers, both elementary and high school
   b. Salaries for colored teachers, both elementary and high school
   c. Salaries of white principals
   d. Salaries of colored principals
   e. Instructional supplies
3. Operation of Plant:
   a. Wages of janitors
   b. Fuel
   c. Water, light and power
   d. Janitors' supplies
   e. Telephone expense
4. Auxiliary Agencies:
   a. Transportation
      (1) Drivers and contracts
      (2) Gas, oil, and grease
      (3) Mechanics
      (4) Parts, tires, and tubes
      (5) Replacement busses
      (6) Compensation for injuries and/or death of school children as now provided by law
   b. Libraries
   c. Health
   d. Workmen's compensation for school employees

In allotting funds for the items of expenditures hereinbefore enumerated, provision shall be made for a school term of only one hundred eighty days.

The state board of education shall effect all economies possible in providing state funds for the objects of general control, operation of plant, and auxiliary agencies, and after such action shall have authority to increase or decrease on a uniform percentage basis the salary schedule of teachers, principals, and superintendents in order that the appropriation of state funds for the public schools may insure their operation for the length of term provided in this subchapter: Provided, however, that the state board of education and county boards of education for county administrative units and boards of trustees for city administrative units, shall have power and authority to promulgate rules by which school buildings may be used for other purposes.

The objects of expenditure designated as maintenance of plant and fixed charges shall be supplied from funds required by law to be placed to the credit of the public school funds of the county and derived from fines, forfeitures, penalties, dog taxes, and poll taxes, and from all other sources except state funds: Provided, that when necessity shall be shown, and upon the approval of the county board of education or the trustees of any city administrative unit, the state board of education may approve the use of such funds in any administrative unit to supplement any object or item of the current expense budget, including the supplementing of the teaching of vocational subjects; and in such cases the tax levying authorities of the county administrative unit shall make a sufficient tax levy to provide the necessary funds for maintenance of plant, fixed charges, and capital outlay: Provided, further, that the tax levying authorities in any county administrative unit may levy taxes to provide necessary funds for teaching vocational agriculture and home econom-

ics and trades and industrial vocational subjects supported in part from federal vocational educational funds: Provided, further, that nothing in this subchapter shall prevent the use of federal and/or privately donated funds which may be made available for the operation of the public schools under such regulations as the state board of education may provide. Provided further, that the tax levying authorities in any county administrative unit may levy taxes to provide necessary funds for attendance enforcement, supervision of instruction, health and physical education, clerical assistance, and accident insurance for school children transported by school bus: Provided, that nothing in this section be interpreted as repealing the present statutes requiring the state board of education's approval of local unit budgets. (1939, c. 358, s. 9; 1943, c. 255, s. 2; 1943, c. 721, s. 8; 1947, c. 1077, ss. 7, 7½.)

Editor's Note.—
The 1947 amendment added subhead 4d, struck out the words "with the approval of the state board of education" formerly appearing after the word "unit" in line twenty of the last paragraph and added the last two provisos thereto.

§§ 115-357, 115-358: Repealed by Session Laws 1945, c. 530, s. 13.

§ 115-359. State standard salary schedule.
Provided, further, that no teacher or principal shall be required to attend summer school during the years one thousand nine hundred forty-five and one thousand nine hundred forty-six, and the certificate of such teacher or principal as may have been required to attend such school shall not lapse but shall remain in full force and effect, and all credits earned by summer school and/or completing extension course or courses shall not be impaired, but shall continue in full force and effect.
(1945, c. 970, s. 7.)

Editor's Note.—
The 1945 amendment changed the years mentioned in the last proviso of the first paragraph. As the rest of the section was not affected by the amendment only this paragraph is set out.
For comment on the 1943 amendment, see 21 N. C. Law Rev. 361.

§ 115-359.1. Salary increments for experience to teachers, principals and superintendents serving in armed and auxiliary forces.—The state board of education, in fixing the state standard salary schedule of teachers, principals and superintendents as authorized by § 115-359, shall provide that teachers, principals and superintendents who entered the armed or auxiliary forces of the United States after September sixteenth, one thousand nine hundred and forty, and who left their positions for such service, shall be allowed experience increments for the period of such service as though the same had not been interrupted thereby, in the event such persons return to the positions of teachers, principals or superintendents in the public schools of the state after having been honorably discharged from the armed or auxiliary forces of the United States. (1945, c. 272.)

§ 115-361. Local supplements.
If a majority of those who shall vote thereon in such new territory shall vote in favor of such tax, the new territory shall be and become a part of said district, and the term "local tax of the same rate" herein used shall include, in addition to the usual local tax, any tax levied to meet the interest and sinking fund of any bonds heretofore issued by the district proposed to be enlarged. In case a majority of those who shall vote thereon at the election shall vote in favor of the tax, the district shall be deemed enlarged as so proposed. (1939, c. 358, s. 14; 1943, c. 721, s. 8; 1949, c. 918, s. 7.)

Cross Reference.—As to ratification of enlargements of school districts pursuant to this section, see note to § 115-31.2.

Editor's Note.—Prior to the 1949 amendment the last two sentences of this section referred to "a majority of the qualified voters" instead of to "a majority of those who shall vote." Only these sentences are set out as the rest of the section was not affected by the amendment.
For brief comment on the 1949 amendment, see 27 N. C. Law Rev. 454.

§ 115-361.1. Alteration or dissolution of city school administrative units; abolition of existing tax levies; new supplementary levies.—1. Alteration or Dissolution and Formation of City School Administrative Units.—The state board of education, upon the filing of a petition by any city administrative unit composed of two municipalities so requesting, may amend by enlarging, reducing, or dissolving any such city administrative unit and notwithstanding the population, create a new city administrative unit with boundaries coterminous with the boundaries of the township in which one of said municipalities is located and form a special school district containing the other municipality with boundaries coterminous with the township in which such municipality is situated.

2. Abolition of Existing Tax Levies.—Upon the altering by enlarging or reducing the boundaries of, or dissolving a city administrative unit as authorized in subsection one hereof, any existing special tax levy authorized by § 115-361 of the General Statutes of North Carolina shall terminate at the end of the fiscal year in which the boundaries of said unit are reduced or enlarged or the district dissolved.

3. Special Tax Levies Authorized.—A special tax levy is hereby authorized in any city administrative unit and a special tax levy of not more than fifteen cents (15c) on the one hundred dollar ($100.00) valuation in a special school district created as herein authorized for the purpose of operating schools of a higher standard in such districts than provided by state support: Provided, that before making any levy for supplementing state allotments, an election shall be held in such administrative unit or district to determine whether there shall be levied a tax to provide supplemental funds for the operation of the schools in the district and to determine the maximum rate which may be levied therefor. Such election to be held under existing election laws and regulations applicable to special school levies authorized in § 115-361 of the General Statutes of North Carolina for such supplements. (1945, c. 284.)

§ 115-366. Bonds.—The state board of education shall, in its discretion, determine what state and local employees shall be required to give bonds for the protection of state school funds and for the faithful discharge of their duties; and, in cases in which bonds are required, the state board of education is authorized to place the same and pay the premiums thereon.

The board of education in each county administrative unit and the trustees of each city administrative unit shall cause all persons authorized to draw or approve school checks or vouchers drawn on school funds, whether county, district, or special, and all persons who as employees of such administrative unit are authorized or permitted to receive any school funds from whatever source, and all persons responsible for or authorized to handle school property to be bonded for the faithful discharge of their duties in such amount as in the discretion of said governing authorities of said administrative unit shall deem sufficient for the protection of said school funds or property with surety by some surety company authorized to do business in the state of North Carolina. The amount deemed necessary to cover the cost of such surety bond shall be included as an item in the general school budget of such school administrative unit and shall be paid from the funds provided therefor; but nothing in this section shall prevent the governing authorities of the respective administrative units from prorating the cost of such bond between the funds sought to be protected. (1939, c. 358, s. 18; 1943, c. 721, s. 8; 1945, c. 970, s. 8; 1949, c. 1082, s. 2.)

Editor's Note.—The 1945 and 1949 amendments rewrote the first and second paragraphs, respectively.

§ 115-368. How school funds shall be paid out. 3. Special Funds of Individual Schools. — The board of education of a county administrative unit and the board of trustees of a city administrative unit shall, unless otherwise provided for by law, designate the bank, depository, or trust company authorized to do business in North Carolina in which all special funds of each individual school shall be deposited. Such funds shall be paid out only on checks signed by the principal of the school and the treasurer who has been selected by the respective boards; provided, this procedure for depositing and disbursing funds is not required for schools handling less than three hundred dollars ($300.00), and if in the judgment of the boards of the respective administrative units such procedure should not be required. However, in all schools a complete record shall be kept by the treasurer and reports made of all money received and disbursed by him in handling funds of the school; provided, further, that nothing in this subsection 3 shall prevent the disbursing of all these special funds upon signatures required under the provisions of subsections 1 and 2 of this section.

4. Records and reports. — The state superintendent of public instruction and state board of education shall have full power and authority to make rules and regulations to prescribe the manner in which records shall be kept by all county and city administrative units as to the expenditure of current expense funds, capital outlay funds, and debt service funds, derived from local sources, and to prescribe for making reports thereof to the state superintendent of public instruction.

5. Cashing Vouchers and Payment of Sums Due on Death of Teachers, etc.—In the event of the death of any superintendent, teacher or principal or other school employee before cashing any voucher which has been issued for services rendered or to whom a payment is due for services rendered in any amount not in excess of five hundred dollars ($500.00), when there is no administration upon the estate of such person, such voucher may be cashed by the clerk of the superior court of the county in which such deceased person resided, or a voucher due for such services may be made payable to such clerk, who will be authorized to pay out such sums in the following manner: 1. For satisfaction of widow's year's allowance, if such is claimed. 2. For funeral expenses and medical and doctors' bills for the last illness of the deceased, and any taxes due the state or local government and the balance, if any, as provided by law for the distribution of decedent's estates. (1939, c. 358, s. 20; 1941, c. 267, s. 8; 1943, c. 721, s. 8; 1949, c. 1033, s. 1; c. 1082, s. 3.)

Editor's Note.—The first 1949 amendment added subsection 5. The second 1949 amendment inserted present subsection 3 and renumbered old subsection 3 as 4. As the rest of the section was not affected by the amendments it is not set out.

§ 115-369. Audit of school funds. — All school funds shall be audited and reports made for each school year.

1. State School Funds. — The state board of education, in cooperation with the state auditor, shall cause to be made an annual audit of the state school funds disbursed by county and city administrative units and such additional audits as may be deemed necessary.

2. County and City Administrative Unit and District School Funds.—The county board of education and the board of trustees of city administrative units, respectively, in cooperation with the State board of education, shall cause to be made an annual audit of all county, city, and district school funds, and the school boards shall provide for the payment of the cost thereof in the school budgets of the respective administrative units.

The annual audits shall be completed as near to the close of the year as practicable and copies of said audit shall be filed with the state board of education, the director of the local government commission, and the state superintendent of public instruction not later than October 1st after the close of the fiscal year on June 30th.

3. Special Funds of Individual Schools.—The county board of education and the board of trustees of city administrative units, respectively, shall cause to be made, at the time the audit of the county or city funds is made, an audit of the special school funds of each school in the respective administrative units.

4. Filing and Publication of Audits.—Copies of the audit of the several county and city administrative units and special funds of individual schools required by this section shall be filed with the chairman and the secretary of the governing body of the unit receiving and disbursing such funds, and with the county auditor and the clerk of the superior court of the county in which such unit is located. It shall be the duty of the chairman and secretary of such governing bodies and of the county auditor and clerk of the superior court to receive and file such audits and make the same accessible for inspection by any citizen of the county or patron of the school during regular office hours. A copy of the audit shall be filed with a newspaper with general circulation in the

county and the same shall be published in said paper together with a statement indicating the offices in the county in which copies of the audit have been filed: Provided that if the length of the audit would cause its publication cost to be excessive in the opinion of the governing body of said unit, the governing body may also file with the newspaper a condensed statement of the audit showing the receipts as to sources thereof and disbursements as to purposes thereof, prepared by the auditor making the full audit, and cause the same to be published in lieu of publication of the full audit. If there be no newspaper published in the county, a copy of the audit shall be posted at the courthouse door and on the bulletin board in the office of the secretary of the board of the unit. It shall be the duty of the governing body of said unit to comply with the provisions of this paragraph on or before the first day of October after the close of every fiscal year.

The county board of education in a county administrative unit and the board of trustees in a city administrative unit shall include in the school budgets of the respective administrative units funds for the payment of the costs of the audits of county, city, district, and special funds of individual schools as required under subsections 2 and 3 of this section; provided, that nothing in this section shall prevent the respective boards from prorating the cost of auditing of special funds to the special funds of each school. (1939, c. 358, s. 21; 1943, c. 721, s. 8; 1949, c. 1082, s. 4.)

Editor's Note.—The 1949 amendment rewrote this section.

§ 115-370. Workmen's compensation and sick leave.—The provisions of the Workmen's Compensation Act shall be applicable to all school employees, and the state board of education shall make such arrangements as are necessary to carry out the provisions of the Workmen's Compensation Act as are applicable to such employees as are paid from state school funds. Liability of the state for compensation shall be confined to school employees paid by the state from state school funds for injuries or death caused by accident arising out of and in the course of their employment in connection with the state operated nine months school term. The state shall be liable for said compensation on the basis of the average weekly wage of such employees as defined in the Workmen's Compensation Act, whether all of said compensation for the nine months school term is paid from state funds or in part supplemented by local funds. The state shall also be liable for workmen's compensation for all school employees employed in connection with the teaching of vocational agriculture, home economics, trades and industries, and other vocational subjects, supported in part by state and federal funds, which liability shall cover the entire period of service of such employees. The county and city administrative units shall be liable for workmen's compensation for school employees whose salaries or wages are paid by such local units from local funds. Such local funds are authorized and empowered to provide insurance to cover such compensation liability and to include the cost of such insurance in their annual budgets.

The state board of education is hereby authorized and empowered, in its discretion, to make provision for sick leave with pay for any teacher or principal not exceeding five days and to promulgate rules and regulations providing for necessary substitutes on account of said sick leave. The pay for a substitute shall not be less than three dollars per day. The state board of education may provide to each administrative unit not exceeding one per cent (1%) of the cost of instructional service for the purpose of providing substitute teachers for those on sick leave as authorized by law or by regulations of the state board of education, not exceeding the provisions made for other state employees.

The provisions of this section shall not apply to any person, firm or corporation making voluntary contributions to schools for any purpose, and such person, firm or corporation shall not be liable for the payment of any sum of money under this subchapter.

No deductions shall be made from salaries of teachers of vocational agriculture and home economics whose salaries are paid in part from state and federal vocational funds, while in attendance upon community, county and state meetings, called for specific purpose of promoting the agricultural interest of North Carolina, when such attendance is approved by the county superintendents of public instruction or the state director of vocational education. (1939, c. 358, s. 22; 1943, c. 255, s. 2; 1943, c. 720, s. 3; 1943, c. 721, s. 8; 1945, c. 970, ss. 10, 11; 1947, c. 1077, s. 1; 1949, c. 1116, s. 5.)

Editor's Note.—

The 1945 amendment inserted the fourth sentence of the first paragraph and added the last paragraph.

The 1947 amendment struck out a portion of the fifth sentence to make it conform to the fourth sentence.

The 1949 amendment added the third sentence of the second paragraph.

For comment on the 1943 amendment, see 21 N. C. Law Rev. 361.

Cited in Hunter v. Board of Trustees, 224 N. C. 359, 30 S. E. (2d) 384 (con. op.).

§ 115-371. Age requirement and time of enrollment.—Children to be entitled to enrollment in the public schools for the school year one thousand nine hundred thirty-nine-forty, and each year thereafter, must be six years of age on or before October first of the year in which they enroll, and must enroll during the first month of the school year. The principal of any public school shall have the authority to require the parents of any child presented for admission for the first time to such school to furnish a certified copy of the birth certificate of such child which shall be furnished upon request by the register of deeds of the county having on file the record of the birth of such child without charge or other satisfactory evidence of date of birth. (1939, c. 358, s. 22½; 1949, c. 1033, s. 1.)

Editor's Note.—The 1949 amendment added the second sentence.

§ 115-372. Purchase of equipment and supplies.—It shall be the duty of the county boards of education and/or the governing bodies of city administrative units to purchase all supplies, equipment and materials in accordance with contracts and/or with the approval of the state division of purchase and contracts. Title to instruction supplies, office supplies, fuel, and janitorial supplies, enumerated under subsections one, two, and three

of § 115-365, purchased out of state funds, shall be taken in the name of the county board of education and/or city board of trustees, which shall be responsible for the custody and replacement. Title to all buses, bus maintenance equipment, and materials and supplies used in the maintenance and operation of the school transportation system, enumerated in subsection four of § 115-356, purchased out of state funds shall be taken in the name of the state board of education and held by the county board of education for the use and benefit and subject to the direction of the state board of education: Provided, that no contracts shall be made by any county or city administrative unit for purchases unless provision has been made in the budget of such unit to provide payment therefor, or unless surplus funds are on hand to pay for same, and in order to protect the state purchase contracts, it is hereby made the mandatory duty upon the part of the governing authorities of such local units to pay for such purchases promptly in accordance with the terms of the contract of purchase. (1939, c. 358, s. 23; 1945, c. 970, s. 12.)

Editor's Note.—The 1945 amendment inserted that part of the section between the first sentence and the proviso.

§ 115-374. School transportation; use of school busses by state guard or national guard.—The control and management of all facilities for the transportation of public school children shall be vested in the state of North Carolina under the direction and supervision of the state board of education, which shall have authority to promulgate rules and regulations governing the organization, maintenance, and operation of the school transportation facilities. The tax levying authorities in the various counties of the state are authorized and empowered to provide in the capital outlay budget adequate buildings and equipment for the storage and maintenance of all school busses. Provision shall be made for adequate inspection each thirty days of each vehicle used in the transportation of school children, and a record of such inspection shall be filed in the office of the superintendent of the administrative unit. It shall be the duty of the administrative officer of each administrative unit to require an adequate inspection of each bus at least once each thirty days, the report or reports of which inspection shall be filed with the administrative officers. Every principal, upon being advised of any defect by the bus driver, shall cause a report of such defect to be made to this administrative officer immediately, whose duty it shall be to cause such defect to be remedied before such bus can be further operated. The use of school busses shall be limited to the transportation of children to and from school for the regularly organized school day and to the transportation of accredited teachers in the public school system on active duty while going to and from school in the discharge of their duties for the regularly organized school day: Provided, that no routing or schedule of school busses shall be arranged or altered to accommodate any such teacher, no teacher shall displace any pupil in the seating arrangements on such bus, and no teacher shall have or exercise any official duty or responsibility while so riding on any such bus, and the bus driver shall retain all legal authority and responsibility granted or imposed on such driver; provided further, that any teacher availing himself or herself of such transportation shall be deemed to have assumed all risks incident thereto, and the state of North Carolina shall not be held in any way responsible or liable for any injury or damage resulting from the transportation of any such teacher; provided further, in cases of sudden illness or injury requiring immediate medical attention of any child or children while attending the public schools, the principal of the school may send the child or children by school bus, if no other vehicle is available, to the nearest doctor or hospital for medical treatment; provided the expense of such transportation shall be paid from county funds.

The state board of education is authorized and empowered, under rules and regulations to be adopted by said state board of education, to permit the use and operation of school busses for the transportation of school children on necessary field trips while pursuing the courses of vocational agriculture, home economics, trade and industrial vocational subjects, to and from demonstration projects carried on in connection therewith; provided that under no circumstances shall the total round trip mileage for any one trip exceed twenty-five miles nor on any such trip shall a state owned school bus be taken out of the state of North Carolina. The state board of education is authorized and empowered, under rules and regulations to be adopted by said board, to permit the use and operation of school busses for transportation of school children and school employees within the boundaries of any county or health district to attend state planned group educational or health activities, specifically excluding athletic or recreational activities, which educational or health activities in the judgment of the state board of education are directly connected with the public school program as administered within the counties of the state, and which are conducted under the auspices or with the sanction of the state board of education. The costs of operating such school busses for said purpose, including the liability for workmen's compensation therewith and the employment of drivers of such busses, shall be paid for out of State funds, and the drivers of such busses shall be selected and employed as is provided for the operation of busses for the regularly organized school day under § 115-378: Provided, further, that the state board of education shall approve and designate any busses used for the purposes herein set forth.

(1947, c. 283; 1949, c. 101.)

Local Modification.—Guilford: 1947, c. 345.

Editor's Note.—

The 1947 amendment inserted the second sentence of the second paragraph. The 1949 amendment inserted in the first paragraph the provisions relating to the transportation of teachers. As the third paragraph was not affected by the amendments it is not set out.

§ 115-376. Bus routes. — In establishing the route to be followed by each school bus operated as a part of the state school transportation system, in all schools where transportation is now or may hereafter be provided, the state board of education shall, in co-operation with the district principal, unless road or other conditions make it inadvisable, route the busses so as to get within one mile of all children who live more than one and one-half miles from the school to which they are assigned: Provided that the state board of education may, in its discretion, route said busses

in such manner as to get within one-half mile of all children who live more than one and one-half miles from the schools to which they are assigned: Provided, where road, geographic, or other conditions make it inadvisable to offer transportation to any school child entitled to attend the school of any particular district, the state board of education is authorized to approve the assignment of such child to such other school as the board may approve; and in lieu of transportation may provide for the payment monthly to the parent or guardian of such child a sum not to exceed $10.00 per month for each school month that such child may attend school outside the district of residence: Provided, that all routes so established shall be subject to the approval of the county board of education and with a view to the needs of the students to the end that the necessity of students waiting on the road for busses in inclement weather be eliminated: Provided, further, that no children shall be transported except to the school to which said child is assigned by the county board of education, or by the state board of education under the provisions of § 115-352. The state shall not be required to provide transportation for children living within one and one-half miles of the school in which provision for their instruction has been made. All bus routes thus established shall be filed with the county board of education prior to the opening of school; and in the event any of said routes are disapproved by the county board of education, notice of same shall be filed with the state board of education, and a hearing on such appeal shall be had by said board within thirty days. (1939, c. 358, s. 25; 1941, c. 267, s. 10½; 1943, c. 721, s. 8; 1945, c. 970, s. 15; 1947, c. 1077, ss. 4, 8.)

Editor's Note.—
The 1945 amendment inserted the fourth proviso, and the 1947 amendment inserted the first two provisos.

§ 115-377. Purchase of new equipment; heating facilities in busses.

The state board of education shall provide that all school busses which may hereafter be placed in operation be equipped with adequate heating facilities. (1939, c. 358, s. 26; 1941, c. 267, ss. 8½, 10; 1943, c. 721, s. 8; 1947, c. 925.)

Editor's Note.—
The 1947 amendment added the above paragraph at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

§ 115-378. Bus drivers.

Local Modification.—Craven: 1945, c. 833; Currituck: 1947, c. 372.

Editor's Note.—As to operation of school bus by person under sixteen, see § 20-32.1.

§ 115-378.1. Monitors to preserve order in school busses.—The superintendent or principal of every public school to which students are brought by school bus or school busses may appoint a monitor for each bus.

It shall be the duty of the monitors so appointed to keep order and do other things necessary for the safe transportation of children in public school busses in North Carolina, under rules and regulations established by the county boards of education or the principal of the school where the bus is operated. (1945, c. 670.)

§ 115-381. Lunch rooms may be provided.

All lunch rooms and cafeterias operated under the provisions of this section shall be operated on a nonprofit basis, and any earnings therefrom over and above the cost of operation shall be used for the purpose of reducing the cost of meals served therein, and for no other purpose. (1939, c. 358, s. 30; 1945, c. 970, s. 9.)

Editor's Note.—The 1945 amendment added the above paragraph at the end of this section. As the rest of the section was not affected by the amendment it is not set out. As to revolving fund for counties receiving federal aid for school lunches, see § 115-25.1.

SUBCHAPTER XXIII. NORTH CAROLINA STATE THRIFT SOCIETY.

Art. 51. North Carolina State Thrift Society.

§ 115-392. Investments.—The funds of the society may, at the discretion of the board, be invested in obligations of the United States Government, or of the State of North Carolina, or deposited as previously provided in § 115-390. (1933, c. 385, s. 11; 1935, c. 489, s. 4.)

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

Chapter 116. Educational Institutions of the State.

Art. 1. The University of North Carolina.

Part 1. General Provisions.

Part 4. Miscellaneous Provisions.

Art. 5. Pembroke State College.

Art. 8. North Carolina College at Durham.

Art. 13A. Negro Training School for Feeble Minded Children.

Art. 15. Educational Advantages for Children of World War Veterans.

Art. 1. The University of North Carolina.

Part 1. General Provisions.

§ 116-3.1. School of dentistry. — In order to carry forward the medical care program for all the people of North Carolina, the board of trustees of the University of North Carolina is hereby authorized, empowered and directed to establish and maintain, in conjunction with the medical school of the University of North Carolina, a school for the teaching of dentistry. (1949, c. 503.)

§ 116-20. Escheats to university.—All real estate which has heretofore accrued to the state, or shall hereafter accrue from escheats, shall be vested in the University of North Carolina, and shall be appropriated to the use of that corporation. Title to any such real property which has escheated to the University of North Carolina, shall be conveyed by deed in the manner now provided by § 143-146 to and including § 143-150 of the General Statutes of North Carolina: Provided, that in any action in the superior court of North Carolina wherein the University of North Carolina is a party, and wherein said court enters a judgment of escheat in behalf of the University of North Carolina for any real property, then, upon petition of the University of North Carolina in said action, said court shall have the authority to appoint the escheat officer of the University of North Carolina as a commissioner for the purpose of selling said real property at a public sale, for cash, at the courthouse door in the county in which the property is located, after properly advertising the sale according to law. The said commissioner, when appointed by the court, shall have the right to convey a valid title to the purchaser of the property at public sale, but only after said sale shall have first been confirmed and approved by the comptroller of the University of North Carolina. The funds derived from the sale of any such escheated real property by the commissioner so appointed shall thereafter be paid by him into the escheat fund of the University of North Carolina. (Rev., s. 4282; Const., art. 9, s. 7; Code, s. 2626; R. C., c. 113, s. 11; 1789, c. 306, s. 2; 1947, c. 494; C. S. 5784.)

Editor's Note.—The 1947 amendment added all of this section beginning with the second sentence.

For a brief discussion of the 1947 amendment to this article, and other provisions of the 1947 Acts relating to escheats, see 25 N. C. Law Rev. 421.

Right Conferred by Constitution.—The right of succession by escheat to all property, when there is no wife or husband or parties to inherit or take under the statutes of descent and distribution, has been conferred upon the University of North Carolina by the state constitution, Art. IX, sec. 7, and extended by this and the following five sections. Board of Education v. Johnston, 224 N. C. 86, 29 S. E. (2d) 126.

§ 116-21. Evidence making prima facie case.

Cross Reference.—See annotations under § 116-20.

§ 116-22. Unclaimed personalty on settlements of decedents' estates to university.—All sums of money or other estate of whatever kind which shall remain in the hands of any executor, administrator, or collector for five years after his qualification, unrecovered or unclaimed by suit, by creditors, next of kin, or others entitled thereto, shall be paid by the executor, administrator, or collector to the University of North Carolina; and that corporation is authorized to demand, sue for, recover, and collect such moneys or other estate of whatever kind, and hold the same without liability for profit or interest, until a just claim therefor shall be preferred by creditors, next of kin, or others entitled thereto. (Rev., s. 4283; Const., art. 9, s. 7; Code, ss. 2627, 1504; 1868-9, c. 113, s. 76; R. S., c. 46, s. 20; 1784, c. 205, s. 2; 1809, c. 763, s. 1; 1947, c. 614, s. 2; C. S. 5785.)

Cross Reference.—See annotations under § 116-20.

Editor's Note.—The 1947 amendment struck out the words "and if no such claim shall be preferred within ten years after such money or other estate be received by such corporation, then the same shall be held by it absolutely," which formerly appeared at the end of this section.

§ 116-23. Other unclaimed personalty to university.—Personal property of every kind, including dividends of corporations, or of joint-stock companies or associations, choses in action, and sums of money in the hands of any person, which shall not be recovered or claimed by the parties entitled thereto for five years after the same shall become due and payable, shall be deemed derelict property, and shall be paid to the University of North Carolina and held by it without liability for profit of interest until a just claim therefor shall be preferred by the parties entitled thereto. (Rev., s. 4284; Code, ss. 2628, 2629; 1947, c. 614, s. 2; C. S. 5786.)

Local Modification.—Forsyth: 1945, c. 1049, s. 4.

Cross Reference.—See annotations under § 116-20.

Editor's Note.—The 1947 amendment struck out the words "and if no such claim shall be preferred within ten years after such property or dividend shall be received by it, then the same shall be held by it absolutely" formerly appearing at the end of this section.

§ 116-23.1. Unclaimed funds held or owing by life insurance companies. — (1) Definitions. — The term "unclaimed funds" as used in this section shall mean and include all monies held and owing by any life insurance company doing business in this state which shall have remained unclaimed and unpaid for seven years or more after such monies became due and payable under any life or endowment insurance policy. A life insurance policy not matured by the prior death of the insured shall be deemed to be matured and the proceeds thereof shall be deemed to be "due and payable" within the meaning of this section when the insured shall have attained the limiting age under the mortality table on which the reserve is based. Monies shall be deemed to be "due and payable" within the meaning of this section although the policy shall not have been surrendered nor proofs of death submitted as required and although the claim as to the payee is barred by a statute of limitations.

(1½) Scope.—This section shall apply to all unclaimed funds, as herein defined, held and owing by any life insurance company doing business in this state where the last known address,

according to the records of such company, of the person entitled to such funds is within this state, provided that if a person other than the insured be entitled to such funds and no address of such person be known to such company or if it be not definite and certain from the records of such company what person is entitled to such funds, then in either event it shall be presumed for the purposes of this section that the last known address of the person entitled to such funds is the same as the last known address of the insured according to the records of such company.

(2) Reports.—Every such life insurance company shall on or before the first day of May of each year make a report in writing to the commissioner of insurance of all unclaimed funds, as hereinbefore defined, held or owing by it on the thirty-first day of December next preceding. Such report shall be signed and sworn to by an officer of such company and shall set forth (1) in alphabetical order the full name of the insured, his last known address according to the company's records, and the policy number; (2) the amount appearing from the company's records to be due on such policy; (3) the date such unclaimed funds became payable; (4) the name and last known address of each beneficiary or other person who, according to the company's records, may have an interest in such unclaimed funds; and (5) such other identifying information as the commissioner of insurance may require.

(3) Notice; Publication.—On or before the first day of September following the making of such reports under this section, the commissioner of insurance shall cause to be published notices entitled: "Notice of Certain Unclaimed Funds Held or Owing by Life Insurance Companies." Each such notice shall be published once a week for two successive weeks in a newspaper published in the county of this state in which is located such last known address of each such insured, or other person who, according to the company's records may have an interest in such unclaimed fund, or if no newspapers are published in such county, then by posting such notice at the court house door of said county.

The notice shall set forth in alphabetical order the names contained in such reports of each insured whose last known address is within the county of publication together with (1) the amount reported due and the date it became payable, (2) the name and last known address of each beneficiary or other person who, according to the company's records, may have an interest in such unclaimed funds, and (3) the name and address of the company. The notice shall also state that such unclaimed funds will be paid by the company to persons establishing to its satisfaction before the following December 1st their right to receive the same, and that not later than December 1st such unclaimed funds still remaining will be paid to the University of North Carolina which shall thereafter be liable for the payment thereof.

It shall not be obligatory upon the commissioner of insurance to publish any item of less than fifty dollars in such notice, unless the commissioner of insurance deems such publication to be in the public interest. The expenses of publication shall be charged against the University of North Carolina.

(4) Payment to University of North Carolina. —All unclaimed funds contained in the report required to be filed under this section, excepting those which have ceased to be unclaimed funds since the date of such report, shall be paid over to the University of North Carolina on or before the following December 1st.

The commissioner of insurance shall have the power, for cause shown, to extend for a period of not more than one year the time within which a life insurance company shall file any report and in such event the time for publication and payment required by this section shall be extended for a like period.

(5) Custody of Unclaimed Funds; Insurers Exonerated. — Upon the payment of such unclaimed funds to the University of North Carolina, the state shall assume, for the benefit of those entitled to receive the same and for the safety of the money so paid, the custody of such unclaimed funds, and the life insurance company making such payment shall immediately and thereafter be relieved of and held harmless by the state from any and all liability for any claim or claims which exist at such time with reference to such unclaimed funds or which thereafter may be made or may come into existence on account of or in respect to any such unclaimed funds.

(6) Reimbursement for Claims Paid by Insurers.—Any life insurance company which has paid to the University of North Carolina monies deemed unclaimed funds pursuant to the provisions of this section may make payment to any person appearing to such company to be entitled thereto, and upon proof of such payment the state of North Carolina shall forthwith reimburse such company to the extent of the full amount, without interest, paid the University of North Carolina for the account of such claimant.

(7) Determination and Review of Claims.— Any person entitled to unclaimed funds paid to the University of North Carolina may file a claim at any time with the commissioner of insurance. The commissioner of insurance shall possess full and complete authority to accept or reject any such claim. If he rejects such claim or fails to act thereon within ninety days after receipt of such claim, the claimant may make application to the superior court of Wake county, upon not less than thirty days' notice to the commissioner of insurance, for an order to show cause why he should not accept and order paid such claim.

(8) Payment of Allowed Claims. — Any claim which is accepted by the commissioner of insurance or ordered to be paid by a court of competent jurisdiction shall be paid by the University of North Carolina.

(9) Records Required.—The University of North Carolina shall keep a public record of each payment of unclaimed funds received from any life insurance company. Such record shall show in alphabetical order the name and last known address of each insured, and of each beneficiary or other person who, according to the company's records, may have an interest in such unclaimed funds, and with respect to each policy, its number, the name of the company, and the amount due.

(10) Payments to Other States; Pending Litigation.—This section shall not apply to or affect

any unclaimed funds (a) which have been paid to another state or jurisdiction prior to the effective date hereof, or (b) which are at the effective date hereof involved in litigation with reference to the custody, appropriation or escheat of such funds. (1949, c. 682.)

§ 116-24. Certain unclaimed bank deposits to university.—All bank deposits in connection with which no debts or credits have been entered within a period of five years, and where the bank is unable to locate the depositor or owner of such deposit, shall be deemed derelict property and shall be paid to the University of North Carolina and held by it, without liability for profit or interest, until a just claim therefor shall be preferred by the parties entitled thereto. The receipt of the University of North Carolina of any deposit hereunder shall be and constitute a release of the bank delivering over any deposit coming within the provisions of this section from any liability therefor to the depositor or any other person. Upon receipt of such funds, the University of North Carolina shall cause to be posted and keep posted for thirty days at the courthouse door of the county in which such bank is located, a notice giving the names of the persons in whose name or names such deposits were made in said bank, the amount thereof, and the last known address of such person, and the bank paying over said funds to the University of North Carolina shall furnish such information to be used in giving said notice. If any person at any time thereafter shall appear and show that he is the identical person to whom such funds are due, the University of North Carolina shall pay the same in full to such person, but without any liability for interest or profits thereon. Debits of service charges and debits of intangible taxes made by banks shall not be considered debits within the meaning of this section. A bank shall be deemed to be unable to locate a depositor or owner when the present address of the depositor or owner is unknown to the bank, and United States mail addressed to the depositor or owner at the last known address, with a return address of the sending bank on the envelope, is returned undelivered to the bank mailing the same. (1937, c. 400; 1939, c. 29; 1947, c. 614, s. 3; 1949, c. 1069.)

Cross Reference.—See annotations under § 116-20.

Editor's Note.—The 1947 amendment added the third and fourth sentences. It also struck out the following phrase formerly appearing at the end of the first sentence of the section: "and if no such claim shall be preferred within ten years after such deposit shall be received by it, then the same shall be held by it absolutely."

The 1949 amendment added the last two sentences. For comment on the amendment, see 27 N. C. Law Rev. 427.

§ 116-25. Other escheats. — Unpaid and unclaimed salary, wages or other compensation due to any person or persons from any person, firm, or corporation engaged in construction work in North Carolina for services rendered in such construction work within the state are hereby declared to be escheats coming within the laws of this state, and the same shall be paid to the University of North Carolina immediately upon the expiration of one year from the time the same became due.

Rebates and returns of overcharges due by utility companies, which have not been paid to or claimed by the persons to whom they are due within a period of two years from the time they are due or from the time any refund was ordered by any court or by the utilities commission, shall be paid to the University of North Carolina.

All monies in the hands of clerks of the superior court, the state treasurer, or any other officer or agency of the state or county, or any other depository whatsoever, as proceeds of the liquidation of state banks by receivers appointed in the superior court prior to the liquidation Act of one thousand nine hundred twenty-seven, shall be immediately turned over into the custody of the University of North Carolina: Provided, however, that nothing in this section shall be construed to require the said clerk or other officer to turn over funds of minors or other incompetents in his possession, but the custody and control of the same shall be under existing law with reference thereto.

All monies in the hands of the treasurer of the state, represented by state warrants in favor of any person, firm, or corporation, whatsoever, which have been unclaimed for a period of five years, shall be turned over to the University of North Carolina.

All monies, claims, or other property coming into the possession of the University of North Carolina under this section shall be deemed derelict property and shall be held by it without liability for profit or interest until a just claim therefor shall be preferred by the parties entitled thereto.

Provided that this section shall not apply to the Agricultural Fund now on hand known as the State Warehouse Fund.

Any funds derived from the liquidation of any national bank organized and operated in this state, which has heretofore or which shall hereafter become insolvent, when such insolvent bank has been fully liquidated by a receiver appointed by the comptroller of the currency as provided by Title 12 of United States Code Annotated, sections 191 and 192, or any other federal law, or has been liquidated by any agent appointed as provided by Title 12 of United States Code Annotated, section 197, which shall remain under the control of the comptroller of the currency and deposited with the treasurer of the United States, or deposited elsewhere, as authorized by law, which shall be due any depositor or stockholder of this state, which for a period of ten years after becoming due such depositor or stockholder or available for distribution to any stockholder in the liquidation of such insolvent bank, has not been paid over to such depositor or stockholder, or the legal representative of such depositor or stockholder, due to inability to locate and deliver the same to the person entitled thereto, shall be deemed derelict property and shall be paid over to the University of North Carolina by the comptroller of the currency, or by such agent as may have the funds in charge, to be held in protective custody by the University of North Carolina until a just claim shall be made for same by the owner thereof. Upon payment of such funds to the University of North Carolina, the comptroller of the currency, or any agent having such funds in charge, shall be relieved of all further liability therefor.

Upon receipt of such funds the University of North Carolina shall cause to be posted, and keep

posted for thirty days, at the courthouse door of the county in which such insolvent national bank did business, a notice giving the names of the persons to whom such amounts so paid over were due, the amount thereof and the last known address of such person, and the source from which such funds were received: Provided, the comptroller of the currency or liquidating agent of such insolvent national bank shall furnish such information to the University of North Carolina when such funds are so paid over to it. If any person at any time thereafter shall appear and show that he is the identical person to whom any part of such fund is due, the University of North Carolina shall pay such part in full to such person, but without any liability for interest or profits thereon. (1939, c. 22; 1947, c. 614, s. 1; c. 621, s. 2.)

Editor's Note.—The 1947 amendment struck out the word "now" in the first line of the third and fourth paragraphs, and struck out the former last clause of the fifth paragraph dealing with the preferring of claims within ten years. The amendment also added the last two paragraphs to the section.

§ 116-26. Application of receipts.—All receipts heretofore had or hereafter to be had from escheated property or derelict property, and all interest and earnings thereon, shall be set apart by the trustees of the University so that the interest and earnings from said fund shall be used for maintenance and/or for scholarships and loan funds to worthy and needy students, residents of this state, attending the University of North Carolina, under such rules and regulations as shall be adopted by the board of trustees of the University with regard thereto. (Rev., s. 4285; Code, s. 2630; 1874-5, c. 236, s. 2; 1947, c. 614, s. 4; C. S. 5787.)

Editor's Note.—The 1947 amendment rewrote this section.

Part 4. Miscellaneous Provisions.

§ 116-44.1. Motor vehicle laws applicable to streets, alleys and driveways on campuses of the University of North Carolina; University trustees authorized to adopt traffic regulations.—(a) All the provisions of Chapter 20 of the General Statutes relating to the use of the highways of the state and the operation of motor vehicles thereon are hereby made applicable to the streets, alleys and driveways on the campuses of the University of North Carolina. Any person violating any of the provisions of said chapter in or on such streets, alleys or driveways shall, upon conviction thereof, be punished as therein prescribed. Nothing herein contained shall be construed as in any way interfering with the ownership and control of such streets, alleys and driveways on the campuses of the University of North Carolina as is now vested by law in the trustees of the University of North Carolina.

(b) The board of trustees of the University of North Carolina is authorized to make such additional rules and regulations and adopt such additional ordinances with respect to the use of the streets, alleys, driveways, and to the establishment of parking areas on such campuses not inconsistent with the provisions of Chapter 20, General Statutes of North Carolina, as in its opinion may be necessary. All regulations and ordinances adopted pursuant to the authority of this subsection shall be recorded in the proceedings of the board and printed, and copies of such regulations and ordinances shall be filed in the office of the secretary of state of North Carolina. Any person violating any such regulations or ordinances shall, upon conviction thereof, be guilty of a misdemeanor, and shall be punishable by a fine of not exceeding fifty dollars ($50.00) or imprisonment for not exceeding 30 days.

(c) The board of trustees of the University of North Carolina shall cause to be posted at appropriate places on the campuses of the University notice to the public of applicable speed limits and parking laws and ordinances. (1947, c. 1070.)

Art. 5. Pembroke State College.

§ 116-79. Incorporation and corporate powers; location.—The Pembroke State College shall be and remain a state institution for educational purposes, at Pembroke, North Carolina, in the county of Robeson, under the name and style aforesaid, and by that name may have perpetual succession, sue and be sued, contract and be contracted with, have and hold school property, including buildings, lands and all appurtenances thereto, situated as aforesaid; acquire by purchase or condemnation, under the general laws pertaining to eminent domain, donation or otherwise, real property for the purpose of maintaining and enlarging the said college, which shall be and remain for the purpose of the education of the Cherokee Indians of Robeson county; acquire by purchase, donation, or otherwise, personal property for the purpose of said college. (Rev., s. 4236; 1887, c. 400, ss. 1, 6; 1911, cc. 168, ss. 1, 2, 215, s. 4; 1913, c. 123, ss. 4, 6; 1941, c. 323, s. 1; 1945, c. 817, s. 1; 1949, c. 58, s. 2; C. S. 5843.)

Editor's Note.—

The 1945 amendment inserted the words "at Pembroke, North Carolina" and rewrote the latter part of the section. Session Laws 1949, c. 58, s. 1, changed the name of the Pembroke State College for Indians to "Pembroke State College." And section 2 of said chapter amended this article accordingly.

§ 116-80. Supervision by State Board of Education.—The State Board of Education shall make all needful rules and regulations concerning the expenditure of funds, the selection of president, teachers and employees of said Pembroke State College. The State Board of Education shall control and supervise said school to the same extent substantially as that provided for the organization, control and supervision of the white normal and training schools; and it may change the organization to suit conditions in so far as the needs of the school and the funds appropriated demand such change. (1931, c. 276, s. 3; 1941, c. 323, s. 2; 1949, c. 58, s. 2.)

§ 116-81. Trustees.—The governor shall appoint eleven trustees for the Pembroke State College. The terms of office of nine of such trustees shall begin on April 1, 1937, and the terms of office of the remaining two shall begin on April 1, 1939. The terms of office of all trustees shall be four years and until the successors of such trustees are appointed and qualified. The trustees shall be such as the governor shall determine, after such inquiry and consideration as he may desire to make, to be fit, competent and proper for the discharge of all the duties that shall devolve upon them as such trustees. The governor shall fill all vacancies. The governor

shall transmit to the senate at the next session of the general assembly following their appointment the names of persons appointed by him for confirmation.

The governor shall have the power to remove any member of the board of trustees provided for in this section whenever in his opinion it is to the best interest of the state to remove such person, and the governor shall not be required to give any reason for such removal. (1925, c. 306, ss. 9, 13, 14; 1929, c. 238; 1931, c. 275; 1941, c. 323; 1949, c. 58, s. 2.)

§ 116-82. Chairman, election, duties and powers.—The trustees shall elect one of their own number chairman and such chairman shall have the duties and the powers that devolve upon the president of corporations in similar cases, or such as shall be defined by the trustees. (Rev., s. 4237; 1887, c. 400, s. 2; 1911, c. 168, s. 2; 1945, c. 817, s. 2; C. S. 5845.)

Editor's Note.—The 1945 amendment rewrote this section.

§ 116-83. Trustees to employ and discharge teachers and manage school.—The board of trustees of said Pembroke State College shall have the power to employ and discharge teachers, to prevent negroes from attending said school, and to exercise the usual functions of control and management of said school, their action being subject to the approval of the state board of education. (1911, c. 168, s. 3; 1941, c. 323, s. 1; 1949, c. 58, s. 2; C. S. 5846.)

§ 116-84. Department for teaching of deaf, dumb and blind.—The board of trustees of the Pembroke State College are hereby authorized, empowered and directed to employ some person trained in the teaching of the deaf and dumb or blind and to provide a department in said school in which said deaf, dumb and/or blind Indian children of Robeson and surrounding counties may be taught, no provisions being now made for the teaching of said children, the said teacher to be employed in the same manner and under the same rules and regulations governing other teachers in the said school. (1935, c. 435; 1941, c. 323, s. 1; 1949, c. 58, s. 2.)

§ 116-85. Admission and qualification of pupils.—In order to protect and promote and preserve for the education of all persons who are now and may hereafter be entitled to admission into the Pembroke State College, there shall be a committee composed of Indians, residents of Robeson county, as provided in chapter one hundred ninety-five, public laws of North Carolina, one thousand nine hundred and twenty-nine, and all questions affecting the race of those applying for admission into the Pembroke State College shall be referred to said committee, who shall have original and exclusive jurisdiction to hear and determine all questions affecting the race of any person, or persons, applying for admission into, or attending, the Pembroke State College, located at Pembroke, North Carolina.

An appeal shall lie from the action of said committee to the superior court of Robeson county, and such appeal shall be taken and perfected only in the following manner: A notice of appeal shall be given either at the time of the announcement of the action of the committee by parole, or at any time within fifteen (15) days from the time of the announcement of the action of the committee, by written notice, which shall state that the appellant does, in good faith, intend to appeal therefrom to the superior court of Robeson county, and said written notice must be served upon the chairman of said committee, or the secretary thereof, or upon two members of said committee. The appellant shall, also, at the time of the service of said notice, pay to the person upon whom the same is served, or to the secretary of the said committee if the notice is given by parole at the time of the announcement of the action of the committee, the sum of one dollar ($1.00) which sum shall be paid to the secretary of the said Indian committee. The secretary of the said Indian committee shall certify thereupon the proceedings with reference to the matter appealed from as a return to the notice of appeal, and the said written notice so served, or a statement thereof, in case the same is given by parole, and the certified record of the proceedings had by the said committee, and their action thereon, shall be filed by the appellant in the office of the clerk of the superior court of Robeson county and shall be docketed on the civil issue docket of the superior court of Robeson county in all respects and under such rules and limitations as now apply to appeals from justices of the peace, to the superior court. The record certified from said committee shall state fully the contentions of those favoring the admission to the Pembroke State College and the said cause shall be tried in the superior court, as herein provided, upon the issues raised upon said contentions and shall be tried in said superior court upon the issues raised upon these stated contentions and the action of the said committee.

The said Indian committee, through its chairman or secretary, shall have the same power to subpoena witnesses and compel their attendance as provided under the law relating to references.

The said Indian committee is now composed of M. L. Lowry, Burleigh Lowry, J. B. Oxendine, William Wilkins, George Locklear, Dawley Maynor, and Wiley Thompson, and the said members of the said committee shall serve until their successors are appointed in the following manner: Whenever a vacancy on said committee shall occur by death, resignation, or otherwise, the remaining members of said committee shall appoint a member of the Indian race, who is a resident of Robeson county, to fill such vacancy.

The qualifications for admission to the Pembroke State College, shall hereafter be as follows:

(a) Persons of the race of Cherokee Indians of Robeson county, who are descendants of those that were determined to constitute those who were within the terms and contemplation of chapter fifty-one, laws one thousand eight hundred and eighty-five, and within the census taken pursuant thereto by the county board of education of Robeson county, of either sex, resident in North Carolina, who are not under thirteen years of age.

(b) Persons who are Indians who are duly accredited members of any tribe of Indians whose Indian status is recognized and accepted by the bureau of Indian affairs in the department of the interior of the United States of America.

All such persons as may be found to be within

the classification specified in subsections (a) and (b) herein, may attend the Pembroke State College located at Pembroke, North Carolina, for the education of the Indian race only, and no others shall be admitted to said college.

The said Indian committee, as heretofore constituted, and as herein provided, shall observe strictly the provisions herein set out as to racial qualifications of all persons who desire to enter Pembroke State College at Pembroke, North Carolina, which is for the education of the Indian race only; and, in case there is any matter brought to their attention, in which the racial qualifications of any person who desires to enter, or who has already entered the said Pembroke State College is brought in question, the said committee shall require all those who seek to enter themselves, or to promote the entrance of such persons in said college, to prove and to establish to the satisfaction of the said committee that such persons who desire to enter are within the qualifications herein set out and are entitled to enter the said college and, unless the said committee shall be fully satisfied that such applicants are thus qualified, they shall enter upon their minutes an order refusing such admission and if they are so satisfied as to such persons' racial qualifications, they shall enter an order admitting such persons. No order admitting an applicant shall be held or construed to be a judgment constituting res adjudicata, and no rights shall flow therefrom that will interfere with the reopening of such order at any time by the said committee upon its own motion, or at the instance of others.

When an appeal is entered and prosecuted in the superior court from an order denying an admission to said college by said committee, the burden of proof shall be upon the applicants to prove and to establish (a) to the full satisfaction of the presiding judge that the evidence on behalf of the applicants, if believed, fully establishes their rights to admission under the terms of this law; and (b) to the full satisfaction of the judge that the evidence offered on behalf of the applicant is credible, and if the presiding judge shall be fully satisfied of these requirements, then he shall submit the issues arising upon said appeal to the jury, and the burden of proof, shall be upon the applicants throughout the said trial to establish to the full satisfaction of the jury that those who seek to enter the said college come within and have all the racial qualifications as set out herein, and unless the jury shall so find, they shall return a verdict against the applicants; and it shall be the duty of the presiding judge so to instruct the jury, whether requested so to do, or not. In case the presiding judge is not satisfied that the evidence on behalf of the applicants meets the requirements above set out, to the court's satisfaction, the said cause shall not be submitted to the jury, but said appeal shall be dismissed, and upon such dismissal the court shall enter a judgment denying the admission of such applicants to said college.

Whenever the said committee, or the court upon appeal, shall decide that any person, or persons are not entitled to admission into said college, then it shall not be lawful for any teacher, or any other person in authority at said college, to admit such person, or persons, to the said college.

Whenever the said committee shall decide that any person, or persons are not entitled to admission into said college, the said committee shall, in writing, at once notify the chairman of the board of trustees, or principal, or president of said college, by whatever name called, and after the receipt of such notice, such person, or persons, so denied admission shall be and remain ineligible for admission therein until said decision shall be reversed, either by the said committee or the superior court of Robeson county, or the supreme court on appeal, and shall not thereafter be admitted unless and until notice of such reversal is received.

Any reference in the laws of this state, either in public, public-local, or private acts, to other persons than those specified in subsections (a) and (b) herein, that prescribe qualifications for admission into said college, shall not be evidence in any hearing before the said Indian committee, or the superior court on appeal, and the issues in such trials, including any appeal to the supreme court, shall be and remain a question of fact, or an issue of fact solely, and the said committee and the said courts, shall determine whether the appeals for admission to said college come within the factual requirements of said subsections (a) and (b) herein, and such references in other laws pertaining to other persons, shall not be competent evidence in any of said hearings, or trials. (Rev., s. 4241; 1887, c. 400, s. 10; 1893, c. 515, s. 2; 1911, c. 215, ss. 2, 3; 1913, c. 123, s. 4; 1929, c. 195, s. 6; 1941, c. 323, s. 1; 1945, c. 817, s. 3; 1949, c. 58, s. 2; C. S. 5847.)

Editor's Note.—The 1945 amendment rewrote this section.

Art. 7. Negro Agricultural and Technical College of North Carolina.

§ 116-96. Powers of trustees.

The board of trustees is specifically authorized to direct the president of the board, for and on behalf of the Negro Agricultural and Technical College of North Carolina, to execute as principal a good and sufficient bond with sureties, securing to the federal government the safekeeping and return of all such federal property as the college may receive from the federal government for reserve officers training corps programs or for other similar purposes. (Rev., s. 4225; 1891, c. 549, s. 5; 1949, c. 130; C. S. 5830.)

Editor's Note.—The 1949 amendment added the above sentence at the end of this section. As the rest of the section was not changed it is not set out.

Art. 8. North Carolina College at Durham.

§ 116-99. Trustees of the North Carolina College at Durham.—There shall be twelve (12) trustees for the North Carolina College at Durham.

(1947, c. 189.)

Editor's Note.—The 1947 amendment substituted "North Carolina College" for "North Carolina College for Negroes" in the first sentence. As the rest of the section was not affected by the amendment it is not set out.

§ 116-100. Graduate courses for negroes; superintendent of public instruction as ex-officio member of boards of trustees.—The board of trustees of the North Carolina College at Durham is hereby authorized and empowered to establish from time to time such graduate courses in the liberal arts field as the demand may warrant, and

the funds of the said North Carolina College at Durham justify. Such courses so established must be standard.

The board of trustees of the North Carolina College at Durham is authorized and empowered to establish departments of law, pharmacy and library science at the above-named institution whenever there are applicants desirous of such courses. Said board of trustees of the North Carolina College at Durham may add other professional courses from time to time as the need for the same is shown, and the funds of the state will justify.

The board of trustees of the Negro Agricultural and Technical College at Greensboro may add graduate and professional courses in agricultural and technical lines as the need for same is shown and the funds of the state will justify, and establish suitable departments therein.

In the event there are negroes resident in the state properly qualified who can certify that they have been duly admitted to any reputable graduate or professional college and said graduate or professional courses are not being offered at the North Carolina College at Durham, then the board of trustees of the North Carolina College at Durham when said certification has been presented to them by the president and faculty of the North Carolina College at Durham, may pay tuition and other expenses for said student or students at such recognized college in such amount as may be deemed reasonably necessary to compensate said resident student for the additional expense of attending a graduate or professional school outside of North Carolina, and the budget commission may upon such presentation reimburse the North Carolina College at Durham the money so advanced. It is further provided that the student applying for such admission must furnish proof that he or she has been duly admitted to said recognized professional college. In the case of agricultural or technical subjects such students desiring graduate courses should apply to the Agricultural and Technical College at Greensboro, North Carolina. The general provisions covering students in the liberal arts field as stated in this section shall apply. In no event shall there be any duplication of courses in the two institutions.

Said boards of trustees are authorized, upon satisfactory completion of prescribed courses, to give appropriate degrees.

It is further stipulated that the superintendent of public instruction for North Carolina shall be a member ex officio of the boards of trustees of the North Carolina College at Durham and Agricultural and Technical College at Greensboro, and shall advise with the boards of trustees of said Colleges upon the courses to be offered, and the certification of students to other colleges. In case of needless duplication of graduate or professional courses in either college, the superintendent of public instruction shall be charged with the duty of reporting the same to the board of trustees of either institution, and the same shall be remedied. In case of failure to remedy the same, he shall report such failure to the budget bureau which will have the power and authority in its judgment to withhold any part of the appropriation from the institution so offending until said duplication is discontinued.

The board of trustees of the North Carolina College at Durham and the trustees of the Agricultural and Technical College, in the event that the budget of the institutions will not permit this section to be carried out on account of lack of funds, shall present the situation to the assistant director of the budget, the governor of North Carolina and the council of state; and they are hereby empowered to provide such funds as may be necessary to carry out the purposes of the same. (1939, c. 65; 1947, c. 189.)

Editor's Note.—The 1947 amendment substituted "North Carolina College at Durham" for "North Carolina College for Negroes."

Art. 10. State School for the Blind and the Deaf in Raleigh.

§ 116-109. Admission of pupils; how admission obtained.—The board of directors shall, on application, receive in the institution for the purpose of education, in the main department, all white blind children, and in the department for colored all colored deaf-mutes and blind children, residents of this state, not of confirmed immoral character, nor imbecile, nor unsound in mind, nor incapacitated by physical infirmity for useful instruction, who are between the ages of seven and twenty-one years: Provided, that pupils may be admitted to said institution who are not within the age limits above set forth, in cases in which the board of directors find that the admission of such pupils will be beneficial to them and in cases in which there is sufficient space available for their admission in said institution: Provided, further, that the board of directors is authorized to make expenditures out of any scholarship funds or other funds already available or appropriated, sums of money for the use of out of state facilities for any student who, because of peculiar conditions of race or disability, cannot be properly educated at the school in Raleigh. (Rev., s. 4191; Code, s. 2231; 1881, c. 211, s. 5; 1917, c. 35, s. 1; 1947, c. 375; 1949, c. 507; C. S. 5876.)

Editor's Note.—The 1947 amendment rewrote this section. The 1949 amendment added the last proviso.

Art. 12. The Caswell Training School.

§ 116-129. Persons admitted; county welfare officer and judge of the juvenile court or clerk of the superior court to approve. — There shall be received into the Caswell training school, subject to such rules and regulations as the board of directors may adopt, feeble-minded and mentally defective persons of any age when in the judgment of the officer of public welfare and the board of directors of said institution it is deemed advisable. All applications for admission must be approved by the local county welfare officer and the judge of the juvenile court or the clerk of the court of the county wherein said applicant resides. (1911, c. 87, s. 3; 1915, c. 266, s. 2; 1919, c. 224, s. 2; 1923, c. 34; C. S. 5898.)

Editor's Note.—

This section is set out in full to correct a typographical error appearing in original.

Art. 13A. Negro Training School for Feeble Minded Children.

§ 116-142.1. Creation; powers.—An institution, to be known and designated as "The Negro Training School for Feeble Minded Children," is

hereby created and such institution is authorized and empowered to accept and use donations and appropriations and do all other things necessary and requisite to be done in furtherance of the purpose of its organization and existence as herein set forth. (1945, c. 459, s. 1.)

§ 116-142.2. School controlled by North Carolina hospitals board of control.—The said institution shall be under the control of the North Carolina hospitals board of control, and whenever the words, "board," "directors" or "board of directors" are used in this article with reference to the governing board of said institution, the same shall mean the North Carolina hospitals board of control, and said board shall exercise the same powers and perform the same duties with respect to the negro training school for feeble minded children, as it exercises and performs with respect to the other institutions under its control, except as may in this article be otherwise provided. (1945, c. 459, s. 2.)

§ 116-142.3. Acquisition of real estate, erection of buildings, etc.—The board of directors, with the approval of the governor and the council of state, is authorized to secure by gift or purchase suitable real estate within the state at such place as the board may deem best for the purpose, and to erect or improve buildings thereon, for carrying out the purposes of the institution; but no real estate shall be purchased or any commitments made for the erection or permanent improvements of any buildings involving the use of state funds unless and until an appropriation for permanent improvements of the institution is expressly authorized by the general assembly; but this prohibition shall not prevent the directors from purchasing or improving real estate from funds that may be donated for the purpose. However, the board is authorized and directed to have prepared the necessary plans and specifications for such buildings as may be deemed necessary to establish said school, incurring the necessary expense of employing engineers and architects, which amount is hereby authorized to be paid out of the contingency and emergency fund of the state. (1945, c. 459, s. 3.)

§ 116-142.4. Temporary quarters.—In order to provide for the operation of the said institution prior to the time that permanent quarters can be established, the board of directors, with the approval of the governor and council of state, is authorized and empowered to enter into an agreement with any other state institution or agency for the temporary use of any state owned property which such other state institution or agency may be able and willing to divert for the time being from its original purpose; and any other state institution or agency, which may be in possession of real estate suitable for the purpose of the negro training school for feeble minded children upon such terms as may be mutually agreed upon. (1945, c. 459, s. 4.)

§ 116-142.5. Authority and powers of board; classification of inmates.—The board of directors shall have the general superintendence, management, and control of the institution; of the grounds and buildings, officers, and employees thereof; of the inmates therein and all matters relating to the government, discipline, contracts, and fiscal concerns thereof; and may make such rules and regulations as may seem to them necessary for carrying out the purposes of the institution. And the board shall have the right to keep, restrain, and control the inmates of the institution until such time as the board may deem proper for their discharge under such proper and humane rules and regulations as the board may adopt. The board shall endeavor as far as possible to classify the inmates and keep the different classes in separate wards or divisions, so as to produce the best results in their rehabilitation. (1945, c. 459, s. 5.)

§ 116-142.6. Superintendent.—The board of directors shall appoint a superintendent of the institution, who shall be a person of professional training and experience in the care and treatment of feeble minded persons, and may fix the compensation of the superintendent, subject to the approval of the budget bureau, and may discharge the superintendent at any time for cause. (1945, c. 459, s. 6.)

§ 116-142.7. Aims of school; application for admission.—The purpose and aim of the negro training school for feeble minded children is to segregate, care for, train, and educate, as their mentality will permit, the mental defectives among the negro children of the state; to disseminate knowledge concerning the extent, nature, and menace of mental deficiency and initiate methods for its control, reduction, and ultimate eradication and to that end, subject to such rules and regulations as the board of directors may adopt, there shall be received into said school feeble minded and mentally defective children of the negro race under the age of twenty-one years when, in the judgment of the board of directors, it is deemed advisable. Application for the admission of a child must be made by the father if the mother and father are living together, and if not, by the one having custody, or by a duly appointed guardian or by the superintendent of any county home or by person having management of any orphanage, association, society, children's home, or other institution for the care of children to which the custody of such child has been committed, in which event the consent of the parents shall not be required. The applications for admission must be approved by the superintendent of public welfare and the judge of juvenile court of the county wherein the applicant resides. (1945, c. 459, s. 7.)

§ 116-142.8. Regulation of admission; financial ability of parent or guardian.—The board of directors is hereby authorized and empowered to promulgate rules, regulations, and conditions of admission of pupils to the school and in cases in which the parents or guardian of a child are financially able, shall require such parents or guardian to transport the child to the school and make such contribution toward maintenance as may to the board of directors seem proper and just. (1945, c. 459, s. 8.)

§ 116-142.9. Discharge of inmate.—Any child entered into the school may be discharged therefrom or returned to his or her parents or guardian when, in the judgment of the directors, it will not be beneficial to such pupil or to the best interest of the school to be retained longer therein. (1945, c. 459, s. 9.)

§ 116-142.10. Offenses relating to inmates.— For the protection of the pupils residing in the school, it shall be unlawful:

(a) For any person to advise, or solicit, or to offer to advise or solicit, any inmate of said school to escape therefrom;

(b) For any person to transport, or to offer to transport, in automobile or other conveyances any inmate of said school to or from any place: Provided, this shall not apply to the superintendent and teachers of said school, or to employees or any other person acting under the superintendent and teachers thereof;

(c) For any person to engage in, or to offer to engage in, prostitution with any inmate of said school;

(d) For any person to receive, or to offer to receive, any inmate of said school into any place, structure, building or conveyance for the purpose of prostitution, or to solicit any inmate of said school to engage in prostitution;

(e) For any person to conceal an escaped inmate of said school, or to furnish clothing to an escaped inmate thereof to enable him or her to conceal his or her identity.

The term "inmate" as used in this section shall be construed to include any and all boys and girls, committed to, or received into, said negro training school for feeble minded children under the provisions of the law made and provided for the receiving and committing of persons to said school; and the term "prostitution" shall be construed to include the offering or receiving of the body for sexual intercourse.

Any person who shall knowingly and wilfully violate subsections (a) and (b) of this section shall be guilty of a misdemeanor, and shall be fined or imprisoned, or both fined and imprisoned, in the discretion of the court; any person who shall knowingly and wilfully violate subsections (c), (d) and (e) of this section shall be guilty of a felony, and shall be fined or imprisoned, or both fined and imprisoned, in the discretion of the court. (1945, c. 459, s. 10.)

Art. 14. General Provisions as to Tuition Fees in Certain State Institutions.

§ 116-143. State-supported institutions required to charge tuition fees.

In the event that said students are unable to pay the cost of tuition and required academic fees as the same may become due, in cash, the said several boards of trustees are hereby authorized and empowered, in their discretion, to accept the obligation of the student or students together with such collateral or security as they may deem necessary and proper, it being the purpose of this article that all students in state institutions of higher learning shall be required to pay tuition, and that free tuition be and the same is hereby abolished, except such students as are physically disabled, and are so certified to be by the vocational rehabilitation division of the state board for vocational education, who shall be entitled to free tuition in any of the institutions named in this article. (1933, c. 320, s. 1; 1939, cc. 178, 253; 1949, c. 586.)

Editor's Note.—The 1949 amendment inserted the words "and required academic fees" after the word "tuition" in line two of the second paragraph. As the first paragraph was not affected by the amendment it is not set out.

Art. 15. Educational Advantages for Children of World War Veterans.

§ 116-145. Free tuition, room rent and board; certificate from veterans commission and superior court clerk; statement from veterans administration.

In addition to the scholarship of free tuition above provided, there shall also be granted to any child needing financial assistance who is embraced within the classification covered by this section, free room rent and board in any of the state's educational institutions which provide rooms and eating halls operated by the institution, and such other items and institutional services as are embraced within the so-called institutional matriculation fees and other special fees and charges required to be paid as a condition to remaining in said institution and pursuing the course of study selected. All applicants desiring to share the benefits of this paragraph and who are qualified to meet the entrance requirements shall submit to the educational institution they desire to enter a certificate, of financial need duly executed by a representative of the North Carolina veterans commission, and by the clerk of the superior court of said county.

(1945, c. 723, s. 2.)

Editor's Note.—

The 1945 amendment struck out in the second sentence of the second paragraph the words "the commanding officer of the American Legion Post located within the same county as applicant" and substituted therefor the words "a representative of the North Carolina veterans commission." The amendment also struck out another provision relating to the American Legion Post. As only the second paragraph was affected by the amendment the rest of the section is not set out.

§ 116-147. Extension of benefits of article to certain children.—The benefits of the provisions of this article shall be extended to and may be availed of by any child whose father was a resident of the state of North Carolina at the time said father entered the armed forces of the United States and whose father was, prior to his death, or is at the time the benefits of this article are sought to be availed of, suffering from a service-connected disability of thirty per cent or more as rated by the United States veterans administration; provided, that such educational benefits to such children of partially disabled veterans shall be limited to not more than ten children in any one school year; and provided further, that if more than ten children of such partially disabled veterans apply for the benefits of this article in any one school year the North Carolina veterans commission shall designate the ten children who shall receive such benefits. (1941, c. 302; 1945, c. 723, s. 2; 1947, c. 522.)

Editor's Note.—The 1945 amendment substituted near the end of the section the words "North Carolina veterans commission" for the words "state superintendent of public instruction."

The 1947 amendment substituted "ten" for "five" in lines thirteen, fifteen and eighteen.

§ 116-148. Extension of benefits of §§ 116-145 through 116-147.—All of the benefits of the provisions of §§ 116-145, 116-146 and 116-147 shall be extended to and made available for the children of veterans of the armed forces of the United States of America who serve between December seventh, one thousand nine hundred and forty-one, the date of the declaration of war, and the date of the

legal termination of said war, wherever the disabilities of said veterans come within the limits of and the provisions of said section. (1937, c. 242, s. 2; 1939, c. 165, s. 2; 1943, c. 534, s. 2; 1945, c. 840.)

Editor's Note.—
The 1945 amendment made this section applicable to §§ 116-146 and 116-147.

§ 116-148.1. Extension of benefits of article to limited number of children.—All of the benefits of the provisions of G. S., § 116-145, G. S., § 116-146 and G. S., § 116-147 shall be extended to and may be availed of by any child whose father was a resident of the state of North Carolina at the time said father entered the armed forces of the United States, and whose father was, prior to his death, or is at the time the benefits of this article are sought to be availed of, suffering from one hundred per cent disability, as rated by the United States veterans' administration, and is drawing compensation therefor whether service connected or otherwise: Provided that such educational benefits to such children of such disabled veterans shall be limited to not more than fifteen (15) children in any one school year, and; provided further, that if more than fifteen (15) children of such one hundred per cent disabled veterans apply for the benefits of this article in any one school year, the North Carolina veterans' commission shall designate the fifteen (15) children who shall receive such benefits. (1949, c. 1040.)

Chapter 117. Electrification.

Art. 4. Telephone Service and Telephone Membership Corporations.

Sec.
117-29. Assistance from rural electrification authority in procuring adequate telephone service.
117-30. Telephone membership corporations.
117-31. Power of rural electrification authority to prosecute requested investigations.
117-32. Loans from federal agencies.

Art. 2. Electric Membership Corporations.

§ 117-6. Title of article.

Cited in Carolina Power, etc., Co. v. Bowman, 228 N. C. 319, 45 S. E. (2d) 531.

Art. 4. Telephone Service and Telephone Membership Corporations.

§ 117-29. Assistance from rural electrification authority in procuring adequate telephone service.—Any number of persons residing in any rural community who are not provided with telephone service or are inadequately provided with same, may make application to the rural electrification authority, upon such form as may be provided by the rural electrification authority for assistance in securing telephone service, showing the circumstances of such community or communities with regard to telephone service and the need therefor. The rural electrification authority shall make an investigation of the situation with respect to telephone service in such rural community or communities and if, upon investigation, it appears that such community or communities are not served with needed telephones or are inadequately served, the facts with reference thereto shall be collected by the rural electrification authority and the rural electrification authority shall promptly bring these facts to the attention of any telephone company serving the area, and shall make reasonable efforts to get such telephone company to provide the needed telephone service in such community or communities. (1945, c. 853, s. 1.)

§ 117-30. Telephone membership corporations.—In the event it is ascertained by the rural electrification authority that the community or communities referred to in the foregoing section are in need of telephone service and that there is a sufficient number of persons to be served to justify such services, and the telephone company serving in the area in which community or communities are located is unwilling to provide such service, a telephone membership corporation may be organized by such community or communities in the same manner that electric membership corporations may be formed under article two of this chapter, and all of the provisions of said article shall be applicable to the formation of telephone membership corporations and such corporations shall have all the authority, powers and duties of such a corporation when formed under the provisions of said article; except that the provisions of §§ 117-8 and 117-9 shall not be applicable to the organization of a telephone membership corporation, and except that such corporation so formed shall have no authority to engage in any business except the telephone business necessary to serving the community or communities prescribed in the application: Provided, that the references in said article to "power lines" or "energy" as to such telephone membership corporations shall be construed to mean telephone lines and telephone service. Provided further, that nothing herein shall be construed to authorize any telephone membership corporation organized hereunder to duplicate any line or lines, systems or other means by which adequate telephone service is being furnished; or to build or construct a telephone line, or telephone lines, or telephone systems, or otherwise to provide facilities or means of furnishing telephone service to any person, community, town or city then being adequately served by a telephone company, corporation or system; or to provide telephone service in an unserved area while any telephone company, corporation or system is acting in good faith and with reasonable diligence in arranging to provide adequate telephone service to such person, community, town or city. (1945, c. 853, s. 2.)

§ 117-31. Power of rural electrification authority to prosecute requested investigations.—In investigating the application filed with the rural electrification authority under the provisions of § 117-30 of this article, the rural electrification authority shall have the authority to employ such personnel as shall be necessary to conduct surveys; to contact the telephone companies serving the general area for the purpose of arranging for

extension of telephone service by such companies to such community or communities; to make estimates of the cost of the extension of telephone service to such community or communities; to call upon the utilities commission of the state to fix such rates as will be applicable to such service; to secure for such community or communities any assistance which may be available from the federal government by gift or loan or in any other manner; to investigate all applications for the creation of telephone membership corporations and determine and pass upon the question of granting authority to form such corporation; to provide forms for making such applications, and to do all things necessary to a proper determination of the question of the establishment of such telephone membership corporations in keeping with the provisions of this article; to act as agent for any such telephone membership corporation in securing loans or grants from any agency of the United States government; to prescribe rules and regulations and the necessary blanks for such membership corporations in making applications for grants or loans from any agency of the United States government; to do all other acts and things which may be necessary to aid the rural communities in North Carolina in securing telephone service. (1945, c. 853, s. 3.)

§ 117-32. Loans from federal agencies.—Whenever any corporation organized under the provisions of this article desires to secure a grant or loan from any agency of the United States government now in existence or hereafter authorized, it shall apply through the North Carolina rural electrification authority and not direct to the United States agency, and the said North Carolina rural electrification authority alone shall have the authority to make application for grants or loans to any such corporation. Nothing in this article shall be deemed to authorize any county, city or town to engage in the telephone business. (1945, c. 853, s. 4.)

Chapter 118. Firemen's Relief Fund.

Art. 1. Fund Derived from Fire Insurance Companies.

§ 118-6. Trustees appointed; organization.—In each town or city complying with and deriving benefits from the provisions of this article, there shall be appointed a local board of trustees, known as the trustees of the firemen's relief fund, to be composed of five members, two of whom shall be elected by the members of the local fire department, two elected by the mayor and board of aldermen or other local governing body, the remaining member to be named by the commissioner of insurance. Their selection and term of office shall be as follows:

a. The members of the fire department shall hold an election each January to elect their representatives to above board. In January 1950, the firemen shall elect one member to serve for two years and one member to serve for one year, then each year in January thereafter, they shall elect only one member and his term of office shall be for two years.

b. The mayor and board of aldermen or other local governing body shall appoint, in January 1950, two representatives to above board. One to hold office for two years and one to hold office for one year and each year in January thereafter they shall appoint only one representative and his term of office shall be for two years.

c. The commissioner of insurance shall appoint one representative in January each year and he shall serve for one year.

All of the above trustees shall hold office for their elected or appointed time, or until their successors are elected or appointed, and shall serve without pay for their services. They shall immediately after election and appointment organize by electing from their members a chairman and a secretary and treasurer, which two last positions may be held by the same person. The treasurer of said board of trustees shall give a good and sufficient bond in a sum equal to the amount of moneys in his hands, to be approved by the commissioner of insurance, for the faithful and proper discharge of the duties of his office. If the chief of the local fire department is not named on the board of trustees as above provided, he shall be ex officio a member, but without the privilege of voting on matters before the board. (1907, c. 831, s. 6; 1925, c. 41; 1945, c. 74, s. 1; 1947, c. 720; 1949, c. 1054; C. S. 6068.)

Editor's Note.—
The 1945 amendment added the last sentence. The 1947 amendment required the bond to be filed with the commissioner of insurance. And the 1949 amendment rewrote this section.

§ 118-7. Disbursements of funds by trustees.

3. To safeguard any fireman who has honorably served for a period of five years in the fire service of his city or town from ever becoming an inmate of any almshouse.

4. To provide for the payment of any fireman's assessment in the firemen's fraternal insurance fund of the state of North Carolina if the board of trustees finds as a fact that said fireman is unable to pay the said assessment by reason of disability. (1907, c. 831, s. 6; 1919, c. 180; Ex. Sess. 1921, c. 55; 1923, c. 22; 1925, c. 41; 1945, c. 74, s. 2; C. S. 6069.)

Local Modification.—Gastonia: 1945, c. 183; Mecklenburg: 1949, c. 728; city of Charlotte: 1947, c. 837; 1949, c. 728.

Editor's Note.—
The 1945 amendment struck out the words "or actually dependent upon charity" formerly appearing at the end of subsection 3, and rewrote subsection 4. As the rest of the section was not affected by the amendment it is not set out.

Cited in Carroll v. North Carolina State Firemen's Ass'n, 230 N. C. 436, 53 S. E. (2d) 524.

Art. 2. State Appropriation.

§ 118-12. Application of fund.

A fireman may not sue the State Firemen's Association on a claim for benefits under this chapter. Carroll v. North Carolina State Firemen's Ass'n, 230 N. C. 436, 53 S. E. (2d) 524.

A claim for hospital expenses incurred as a result of an injury received by a fireman in the course of his duties does not come within the benefits provided for members of the State Firemen's Association. Carroll v. North Carolina State Firemen's Ass'n, 230 N. C. 436, 53 S. E. (2d) 524.

Chapter 119. Gasoline and Oil Inspection and Regulation.

Art. 1. Lubricating Oils.

Sec.

119-6. Inspection duties devolve upon commissioner of agriculture.

Art. 3. Gasoline and Oil Inspection.

119-23. Administration by commissioner of agriculture; collection of fees by department of revenue and payment into state treasury; "gasoline and oil inspection fund."

Art. 4. Equipment for Handling, etc., Liquefied Petroleum Gases.

119-48. "Liquefied petroleum gas" defined.
119-49. Declaration of necessity for regulations; regulations of commissioner of agriculture.
119-50. Regulation of use of containers.
119-51. Punishment for violations.
119-52. Restrictions on local regulations.

Art. 1. Lubricating Oils.

§ 119-6. Inspection duties devolve upon commissioner of agriculture.—The duties of inspection required by §§ 119-1 through 119-5 shall be performed by the commissioner of agriculture. (1933, c. 214, s. 9; 1949, c. 1167.)

Editor's Note.—The 1949 amendment substituted "commissioner of agriculture" for "commissioner of revenue."

Art. 3. Gasoline and Oil Inspection.

§ 119-23. Administration by commissioner of agriculture; collection of fees by department of revenue and payment into state treasury; "gasoline and oil inspection fund."—Gasoline and oil inspection fees or taxes shall be collected by, and reports relating thereto shall be made to, the department of revenue. The administration of the gasoline and oil inspection law shall otherwise be administered by the commissioner of agriculture. All moneys received under the authority of the inspection laws of this state shall be paid into the state treasury and kept as a distinct fund, to be styled "The Gasoline and Oil Inspection Fund," and the amount remaining in such fund at June thirtieth and December thirty-first of each year shall be turned over to the general fund by the state treasurer. (1937, c. 425, s. 6; 1941, c. 36; 1949, c. 1167.)

Editor's Note.—The 1949 amendment rewrote the former first sentence to appear as the present first two sentences. The amendatory act, which specifically amended certain statutes, provides: "The administration of the Gasoline and Oil Inspection Law is hereby transferred from the department of revenue to the department of agriculture. The collection of the gasoline and oil inspection fee or tax shall still be made by the department of revenue in the manner in which it is now being collected. In order to effectuate the purposes of this act all statutes in which administrative duties relating to the Gasoline and Oil Inspection Law are imposed upon the commissioner of revenue are hereby amended so as to impose such duties upon the commissioner of agriculture."

§ 119-24. Report of operation and expenses to general assembly.—The commissioner of revenue shall include in his report to the general assembly an account of the operation and expenses of his phase of the gasoline and oil inspection law and the commissioner of agriculture shall include in his report to the general assembly an account of his portion of the operation and expenses of the gasoline and oil inspection law. (1937, c. 425, s. 7; 1949, c. 1167.)

Editor's Note.—The 1949 amendment rewrote this section.

§ 119-25. Inspectors, clerks and assistants.—The commissioner of revenue and the commissioners of agriculture, respectively, shall appoint and employ such number of inspectors, clerks and assistants as may be necessary to administer and effectively enforce all the provisions of the gasoline and oil inspection law with the administration or enforcement of which each said commissioner is charged.

(1949, c. 1167.)

Editor's Note.—The 1949 amendment rewrote the first sentence. As the rest of the section was not affected by the amendment it is not set out.

§ 119-26. Gasoline and oil inspection board created.—In order to more fully carry out the provisions of this article there is hereby created a gasoline and oil inspection board of five members, to be composed of the commissioner of agriculture, the director of the gasoline and oil inspection division, and three members to be appointed by the governor, who shall serve at his will. The commissioner of agriculture and the director of the gasoline and oil inspection division shall serve without additional compensation.

(1949, c. 1167.)

Editor's Note.—The 1949 amendment substituted "commissioner of agriculture" for "commissioner of revenue" in the first two sentences. As the rest of the section was not affected by the amendment it is not set out.

§ 119-28. Regulations for sale of substitutes.—All materials, fluids, or substances offered or exposed for sale, purporting to be substitutes for or motor fuel improvers, shall, before being sold, exposed or offered for sale, be submitted to the commissioner of agriculture for examination and inspection, and shall only be sold or offered for sale when properly labeled with a label, the form and contents of which label has been approved by the said commissioner of agriculture in writing. (1937, c. 425, s. 12; 1949, c. 1167.)

Editor's Note.—The 1949 amendment substituted "agriculture" for "revenue" in lines five and nine.

§ 119-29. Rules and regulations of board available to interested parties.—It shall be the duty of the commissioner of agriculture to make available for all interested parties the rules and regulations adopted by the gasoline and oil inspection board for the purpose of carrying into effect the laws relating to the inspection and transportation of petroleum products. (1937, c. 425, s. 13; 1949, c. 1167.)

Editor's Note.—The 1949 amendment substituted "agriculture" for "revenue" in line two.

§ 119-30. Establishment of laboratory for analysis of inspected products.—The commissioner of agriculture is authorized to provide for the analysis of samples of inspected articles by establishing a laboratory under the gasoline and oil inspection division for the analysis of inspected products. (1937, c. 425, s. 14; 1949, c. 1167.)

Editor's Note.—The 1949 amendment substituted "agriculture" for "revenue" in line two.

§ 119-31. Payment for samples taken for in-

spection.—The gasoline and oil inspectors shall pay at the regular market price, at the time the sample is taken, for each sample obtained for inspection purposes when request for payment is made: Provided, however, that no payment shall be made any retailer or distributor unless said retailer or distributor or his agent shall sign a receipt furnished by the commissioner of agriculture showing that payment has been made as requested. (1937, c. 425, s. 15; 1949, c. 1167.)

Editor's Note. — The 1949 amendment substituted "commissioner of agriculture" for "commissioner of revenue."

§ 119-32. Powers and authority of inspectors. —The gasoline and oil inspectors shall have the right of access to the premises and records of any place where petroleum products are stored for the purpose of examination, inspection and/or drawing of samples, and said inspectors are hereby vested with the authority and powers of peace and police officers in the enforcement of motor fuel tax and inspection laws throughout the state, including the authority to arrest, with or without warrants, and take offenders before the several courts of the state for prosecution or other proceedings, and seize or hold or deliver to the sheriff of the proper county all motor or other vehicles and all containers used in transporting motor fuels and/or other liquid petroleum products in violation of or without complying with the provisions of this article or the rules, regulations or requirements of the commissioner of agriculture and/or the gasoline and oil inspection board and also all motor fuels contained therein.

(1949, c. 1167.)

Editor's Note. — The 1949 amendment substituted "commissioner of agriculture" for "commissioner of revenue" near the end of the first sentence. As the rest of the section was not affected by the amendment it is not set out.

§ 119-33. Investigation and inspection of measuring equipment; devices calculated to falsify measures.—The gasoline and oil inspectors shall be required to investigate and inspect the equipment for measuring gasoline, kerosene, lubricating oil, and other liquid petroleum products. Said inspectors shall be under the supervision of the commissioner of agriculture, and are hereby vested with the same power and authority now given by law to inspectors of weights and measures, in so far as the same may be necessary to effectuate the provisions of this article. The rules, regulations, specifications and tolerance limits as promulgated by the national conference of weights and measures, and recommended by the United States bureau of standards, shall be observed by said inspectors in so far as it applies to the inspection of equipment used in measuring gasoline, kerosene, lubricating oil and other petroleum products. Inspectors of weights and measures appointed and maintained by the various counties and cities of the state shall have the same power and authority given by this section to inspectors under the supervision of the commissioner of agriculture. In all cases where it is found, after inspection, that the measuring equipment used in connection with the distribution of such products is inaccurate, the inspector shall condemn and seize all incorrect devices which in his best judgment are not susceptible of satisfactory repair, but such as are incorrect, and in his best judgment may be repaired, he shall mark or tag as "condemned for repairs" in a manner prescribed by the commissioner of agriculture.

(1949, c. 1167.)

Editor's Note.—The 1949 amendment struck out the words "commissioner of revenue" wherever they appeared in the first five sentences of this section and inserted in lieu thereof the words "commissioner of agriculture." As the rest of the section was not affected by the amendment it is not set out.

§ 119-34. Responsibility of retailers for quality of products.—The retail dealer shall be held responsible for the quality of the petroleum products he sells or offers for sale: Provided, however, that the retail dealer shall be released if the results of analysis of a sealed sample taken in a manner prescribed by the commissioner of agriculture at the time of delivery, and in the presence of the distributor or his agent, shows that the product delivered by the distributor was of inferior quality. It shall be the duty of the distributor or his agent to assist in sampling the product delivered. (1937, c. 425, s. 18; 1949, c. 1167.)

Editor's Note. — The 1949 amendment substituted "commissioner of agriculture" for "commissioner of revenue."

§ 119-36. Certified copies of official tests admissible in evidence.—A certified copy of the official test of the analysis of any petroleum product, under the seal of the commissioner of agriculture, shall be admissible as evidence of the fact therein stated in any of the courts of this state on the trial of any issue involving the qualities of said product. (1937, c. 425, s. 20; 1949, c. 1167.)

Editor's Note. — The 1949 amendment substituted "commissioner of agriculture" for "commissioner of revenue."

§ 119-39. Violation a misdemeanor. — Unless another penalty is provided in this article, any person violating any of the provisions of this article or any of the rules and regulations of the commissioner of revenue or the commissioner of agriculture and/or the gasoline and oil inspection board shall be guilty of a misdemeanor, and upon conviction shall be fined not more than one thousand dollars or be imprisoned for not more than twelve months, or both, in the discretion of the court. (1937, c. 425, s. 23; 1949, c. 1167.)

Editor's Note. — The 1949 amendment inserted the words "or the commissioner of agriculture."

§ 119-40. Manufacturers to notify commissioner of shipments.—Where oil or gasoline is shipped in tanks, cars, or other large containers, the manufacturer or jobber shall give notice to the commissioner of agriculture of their shipment, with the name and address of the person, company, or corporation to whom it is sent and the number of gallons, on the day the shipment is made. (1917, c. 166, s. 4; 1933, c. 214, s. 8; 1949, c. 1167; C. S. 4856.)

Editor's Note. — The 1949 amendment substituted "commissioner of agriculture" for "commissioner of revenue."

§ 119-41. Persons engaged in transporting are subject to inspection laws.—The owner or operator of any motor vehicle using the highways of this state or the owner or operator of any boat using the waters of this state transporting into, out of or between points in this state any gasoline or liquid motor fuel taxable in this state and/or any liquid petroleum product that is or may hereafter be made subject to inspection laws

of this state shall make application to the commissioner of agriculture on forms to be provided by him for a liquid fuel carrier's permit. Upon receipt of said application, together with a signed agreement to comply with the provisions of the act and/or acts relating to the transportation of petroleum products subject to the motor fuel tax and/or inspection laws, the commissioner of agriculture shall, without any charge therefor, issue a numbered liquid fuel carrier's permit to the owner or operator of each motor vehicle or boat intended to be used in such transportation.

(1949, c. 1167.)

Editor's Note. — The 1949 amendment substituted "commissioner of agriculture" for "commissioner of revenue" in the first two sentences. As the rest of the section was not affected by the amendment it is not set out.

§ 119-42. Persons engaged in transporting required to have in possession an invoice, bill of sale or bill of lading.

Such person engaged in transporting said motor fuels and/or other petroleum products shall, at the request of any agent of the commissioner of agriculture, exhibit for inspection such papers or documents immediately, and if said person fails to produce said papers or documents or if, when produced, they fail to clearly disclose said information, the agent of the commissioner of agriculture shall hold for investigation the vehicle and contents thereof.

(1949, c. 1167.)

Editor's Note. — The 1949 amendment substituted "commissioner of agriculture" for "commissioner of revenue" in the second sentence. As only this sentence was changed, the rest of the section is not set out.

§ 119-43. Display required on containers used in making deliveries.—Every person delivering at wholesale or retail any gasoline in this state shall deliver the same to the purchaser only in tanks, barrels, casks, cans, or other containers having the word "Gasoline" or the name of such other like products of petroleum, as the case may be, in English, plainly stenciled or labeled in colors to meet the requirements of the regulations adopted by the commissioner of agriculture and/or the gasoline and oil inspection board.

(1949, c. 1167.)

Editor's Note. — The 1949 amendment substituted "commissioner of agriculture" for "commissioner of revenue" near the end of the first sentence. As the rest of the section was not affected by the amendment it is not set out.

§ 119-44. Registration of exclusive industrial users of naphthas and coal tar solvents.—All persons who are exclusive industrial users of naphtha and coal tar solvents, and who are not engaged in the business of selling motor fuel, may register with the commissioner of agriculture as an exclusive industrial user of naphthas and coal tar solvents upon the presentation of satisfactory evidence of such fact to said commissioner and the filing of a surety bond in approved form not to exceed the sum of one thousand dollars. Such registration, properly evidenced by the issuance of a certificate of registration as an exclusive industrial user of naphthas and coal tar solvents, will thereafter, and until such time as certificate of registration may be canceled by the commissioner of agriculture, permit licensed distributors of motor fuel in this state to sell naphthas and coal tar solvents to the holder of such certificate of registration upon the proper execution of an official certificate of industrial use in lieu of the collection of the motor fuel tax: Provided, however, that no licensed distributor of motor fuel shall sell gasoline tax free under the conditions of this article: Provided, further, that the rules and regulations adopted by the commissioner of agriculture for the proper administration and enforcement of this article shall be strictly adhered to by the holder of the certificate of registration under penalty of cancellation of such certificate for violation of or non-observance of such rules. (1937, c. 425, s. 27; 1949, c. 1167.)

Editor's Note. — The 1949 amendment substituted "commissioner of agriculture" for "commissioner of revenue."

Art. 4. Equipment for Handling, etc., Liquefied Petroleum Gases.

§ 119-48. "Liquefied petroleum gas" defined.— As used in this article, the term "liquefied petroleum gas" shall mean and include any material which is composed predominantly of any of the following hydrocarbons, or mixtures of the same: propane, propylene, butanes (normal butane or isobutane), and butylenes. (1947, c. 822, s. 1.)

§ 119-49. Declaration of necessity for regulations; regulations of commissioner of agriculture. —It is hereby declared that the regulation of the design, construction, location, installation and operation of equipment for the storing, handling, transporting by tank truck, tank trailer or otherwise and the utilization of liquefied petroleum gases and the specification of the odorization of said gases and the degree thereof are matters necessary to the preservation of the public health and safety. To that end, the commissioner of agriculture shall make and promulgate regulations setting forth minimum general standards covering the design, construction, location, installation and operation of the equipment for storing, handling, transporting by tank truck, tank trailer or otherwise and the utilization of liquefied petroleum gases and the specification of the odorization of said gases and the degree thereof. Said regulations shall be such as are reasonably necessary for the protection, health, welfare and safety of the public and persons using such materials and shall be in substantial conformity with the generally accepted standards of safety concerning the same and in conformity with the published standards of the National Board of Fire Underwriters and as recommended by the National Fire Protection Association. Such regulations when adopted by the commissioner of agriculture shall be filed in the office of the secretary of state as provided by law. (1947, c. 822, s. 2; 1949, c 1294.)

Editor's Note. — The 1949 amendment substituted "commissioner of agriculture" for "commissioner of insurance." The amendatory act provides: "The administration of the equipment for handling, etc., liquefied petroleum gases, the same being article 4 of chapter 119 of the General Statutes of North Carolina, is hereby transferred from the department of insurance to the department of agriculture. In order to effectuate the purpose of this act, all statutes in which administrative duties relating to equipment for handling, etc., of liquefied petroleum gases are imposed upon the commissioner of insurance are hereby amended so as to impose such duties upon the commissioner of agriculture."

§ 119-50. Regulation of use of containers.—No person, firm or corporation other than the owner or those authorized by the owner so to do shall

sell, fill, refill, deliver or permit to be delivered, or use in any manner any liquefied petroleum gas container or receptacle for any gas, compound, or for any other purpose whatsoever. (1947, c. 822, s. 3.)

§ 119-51. Punishment for violations.—It shall be unlawful for any person, firm, association or corporation on or after the effective date of this article to violate any of the provisions hereof or of the lawful regulations of the commissioner of agriculture made pursuant hereto. Any person, firm, association or corporation violating any provisions of this article or said regulations hereof shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00) or by imprisonment or by both fine and imprisonment in the discretion of the court. (1947, c. 822, s. 4; 1949, c. 1294.)

Editor's Note. — The 1949 amendment substituted "commissioner of agriculture" for "commissioner of insurance."

§ 119-52. Restrictions on local regulations.—No municipality or other political subdivision shall adopt or enforce any regulation in conflict with the provisions of this article or with the regulations promulgated pursuant hereto by the commissioner of insurance. (1947, c. 822, s. 5.)

Cross Reference.—See note to § 119-49.

Chapter 120. General Assembly.

Art. 10. Influencing Public Opinion or Legislation.

Sec.

Art. 6. Acts and Journals.

§ 120-22. Enrollment of acts.—All bills passed by the general assembly shall be enrolled for ratification under the supervision and direction of the secretary of state. Prior to enrolling any bill the secretary of state shall substitute the corresponding arabic numerals for any date or for any section number of the General Statutes or of any act of the general assembly which is written in words. All bills so enrolled shall be typewritten and carefully proof-read. The secretary of state is authorized and empowered to secure such equipment as may be required for this purpose, and from time to time during the sessions of the general assembly, to employ such number of competent and trained persons, not to exceed twelve at any one time, as may be necessary to perform this service. One of such number so employed shall be designated as chief enrolling clerk, and shall receive not to exceed the sum of six dollars ($6.00) per day for his services, and each of the others so employed shall receive not to exceed the sum of five dollars ($5.00) per day for his services: Provided, that when the business of the general assembly has reached such a proportion that the employees authorized are unable to keep up with the enrollment of bills as they are passed, the secretary of state is hereby authorized to use the employees in the various state departments before and after office hours in the enrollment of such bills, and they shall be paid one cent per line upon certification made to the state auditor by the secretary of state. (Rev., s. 4422; 1903, c. 5; 1933, c. 173; 1945, c. 416, s. 1; 1947, c. 378; C. S. 6108.)

Editor's Note.—

The 1945 amendment substituted the present proviso at the end of this section for the former proviso which authorized the rules committees to increase or decrease the number of persons employed in the enrollment of bills.

Section 2 of the amendatory act provides that state employees borrowed and used to do work under the proviso shall not be entitled to receive any additional compensation for services which may be performed during their regular office hours.

The 1947 amendment inserted the second sentence.

Art. 7. Employees.

§ 120-33. Compensation of employees of the general assembly; mileage.—The principal clerks of each house and the chief enrolling clerk shall be allowed the sum of ten dollars per day during the session of the general assembly, and mileage at the rate of ten cents per mile from their homes to Raleigh and return. The journal clerks, calendar clerks, chief engrossing clerks, reading clerks, sergeants-at-arms, and one assistant calendar clerk in each house shall be allowed the sum of eight dollars per day during the session of the general assembly, and mileage at the rate of ten cents per mile from their homes to Raleigh and return. The secretary to the speaker of the house of representatives, the secretary to the lieutenant-governor, the clerks to the finance and appropriation committees of both houses, the assistant clerks to the principal clerks and the assistant sergeant-at-arms, of the general assembly, and the assistants appointed by the secretary of state to supervise the enrollment of bills and resolutions, shall receive the sum of six dollars per day, and mileage at the rate of ten cents per mile from their homes to Raleigh and return. The clerks to all committees which by the rules of either house of the general assembly are entitled to clerks, except as hereinbefore provided, and the assistants to the engrossing clerks shall receive compensation on the basis of their qualifications, according to the following classification: Six dollars ($6.00) per day for secretaries who are stenographers and typists; five dollars ($5.00) per day for typists, and mileage at the rate of five cents (5c) per mile from their homes to Raleigh and return. The chief pages of the house of representatives and the senate shall receive four dol-

lars per day during the session of the general assembly and mileage at the rate of five cents a mile from their homes to Raleigh and return. All other pages authorized by either of the two houses shall receive three dollars per day during the session of the general assembly and mileage at the rate of five cents a mile from their homes to Raleigh and return. All laborers of the first-class authorized by law or the rules of either the house of representatives or the senate shall receive three dollars and one-half per day during the session of the general assembly and all mileage at the rate of five cents per mile from their homes to Raleigh and return, and laborers of the second class the sum of three dollars per day and mileage at the rate of five cents per mile from their homes to Raleigh and return. The chaplain of each house shall receive four dollars and fifty cents per day. (1925, c. 72, s. 1; 1929, c. 3, s. 1; 1933, c. 6, s. 1; 1937, cc. 1, 272; 1943, c. 393; 1945, c. 9.)

Editor's Note.—
The 1945 amendment struck out the words "the assistants to the engrossing clerks" formerly appearing after the word "houses" in the fourth line of the third sentence and rewrote the fourth sentence.

§ 120-35. Principal clerks; extra compensation.—The principal clerks of the general assembly shall be allowed seven hundred fifty dollars as a compensation for indexing the journals of their respective houses, and five hundred dollars each for extra work and for services required to be performed by them after the adjournment of each session of the general assembly, including the transcribing of a copy of their respective journals, which shall be filed in the office of the secretary of state. (Rev., s. 2732; Code, s. 2868; 1866-7, c. 71; 1881, c. 292; 1911, c. 116; 1919, c. 170; 1921, c. 160; 1947, c. 998; C. S. 3855.)

Editor's Note.—The 1947 amendment substituted "seven hundred fifty" for "four hundred" in line two.

Art. 10. Influencing Public Opinion or Legislation.

§ 120-48. Registration of persons and organizations engaged principally in influencing public opinion or legislation.—Every person, firm, corporation, association, or organization, whether by or through its agents, servants, employees or officers, who or which is principally engaged in the activity or business of influencing public opinion and/or legislation in this state shall, prior to engaging in such activity or business, cause his, or its name to be entered upon a docket in the office of the secretary of state of North Carolina, as hereinafter provided. (1947, c. 891, s. 1.)

Editor's Note.—For comment on this article, see 25 N. C. Law Rev. 458.

§ 120-49. Information to be shown on docket.—The following information shall be entered in such docket:

The name, business address of the principal and all branch offices of the applicant; the purpose or purposes for which such corporation, association, or organization was formed; the names of the principal officers, the names and addresses of its agents, servants, employees or officers by or through which it intends to carry on such activity or business in this state; a financial statement showing the assets and liabilities of the applicant and the source or sources of its income, itemizing in detail any contributions, donations, gifts or other income and from what source or sources received. (1947, c. 891, s. 2.)

§ 120-50. Docket kept by secretary of state; record open to public.—The secretary of state shall prepare and keep in his office the docket containing the information required by § 120-49. Such record shall be a public record and shall be open to the inspection of any citizen at any time during the regular business hours of the office of the secretary of state. (1947, c. 891, s. 3.)

§ 120-51. Certain localized activities exempted.—This article shall not apply to any person, firm, corporation, or organization who or which is engaged in influencing public opinion on any matter which is applicable only to one county or one county and a county contiguous thereto. (1947, c. 891, s. 4.)

§ 120-52. Failure to comply with article made misdemeanor.—Any person, firm, corporation, association, or organization who or which shall engage in the activity or business herein described without first causing his, her, or its name to be entered upon such docket in the manner and form prescribed in this article shall be guilty of a misdemeanor and shall, upon conviction, be fined or imprisoned in the discretion of the court. (1947, c. 891, s. 5.)

§ 120-53. Time for registration by persons presently engaged in regulated activities.—All persons engaged in the activity or business herein described, upon the date of the ratification of this article, shall, within thirty days thereafter, cause his, her, or its name to be entered upon the docket in the office of the secretary of state of North Carolina in the manner and form prescribed by this article. (1947, c. 891, s. 6.)

The act from which this article was codified was ratified on April 5, 1947.

§ 120-54. Annual registration required.—Every person, firm, corporation, or organization engaging in the activity or business prescribed in this article shall, on or before the first day of January, 1948, and annually thereafter, again cause his, her, or its name to be entered upon such docket in the manner and form prescribed in this article. (1947, c. 891, s. 7.)

§ 120-55. Exemption of newspapers, radio, political candidates, etc.—This article shall not apply to persons, firms, corporations, or organizations who carry on such activity or business solely through the medium of newspapers, periodicals, magazines, or other like means which are or may be admitted under U. S. Postal regulations as second-class mail matter in the United States mails as defined in Title 39, Section 224, United States Code Annotated, and/or through radio, television or facsimile broadcast operations. This article shall also not apply to any person, firm, corporation, candidate in any political election campaign committee, or any committee, association, organization, or group of persons who or which have filed information as required by the Corrupt Practices Act of 1931. (1947, c. 891, s. 8.)

Chapter 121. State Department of Archives and History.

Sec.
121-1. Name.
121-2. Executive board.
121-3. Director; salary; removal.
121-4. Duties of the department.
121-5. Powers of the executive board.
121-6. Preservation of records; copies furnished.
121-7. Custody of emergency relief administration records; use of emergency relief administration funds.

§ 121-1. Name.—The archival and historical agency of the state of North Carolina shall be the state department of archives and history. (1945, c. 55.)

Editor's Note.—
The 1945 amendment rewrote this chapter.

§ 121-2. Executive board. — The department shall be governed by an executive board, composed of the seven persons heretofore appointed and now serving as the governing board of the department. At the expiration of the current term of each member, his successor shall be appointed by the governor for a term of six years and until his successor shall be appointed and qualified. Thereafter all members shall be appointed by the governor and their terms shall be for six years and until their successors shall be appointed and qualified. Four members of the board shall constitute a quorum. In case of a vacancy in any of the above terms, the person appointed to fill such vacancy shall serve only for the unexpired term and until his successor shall be appointed and qualified. The members of the board shall serve without salary, but shall be allowed their actual expenses when attending to their official duties, to be paid out of any funds appropriated for the maintenance of the department. (Rev., s. 4539; 1903, c. 767, s. 2; 1907, c. 714, s. 1; 1941, c. 306; 1943, c. 237; 1945, c. 55; C. S. 6141.)

§ 121-3. Director; salary; removal.—The executive board shall elect a director of the department whose duty it shall be, under the supervision of the board, to direct and administer the work and activities of the department as defined and specified by law. The director shall have authority, with the approval of the board, to make rules and regulations covering the administration and use of the materials in the custody of the department. He shall serve at a salary to be fixed by the board and approved by the budget bureau. The board, after proper notice and hearing, may remove the director from office for neglect of duty, malfeasance, misfeasance, or nonfeasance in office. The director may employ such other qualified persons as may be needed to perform the work and carry out the duties of the department, as defined by law. (1945, c. 55.)

§ 121-4. Duties of the department.—The following shall be the duties of the department:

(1) To preserve and administer such public archives as shall be transferred to its custody, and to collect, preserve, and administer private and unofficial historical records and relics relating to the history of North Carolina and the territory included therein from the earliest times. The department shall carefully protect and preserve such materials from deterioration, mutilation, loss, or destruction, and, when feasible, shall collate, classify, and file them according to approved archival practices, and shall permit them, at reasonable times and under the supervision of the department, to be inspected, examined, or copied: Provided, any materials placed in the keeping of the department under special terms or conditions restricting their use shall be made accessible only in accordance with such terms or conditions;

(2) To promote and encourage throughout the state the preservation and proper care of archives, historical manuscripts, and other historical materials;

(3) To encourage and assist in the proper marking and preservation of places of importance in the history of the state;

(4) To have materials on the history of North Carolina properly edited, published as other state printing, and distributed under the direction of the department;

(5) To maintain a historical museum, to collect and preserve therein artifacts, curios, relics, and any other objects whatsoever which are of historical significance to North Carolina, and when feasible to display such objects. The museum shall be free to all visitors at reasonable times to be determined by the department;

(6) To make to the governor a biennial report of its receipts and expenditures, its activities and its needs, including recommendations for improving and broadening its services to the state, to be transmitted by the governor to the general assembly;

(7) To cooperate with and assist, in so far as practicable, historical and other organizations engaged in activities in the fields of North Carolina archives and history. (Rev., ss. 4540, 4541; 1907, c. 714, s. 2; 1911, c. 211, s. 6; 1925, c. 275, s. 11; 1943, c. 237; 1945, c. 55; C. S. 6142.)

Cross Reference.—As to official records of inoperative boards and agencies, see § 143-268.

§ 121-5. Powers of the executive board.—The following shall be the powers of the board:

(1) To adopt a seal for use in official business;

(2) To adopt rules for its own government not inconsistent with the provisions of the laws of the state of North Carolina;

(3) To fix a reasonable price for any of its publications and to devote the revenue arising from such sales to the work of the department;

(4) To control the expenditure of such funds as may be appropriated for the department, subject to the provisions of the executive budget act;

(5) To accept gifts, bequests, and endowments for purposes which fall within the general legal powers and duties of the department. Unless otherwise specified by the donor or legator, the board may either expend both the principal and interest of any gift or bequest or may invest such funds, in whole or in part, in such securities as those in which the state sinking fund may be invested. (1907, c. 714, s. 3; 1935, c. 40; 1943, c. 237; 1945, c. 55; C. S. 6143.)

§ 121-6. Preservation of records; copies furnished.—Any state, county, town, or other public

official is hereby authorized and empowered to turn over to the department any state, county, town, or other public records no longer in current official use, and the department is authorized in its discretion to accept such records, and having done so, shall provide for their administration and preservation. When such records have been thus surrendered, photographs, photocopies, microfilms, typescripts, manuscripts, or other copies of them shall be made and certified by such person or persons as may be authorized by the executive board for this purpose, under the seal of the department, upon application of any person, which certification shall have the same force and effect as if made by the official or agency by which the records were transferred to the department, and the department may charge reasonable fees for such copies.

When the custodian of official state records certifies to the director of the state department of archives and history that such records have no further use or value for official or administrative purposes and when the state department of archives and history states that such records appear to have no further use or value for historical research or other scholarly purposes, then such records may be destroyed or otherwise disposed of by the agency having custody of them.

When the custodian of any official records of any county, city, town, or other governmental agency certifies to the state department of archives and history that such records have no further use or value for official business and when the director of the state department of archives and history states that such records appear to have no further use or value for historical research or other scholarly purposes, then such records may be authorized by the governing body of said county, city, town, or other governmental agency to be destroyed or otherwise disposed of by the agency having custody of them. The executive board of the department is hereby authorized and empowered to make such orders, rules, and regulations as may be necessary and proper to carry into effect the provisions of this section. (1907, c. 714, s. 5; 1939, c. 249; 1943, c. 237; 1945, c. 55; C. S. 6145.)

§ 121-7. Custody of emergency relief administration records; use of emergency relief administration funds.—The emergency relief administration records of North Carolina shall be turned over to the state department of archives and history to be arranged, classified, and made available for public investigation under the rules and regulations of said department in accordance with the other provisions of this law. When the department deems it advisable, microfilms, photocopies, or other copies of these records may be made and preserved in lieu of the original records, which may thereupon be destroyed or otherwise disposed of.

For the purpose of carrying out the provisions of this section the governor and council of state shall allot the remaining funds granted to the state of North Carolina for the emergency relief administration or any such funds hereafter accruing from claims, collections, or otherwise, to the state department or archives and history, to be used in arranging, classifying, microfilming, photocopying or otherwise copying, and making available to the public the said records in accordance with the purpose of the funds. The said funds are to be disbursed in accordance with and under the terms of the executive budget act.

Any balance remaining in the said funds after these records are arranged, classified, and made available to the public by the state department of archives and history shall revert to the state board of charities and public welfare. (1941, c. 252; 1943, c. 237; 1945, c. 55.)

Chapter 122. Hospitals for the Mentally Disordered.

Art. 1. Organization and Management.

Art. 2. Officers and Employees.

Art. 3. Admission of Patients.

Art. 1. Organization and Management.

§ 122-1. Incorporation and names.—The hospital for the mentally disordered, located near Morganton, shall be and remain a corporation under this name: The state hospital at Morganton. The hospital for the mentally disordered, located near Raleigh, shall be and remain a corporation under this name: The state hospital at Raleigh. The hospital for the mentally disordered, located near Goldsboro, shall be and remain a corporation under this name: The state hospital at Goldsboro. The North Carolina hospitals board of control shall be authorized to acquire property and to establish, operate and maintain thereon a hospital or institution and to exercise with respect to such hospital or institution the same property rights and powers as are exercised by it with respect to the state hospitals above referred to. Under their respective names each corporation is invested with all the property and rights heretofore held by each, under whatsoever name called or incorporated, and all other corporate names are hereby abolished. Hereafter in this chapter, when the above names are used, they shall be deemed to relate back to and include the corporation under whatsoever name it might heretofore have had. (Rev., s. 4542; Code, ss. 2227, 2240; 1899, c. 1, s. 1; 1945, c. 952, s. 8; 1947, c. 537, s. 2; C. S. 6151.)

Editor's Note.—The 1945 amendment substituted "mentally disordered" for "insane." Prior to section 7 of the amendatory law the title of this chapter was "Hospital for the Insane."

The 1947 amendment inserted the fourth sentence relating to hospitals board of control.

As to Camp Butner Hospital, see §§ 122-92 to 122-98.

Chapter 537 of Session Laws 1947, which amended or inserted various sections of this article, provides in section 1: "The purposes of this act shall be to authorize the North Carolina hospitals board of control to acquire Camp Butner to establish there an institution similar to the other state hospitals and a colony of feeble-minded. To authorize the transfer there of patients and children from the other institutions under the North Carolina hospitals board of control. To authorize the transfer of patients or inmates between the institutions under the control of the North Carolina hospitals board of control, and to authorize rules and regulations in regard to admission of persons to these institutions. To simplify the commitment laws for state hospitals; also to provide for release, discharge and termination of commitment of patients. To authorize the North Carolina hospitals board of control to establish requirements for care in state hospitals of this state and to make reciprocal agreements with other states in this regard, and to authorize the interstate transfer of mental patients. To provide a means to obtain authority for emergency life saving operations on inmates of state institutions, when the family cannot be reached and permission obtained."

§ 122-1.1. Authority to establish other mental health activities; treatment of alcoholism.—The North Carolina hospitals board of control shall be and hereby is empowered to set up on property now held or hereafter acquired mental health facilities for the care and treatment of persons suffering from alcoholism. It is authorized to establish rules and regulations for the admission, care, and treatment of such persons, and to determine costs, and to set rates for the maintenance of these persons. The North Carolina hospitals board of control may itself operate such facilities directly, or in cooperation with the state board of alcoholic control, or may delegate such operation. The state board of health and the state department of public welfare shall act in an advisory capacity in the operation of these facilities. (1949, c. 1206, s. 1.)

Editor's Note.—As to alcoholic rehabilitation fund, see Session Laws 1949, c. 1206, s. 2.

§ 122-2. Power to acquire and hold property.—The state hospital at Morganton, the state hospital at Goldsboro, and any institution established, operated and maintained by the North Carolina hospitals board of control, may each acquire and hold, for the purpose of its institution, real and personal property by devise, bequest, or by any manner of gift, purchase or conveyance whatso-

ever. (Rev., s. 4543; 1899, c. 1, s. 2; 1947, c. 537, s. 3; C. S. 6152.)

Editor's Note.—The 1947 amendment omitted the former reference to the state hospital at Raleigh and inserted the words "and any institution established, operated and maintained by the North Carolina hospitals board of control."

§ 122-2.1. Power to acquire and hold property conveyed by federal government.—The North Carolina hospitals board of control shall be and is authorized and empowered to accept, acquire and hold any real or personal property conveyed to it by an agency of the federal government with such reversionary restrictions imposed upon it by federal statute. The North Carolina hospitals board of control may use and maintain such property in the same manner as if it held title in fee simple, and may construct such buildings upon it as are necessary to accomplish the purposes of the institution. (1947, c. 537, s. 4.)

§ 122-3. Division of patients among the several institutions under the North Carolina hospitals board of control.—The state hospital at Raleigh and the state hospital at Morganton shall be exclusively for the accommodation, maintenance, care and treatment of white mentally disordered persons of the state, and the state hospital at Goldsboro shall be exclusively for the accommodation, maintenance, care and treatment for the colored mentally disordered, epileptic, feebleminded, and inebriate of the state.

White epileptics shall be admitted to the State Hospital at Raleigh as now provided by law, and may by action of the North Carolina hospitals board of control be transferred to another institution under the North Carolina hospitals board of control when in the opinion of the board such is in the best interests of the epileptic patients and the institutions.

The North Carolina hospitals board of control shall have the authority to establish rules and regulations not contrary to law governing the admission of persons to any state hospital or other institution under its control which is now or may be established. Clerks of superior court of the several counties of the state may make commitments to such institutions in the same manner now provided by law for the several state hospitals and Caswell Training School.

The North Carolina hospitals board of control is hereby given authority to admit certain classes of patients to any one of the institutions under its control and shall notify the clerks of the superior court of its action. Sections 116-129 through 116-137 shall apply to any colonies for feeble-minded persons and to feeble-minded persons held in any colonies providing that § 116-135 shall apply only to Caswell Training School. (1929, c. 265, s. 1; 1933, c. 342, s. 1; 1943, cc. 32, 164; 1945, c. 952, s. 9; 1947, c. 537, s. 5; C. S. 6153(a).)

Editor's Note.—
The 1945 amendment substituted "mentally disordered" for "insane."
The 1947 amendment rewrote this section.

§ 122-4. Division of territory among the several institutions under the North Carolina hospitals board of control.—It shall be the duty of the North Carolina hospitals board of control to designate territories for the state hospital at Raleigh, the state hospital at Morganton and any state hospitals or institutions now or hereafter established for the admission of the white mentally disordered persons of the state, with authority to change said territories when deemed necessary. It shall notify the clerks of superior court of the counties of the territories designated and of any change of these territories. (1929, c. 265, s. 1; 1933, c. 342, s. 1; 1943, cc. 32, 164; 1945, c. 952, s. 9; 1947, c. 537, s. 6; C. S. 6153(a).)

Editor's Note.—
The 1947 amendment rewrote this section.

§ 122-5. Care and treatment of Indians in mental hospitals.—The authorities of the state hospital at Raleigh and the state hospital at Morganton may also receive for care and treatment mentally disordered, epileptic, and inebriate Indians who are resident within the state, and who may, within the discretion of the superintendent, be assigned to any of the wards of the hospitals. (1919, c. 211; 1945, c. 952, s. 10; 1947, c. 537, s. 7; C. S. 6154.)

Editor's Note.—The 1945 amendment substituted "mentally disordered" for "insane."
The 1947 amendment rewrote this section.

§ 122-6. Epileptics cared for at Raleigh, Goldsboro and other hospitals.—Whenever it becomes necessary for any person of this state afflicted with the disease known as epilepsy to be confined or to receive hospital treatment, such person shall be committed by the clerks of superior court of the several counties in the manner now provided by law for the commitment of mentally disordered persons to the several hospitals for the mentally disordered. Commitment of negro epileptic persons shall be made to the state hospital at Goldsboro. Commitment of white epileptic persons shall be made to the state hospital at Raleigh. The superintendents of the state hospitals to which such epileptic persons have been committed or transferred shall receive, care for, maintain and treat such persons as are afflicted if necessary to prevent them from becoming public charges, to the extent of the facilities of the hospital.

Charges for the patients shall be made in the same manner as now provided by law for care of mentally disordered persons. (1909, c. 910, ss. 1, 2; 1945, c. 952, s. 11; 1947, c. 537, s. 8; C. S. 6155.)

Editor's Note.—The 1945 amendment substituted "mentally disordered" for "insane."
The 1947 amendment rewrote this section.

§ 122-7. Management of certain institutions by unified board of directors; appointment; quorum; term of office.—The following institutions of this state shall be under the management of one board of directors composed of fifteen members, all of whom shall be appointed by the governor of North Carolina: the state hospital at Raleigh, the state hospital at Morganton, the state hospital at Goldsboro, and the Caswell training school at Kinston. In order that all sections of the state shall have representation on said board, the governor shall name one member from each congressional district of the state and three members at large on said board. The board of directors to be named from congressional districts shall be divided into four classes of three directors each, the first class to serve for a period of one year, the second class to serve for a period of two years, the third class to serve for a period of three years,

the fourth class to serve for a period of four years, and the three directors at large to serve for a period of four years, and at the expiration of their respective terms of office all appointments shall be for a term of four years, except such as are made to fill unexpired terms. Eight directors shall constitute a quorum.

Members of the board shall serve for terms as prescribed above, and until their successors are appointed and qualified. The governor shall have the power to remove any member of the board whenever in his opinion it is to the best interest of the state to remove such person, and the governor shall not be required to give any reason for such removal. (1921, c. 183, s. 2; 1925, c. 306, s. 3; 1943, c. 136, s. 2; 1945, c. 925, s. 1; C. S. 6159(a).)

Editor's Note.—
The 1945 amendment, effective April 1, 1945, rewrote all of this section except the second paragraph.

For comment on the 1943 amendment to this and two following sections, see 21 N. C. Law Rev. 353.

§ 122-11. Meetings of directors.—The board of directors shall convene annually at each of the institutions enumerated in § 122-7 at a time to be fixed by such board and at such other times as it shall appoint, and investigate the administration and condition of said institutions. (Rev., 4550; 1899, c. 1, s. 8; 1917, c. 150, s. 1; 1943, c. 136, s. 5; C. S. 6161.)

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

§ 122-11.2. Superintendent of mental hygiene. He shall be employed for a period of six years from and after the date of his selection, unless sooner removed therefrom by the board for incompetence or misconduct.

(1945, c. 925, s. 2.)

Editor's Note.—The 1945 amendment, effective April 1, 1945, substituted "six" for "two" in the third sentence. As the rest of the section was not affected by the amendment it is not set out.

§ 122-11.3. Business manager for institutions. The said general business manager shall be employed for a period of six years from and after the time of his selection, unless sooner removed by the board for incompetence or misconduct. He shall devote his full time to the duties of his employment and shall hold no other office or position of employment.

(1945, c. 925, s. 3.)

Editor's Note.—The 1945 amendment, effective April 1, 1945, substituted "six" for "two" in line two of the second paragraph. As the rest of the section was not affected by the amendment it is not set out.

§ 122-11.5: Repealed by Session Laws 1945, c. 925, s. 4.

§ 122-13. Transfer of patients from one hospital to another; transfer of funds.—The North Carolina hospitals board of control is authorized to make such rules and regulations as in its discretion may seem best for the transfer of patients from one state hospital or institution under its control to another state hospital or institution under its control; and it is further authorized and empowered to transfer from one state hospital for the mentally disordered any funds appropriated for permanent improvement or maintenance, if in their discretion and judgment it may become advisable or necessary. (1919, c. 330; 1947, c. 537, s. 9; C. S. 6163.)

Editor's Note.—Prior to the 1947 amendment the authority conferred by this section was vested in the former unified board of directors.

§ 122-14. Delivery of inmates to Federal agencies.—The directors and superintendents of the state hospital at Raleigh, the state hospital at Morganton and the state hospital at Goldsboro are hereby authorized, empowered and directed to transfer and deliver to the United States veterans bureau or other appropriate department or bureau of the United States government or to the representatives or agents of such veterans bureau or other department or bureau of said government, all inmates or prisoners, being soldiers or sailors who have served at any time in any branch of the military or naval forces of the United States, who are now in or may hereafter be committed to said hospitals.

(1945, c. 925, s. 5; 1947, c. 623, s. 1.)

Editor's Note.—The 1945 amendment, effective April 1, 1945, made the section applicable to the State Hospital at Morganton, and the 1947 amendment struck out the word "insane" formerly appearing before the word "inmates" in line ten. As only the first sentence was affected by the amendment, the rest of the section is not set out.

§ 122-17. Executive committee appointed.—The board of directors shall, out of their number, appoint five members as an executive committee, who shall hold their respective offices as such for one year, and shall have such powers and be subject to such duties as the board of directors may delegate to them. (Rev., s. 4548; 1899, c. 1, s. 6; 1917, c. 150, s. 1; 1945, c. 925, s. 6; C. S. 6165.)

Editor's Note.—The 1945 amendment, effective April 1, 1945, substituted "five" for "three" in line three.

§ 122-21. Fiscal year.—The close of the fiscal year shall be that established for all state agencies. (Rev., s. 4558; 1899, c. 1, s. 38; 1947, c. 537, s. 10; C. S. 6169.)

Editor's Note.—The 1947 amendment rewrote this section.

Art. 2. Officers and Employees.

§ 122-27. Superintendent to notify of escape or revocation of probation of inmate.—When any inmate of a state hospital who has been released therefrom on probation has breached the conditions of his probation or when any inmate has escaped from a state hospital, the superintendent of the hospital shall immediately notify the committing physicians and the sheriff and clerk of court of the county in which such inmate is located at the time of such escape or breach of the conditions of probation. Upon the receipt of such notice, it shall be the duty of the sheriff to return such inmate to the hospital from which he has escaped or has been released on probation. The expense of returning such inmate shall be borne by the county of such inmate's legal settlement. (Rev., s. 4563; 1899, c. 1, s. 27; 1927, c. 114; 1945, c. 952, s. 12; C. S. 6175.)

Editor's Note.—The 1945 amendment rewrote this section.

Art. 3. Admission of Patients.

§ 122-36. Persons entitled to immediate admission if space available.—Any resident of North Carolina who has been legally adjudged by a clerk of court or other properly authorized person in accordance with the provisions of this chapter to

be mentally disordered or a proper person to be committed to a state hospital for observation shall, if space is available, be entitled to immediate admission in the state hospital at Morganton, the state hospital at Raleigh, or the state hospital at Goldsboro, in accordance with the principles of division of race and residence prescribed in this chapter. No resident of this state who has been legally adjudged mentally disordered or a proper subject for observation and who has been presented to the superintendent of the proper state hospital for the mentally disordered as provided in this article, shall be refused admission thereto if space is available, but nothing in this article shall be construed to affect the discharge or transfer of patients as now provided by law.

Upon the admission of any such person, the superintendent of the institution shall notify the clerk of the superior court who has committed such person as mentally disordered, or as a proper subject for observation. (1919, c. 326, ss. 1, 6; 1945, c. 952, s. 13; C. S. 6184.)

Editor's Note.—The 1945 amendment substituted "mentally disordered" for "insane," made the right to immediate admission dependent upon space being available, and added the second paragraph.

§ 122-37. Mental defectives admitted. — Any person with mental deficiency who in addition is suffering from epilepsy or a mental disorder may be admitted to the proper state hospital for the mentally disordered. Mental defective delinquents and low grade idiots who are unable to look after their own persons may be admitted to the Caswell training school. (Rev., s. 4572; 1899, c. 1, s. 18; 1933, c. 342, s. 2; 1945, c. 952, s. 14; C. S. 6185.)

Cross Reference.—As to training school for feeble minded negro children, see §§ 116-142.1 to 116-142.10.

Editor's Note.—
The 1945 amendment rewrote this section.

§ 122-38. Priority given to indigent patients; payment required from others.—In the admission of patients to any state hospital, priority of admission shall be given to indigent persons; but the board of directors may regulate admissions, having in view the curability of patients, the welfare of the institutions, and the exigencies of particular cases. The board of directors may, if there be sufficient room, admit other than indigent patients, upon proper compensation, based upon the ability of the patient or his estate to pay. Where the clerk of court or the superintendent of the hospital has doubt as to the indigency of the mentally disordered person, he shall refer the question to the county department of public welfare for investigation. If any patient of any state hospital shall require private apartments, extras, or private nurses, the directors, if practicable, shall provide the same at a fair price to be paid by such patient. Upon the death of any nonindigent patient, the state hospital may maintain an action against his estate for his support and maintenance for a period of five years prior to his death. (Rev., s. 4573; 1899, c. 1, s. 44; 1915, c. 254; 1917, c. 150, s. 1; 1945, c. 952, s. 15; C. S. 6186.)

Editor's Note.—The 1945 amendment substituted "persons" for "insane" in line three, and "patient" for "inmate" in the fourth sentence. The amendment also rewrote the second sentence and inserted the third sentence.

§ 122-39. Only bona fide residents entitled to care in state mental hospitals.—No clerk of superior court shall commit to any state hospital any mentally disordered person known to be a resident of another state or whose residence is unknown unless he shall state that the mentally disordered person is known to be resident of another state or that his residence is not known, and he shall give all available information concerning places in which he has been recently living.

The legal residence of a person as to his being entitled to mental hospital care shall be determined between this and the other state or states as elsewhere provided.

No person who shall have removed into this state while mentally disordered or while under commitment to a mental hospital in any other state, nor any person not a resident of North Carolina but under commitment to any mental institution, public or private, in this state shall be considered as a resident; and no length of residence in this state of such a person, while mentally disordered or under commitment, shall be sufficient to make him a resident of this State or entitled to state mental hospital care. (Rev., ss. 3591, 4587; 1899, c. 1, s. 18; 1945, c. 952, s. 16; 1947, c. 537, s. 11; C. S. 6187.)

The 1945 amendment substituted "mentally disordered" for "insane."

The 1947 amendment rewrote this section.

§ 122-40. Findings as to residence in examination reported.—In every examination of an alleged mentally disordered person it shall be the duty of the clerk or justice of the peace to particularly inquire whether the alleged mentally disordered person is a resident of this state, as hereinbefore set forth, and he shall state his findings upon the subject in his report to the superintendent of the hospital. If it is not possible to ascertain the legal residence of the alleged mentally disordered person and the clerk or the assistant clerk of court shall be of the opinion that the alleged mentally disordered person is a resident of this state, within the meaning of the law, and in all other respects would be a proper person to be committed as mentally disordered or for observation, he shall state that he was unable to ascertain the legal residence of the alleged mentally disordered person and shall commit him to the proper state hospital in accordance with the principles of divisions as to race and residence prescribed in this chapter. (Rev., s. 4588; 1899, c. 1, s. 18; 1945, c. 952, s. 17; C. S. 6188.)

Editor's Note.—The 1945 amendment substituted "mentally disordered" for "insane" in the first sentence and rewrote the second sentence.

§ 122-41. County of settlement.—For the purposes of this chapter, the county of settlement of an alleged mentally disordered person shall be the county of his actual residence at the time of his commitment to the state hospital, notwithstanding where such person may have been temporarily out of the county of settlement, in a hospital, or under court order an inmate of some other state institution at the time of his commitment to a state hospital, the county of residence shall not have been changed by his being temporarily out of his county, in a hospital, or by his confinement under court order.

The provisions of this section shall not be construed as entitling a person to care and treatment in a mental hospital unless he is a bona fide citi-

zen and resident of this state, and was so before mental disease became manifest. (Rev., s. 4574; 1899, c. 1, s. 28; 1945, c. 952, s. 18; 1947, c. 537, s. 12; C. S. 6189.)

Editor's Note.—The 1945 amendment substituted the words "for the mentally disordered" for the words "as insane."

The 1947 amendment rewrote this section.

§ 122-42. Affidavit of mental disorder and request for examination.—When it appears that a person is suffering from some mental disorder and is in need of observation or admission in a state hospital, some reliable person having knowledge of the facts shall make before the clerk of the superior court of the county in which alleged mentally disordered person is or resides, and file in writing, on a form approved by the North Carolina hospitals board of control, an affidavit that the alleged mentally disordered person is in need of observation or admission in a hospital for the mentally disordered, together with a request that an examination into the mental condition of the alleged mentally disordered person be made.

This affidavit may be sworn to before the clerk of the superior court, or the deputy clerk of court. (Rev., s. 4575; 1899, c. 1, s. 15; 1945, c. 952, s. 19; 1947, c. 537, s. 13; C. S. 6190.)

Editor's Note.—Prior to the 1945 amendment the affiant was required to be a resident of the county in which the alleged insane person resided.

The 1947 amendment rewrote this section which formerly set out the form of affidavit. Subsequently Session Laws 1947, c. 623, s. 2, purported to amend such omitted form.

§ 122-43. Clerk to issue an order for examination.—When an affidavit and request for examination of an alleged mentally disordered person has been made, or when the clerk of the superior court has other valid knowledge of the facts of the case to cause an examination to be made, he shall direct two physicians duly licensed to practice medicine by the state and not holding any office or appointment except advisory or consultative in the hospital to which commitment may be made, to examine the alleged mentally disordered person or shall have him brought to them in order to determine if a state of mental disorder exists and if it warrants commitment to one of the state hospitals or institutions for the mentally disordered. If the said physicians are satisfied that the alleged mentally disordered person should be committed for observation and admission into a hospital for the mentally disordered, they shall sign an affidavit to that effect on a form approved by the North Carolina hospitals board of control.

This affidavit may be sworn to before the clerk of the superior court, the assistant clerk of the superior court, or the deputy clerk of court, or a notary public. (Rev., s. 4576; 1899, c. 1, s. 15; 1945, c. 952, s. 20; 1947, c. 537, s. 14; C. S. 6191.)

Editor's Note.—The 1945 amendment rewrote this section. The 1947 amendment also rewrote this section which formerly set out the form of affidavit. Subsequently Session Laws 1947, c. 623, s. 3, purported to amend such omitted form.

§ 122-45: Repealed by Session Laws 1945, c. 952, s. 21.

§ 122-46. Clerk to commit for observation in a hospital, for commitment, release or discharge.—When the two physicians shall have certified that the alleged mentally disordered person is in need of observation and admission in a hospital for the mentally disordered and after the clerk has heard all proper witnesses he shall issue an order of commitment on form approved by the North Carolina hospitals board of control, which shall authorize the hospital to receive said person and there to examine him and observe his mental condition for a period not exceeding thirty days. The clerk may authorize the transfer of the said alleged mentally disordered person to the proper hospital, when notified by the superintendent that space is available.

The clerk shall transmit to the hospital information relevant to the mental condition of the alleged mentally disordered person. He shall certify as to the indigency of the mentally disordered person and any persons liable for the care of the person under §§ 35-33 or 143-117 et seq., on forms approved by the North Carolina hospitals board of control. (Rev., s. 4578; 1899, c. 1, s. 15; 1915, c. 204, s. 1; 1923, c. 144, s. 1; 1945, c. 952, s. 22; 1947, c. 537, s. 15; C. S. 6193.)

Editor's Note.—

The 1945 and 1947 amendments rewrote this section.

§ 122-46.1. Clerk may make final commitment to hospital.—When such alleged mentally disordered person is committed to a state hospital for observation, the hospital authorities shall, at the expiration of thirty days, file with the clerk of the superior court of the county in which the alleged mentally disordered person resided, if known, if not known, with the clerk of the superior court who committed such alleged mentally disordered person for observation, a written report stating the conclusion reached by the hospital authorities as to the mental condition of the alleged mentally disordered person. Upon the basis of this report, the clerk of the superior court of the county in which the alleged mentally disordered person resided, or if such alleged mentally disordered person's residence is not known, the clerk of the superior court who committed him for observation is authorized to order said person discharged or to order him to remain at the hospital as a patient, as the facts may warrant. Any person who has been committed to any state hospital as mentally disordered as provided by law shall be and remain a charge of such state hospital until he has been discharged from said hospital or declared competent as otherwise provided by law.

At the end of the thirty-day observation period the superintendent of the state hospital in which the alleged mentally disordered person has been confined for a thirty-day period of observation may signify in writing to the clerk of the court of the county in which the alleged mentally disordered person is settled that his observation of the alleged mentally disordered person has not been completed and that a second thirty-day period of observation of the alleged mentally disordered person is requested. Whereupon the clerk of the superior court who committed the alleged mentally disordered person for observation is authorized to order said person to remain at the hospital as a patient for another thirty-day observation period. (1945, c. 952, s. 23.)

§§ 122-47 to 122-49: Repealed by Session Laws 1945, c. 952, s. 24.

§ 122-49.1. Withdrawal of petition.—The petitioner in proceeding to determine the mental

health or mental disease of an alleged mentally disordered person may, at any time before the alleged mentally disordered person has been admitted to the particular state hospital, withdraw such petition by filing with the clerk of the superior court, in writing, a motion to this effect. The clerk with the written consent of the examining physicians is authorized to allow such motion. When such motion is allowed, the proceedings shall be deemed to be at an end. (1945, c. 952, s. 25; 1947, c. 537, s. 16.)

Editor's Note.—Prior to the 1947 amendment the petition could be withdrawn before the adjudication of mental disorder or mental health.

§ 122-50. Clerk to keep record of examinations and discharges.—The clerk will keep a record of all examinations of persons alleged to be mentally disordered, and he shall record in such record a brief summary of the proceedings and of his findings, and whenever a justice of the peace shall transmit to the clerk a report of his proceedings when he shall have examined a person under the powers granted under this chapter, the clerk shall make a record of his proceedings, and for recording the justice's proceedings he shall be entitled to a fee of twenty-five cents, to be paid by the county aforesaid, and he shall keep a record of all probations and discharges provided for in article four of this chapter. (Rev., s. 4586; 1899, c. 1, s. 17; 1945, c. 952, s. 26; C. S. 6197.)

Editor's Note.—The 1945 amendment substituted "mentally disordered" for "insane."

§ 122-51. Fees for examination.—The following fees shall be allowed to the officers who make the examination, and they shall be paid by the county in which the alleged mentally disordered person is settled:

To the clerk who makes the examination two dollars ($2.00) and if the clerk goes to the place where the alleged mentally disordered person is or resides, five cents (5c) a mile each way in addition. This shall cover his entire costs in taking the examination and making out the necessary papers.

To the physician or physicians called in addition to or in the absence of the county physician the sum of five dollars ($5.00). If the county physician is a salaried officer he is not allowed any fee for his services in this examination.

The sheriff shall be entitled to such fees as are now allowed by law for the service of a process of similar character. (Rev., ss. 4580, 4581; 1899, c. 1, s. 15; 1947, c. 537, s. 17; C. S. 6198.)

Editor's Note.—The 1947 amendment rewrote this section.

§ 122-52. Superintendent of hospital notified; attendant to convey patient.—Whenever an alleged mentally disordered person shall be entitled to admission in any one of the hospitals of the state as prescribed by law, and the clerk of the superior court or other officer authorized by law to find such person mentally disordered or a proper subject for observation has so found, it shall be the duty of the clerk or other officer forthwith to notify the superintendent of the proper hospital, giving the name, race, sex and age of the patient; and it shall be the duty of such superintendent, unless said patient has been exposed to a contagious disease as hereinafter mentioned in this article, to send an attendant to bring such mentally disordered person to the hospital. Such attendant shall have all such rights as the sheriff or other officer has heretofore, and shall convey such mentally disordered person to the hospital. (1919, c. 326, s. 2; 1945, c. 952, s. 27; C. S. 6199.)

Editor's Note.—The 1945 amendment substituted "mentally disordered" for "insane," and inserted in lines six and seven the words "or a proper subject for observation."

§ 122-53. Bill of expense sent to county commissioners.—Upon the arrival of such mentally disordered person at the hospital, the superintendent shall send to the board of commissioners of the county in which such mentally disordered person had a settlement a bill covering the costs of conveying such mentally disordered person to the hospital, including any fees that would now be allowed an officer, and it shall be the duty of the board of commissioners forthwith to repay to such hospital the amount of such bill. (1915, c. 204, s. 2; 1919, c. 326, s. 3; 1945, c. 952, s. 28; C. S. 6200.)

Editor's Note.—The 1945 amendment substituted "mentally disordered" for "insane."

§ 122-54. Failure of superintendent to send attendant; sheriff to act.—If the superintendent of any hospital for the mentally disordered in this state shall, for ten days after receiving a notice as prescribed in § 122-52, fail and neglect to send an attendant, as is prescribed by § 122-52, to bring such mentally disordered person to the hospital, it shall be the duty of the sheriff of the county from which the notice was sent to bring at the expense of the county such mentally disordered person to the state hospital, whereupon it shall be the duty of the said superintendent to receive said mentally disordered person and relieve said sheriff of his care.

Each female mentally disordered patient must be accompanied to the hospital by a member of her family; if a member of her family is not available, she must be accompanied by a female designated by the county superintendent of public welfare of the county of the patient's settlement, the expenses of said female attendant to be borne by the county commissioners. (1919, c. 326, s. 4; 1945, c. 952, s. 29; C. S. 6201.)

Editor's Note.—The 1945 amendment substituted "mentally disordered" for "insane" and added the second paragraph.

§ 122-55. Costs of conveying patients to and from hospital; how paid.—The cost and expenses of conveying every mentally disordered person to any hospital from any county, or of removing him from the hospital to his county, or of the return to the county of his settlement, as sane, shall be paid by the treasurer of such county, upon the order of its board of county commissioners. Whenever the board of commissioners shall be satisfied that such person has property sufficient to pay such cost and expenses, or that some other person liable for his support and maintenance has property sufficient to pay such costs and expenses as aforesaid, they shall bring an action and recover the amount paid from the said person, or from the other person liable for his support and maintenance. (Rev., s. 4555; 1899, c. 1, s. 32; 1945, c. 952, s. 30; C. S. 6202.)

Editor's Note.—The 1945 amendment substituted "mentally disordered" for "insane."

§ 122-57. Commitment in case of sudden or violent mental disorder.—Whenever any citizen or resident of this state or any other state becomes suddenly or violently mentally disordered, he may be committed to the proper state hospital for the mentally disordered, private hospital, county hospital, or other suitable place, until adjudication can be made or for a period not exceeding ten days upon the affidavit of one physician not related by blood to the mentally disordered person and licensed to practice medicine in North Carolina, or by the order of the clerk of the superior court of the county in which the patient becomes suddenly or violently mentally disordered upon the application of a respectable citizen. The affidavit of the physician will be on a standard form provided by the state hospitals board of control for this purpose. The physician's signature upon this form must be sworn to before a notary public or a deputy sheriff. The physician's notarized signature to the standard form provided by the state hospitals board of control for the purposes enumerated in this section shall constitute authority for the temporary commitment of the alleged mentally disordered person who has become suddenly or violently mentally disordered without an order of the clerk of the superior court. Adjudication of a person temporarily committed under the provisions of this section may proceed without removing said person to the county of his residence. (Rev., s. 4582; 1899, c. 1, s. 16; 1945, c. 952, s. 31; C. S. 6204.)

Editor's Note.—The 1945 amendment rewrote this section.

§ 122-62. Commitment upon patient's application.—Any person believing himself to be of unsound mind or threatened with mental disorder may voluntarily commit himself to the proper hospital. The application for commitment shall be in the following form:

State of North Carolina, County of.....
I, ..., a resident of ..... County, North Carolina, being of mind capable of signifying my wishes, do hereby solicit admission as a patient in the State Hospital at .....
I agree in all respects to conform to the rules and regulations of said institution. I understand that I shall not be entitled to a discharge until I shall have given the superintendent ten days notice of my desire to be discharged.

.....
Attest: .....

This application shall be accompanied by the certificate of a licensed physician, which certificate shall state that in the opinion of the physician the applicant is a fit subject for admission into a hospital, and that he recommends his admission. The certificate of the clerk of the superior court need not accompany this application, and the medical director of the State hospital shall not notify the clerk of court of the county of the residence of the patient of the discharge of the patient. The superintendent may, if he think it a proper application, receive the patient thus voluntarily committed and treat him, but no report need to be made to the clerk of court of the county of his settlement. The superintendent and board of directors shall have the same control over patients who commit themselves voluntarily as they have over those committed under the regular proceedings hereinbefore provided except that a voluntary patient shall be entitled to a discharge after he shall have given the superintendent ten days notice of his desire to be discharged.

Final commitment of voluntarily committed patients must proceed through the same channels as in case of the involuntary commitment of an allegedly mentally disordered person. (Rev., s. 4593; 1899, c. 1, s. 49; 1917, c. 150, s. 1; 1945, c. 952, s. 32; C. S. 6209.)

Editor's Note.—The 1945 amendment substituted "mental disorder" for "insanity" in the first sentence, inserted the last sentence in the form of application, added the last paragraph of the section and made other changes.

§ 122-63. Proceedings in case of a mentally disordered citizen of another state.—If any person not a citizen of this state but of another state of the United States shall be ascertained to be mentally disordered, the clerk of superior court shall commit such mentally disordered person to the proper state hospital for the mentally disordered of this state, and shall record on the order of commitment his not being a resident of this state. He shall also give on the application such information available in regard to his proper residence. Upon the admission of such mentally disordered person, the superintendent of the hospital shall notify the North Carolina hospitals board of control that such person appears to be resident of another state, so that the board of control can take steps to establish such person's residence and have him transferred to the state in which he is legally resident.

After the legal residence of such mentally disordered person has been verified and confirmed by the state of his residence, such mentally disordered person shall be transferred to the state of his residence. If that state shall not provide for his removal to that state within a reasonable time, the superintendent of the state hospital shall cause him to be conveyed directly from the state hospital to the state of his legal residence and delivered there to the superintendent of the proper state hospital.

The cost of such proceedings and conveyance away from the state shall be borne by the county in which the person shall have been adjudged to be mentally disordered.

The provisions of this section shall apply only to such aforementioned mentally disordered persons who shall have been committed by the clerk of court to a state hospital, and shall not be construed to limit the responsibility of the state board of public welfare with respect to the return of any other nonresident to his state of residence. (Rev., s. 4584; 1899, c. 1, s. 16; 1945, c. 952, s. 33; 1947, c. 537, s. 18; C. S. 6210.)

Editor's Note.—The 1945 amendment substituted the words "mentally disordered" for the word "insane." The 1947 amendment rewrote this section.

§ 122-63.1. Transfer of mentally disordered citizens of North Carolina from another state to North Carolina.—When the North Carolina hospitals board of control or the state board of public welfare shall have been notified by an agency of another state that there is confined within a state or psychiatric hospital of that state a mentally disordered person alleged to be a resident of the state of North Carolina, and shall have been

given information to support the allegation and to aid in establishing such person's residence, the state board of public welfare shall determine the residence of the alleged resident and shall report its findings to the North Carolina hospitals board of control. On the basis of the findings of this investigation, and in accordance with the requirements for eligibility to state hospital care, the North Carolina hospitals board of control may authorize his return directly to the proper state hospital for the mentally disordered at the expense of the state in which he is already confined.

The commitment of such mentally disordered person in another state, and the authorization by the board of control of his return shall be sufficient authority for the superintendent of the state hospital to hold this patient for a reasonable length of time, not to exceed thirty days or until he can be committed. Commitment of said mentally disordered person shall be effected by the examination of the person by two licensed physicians not connected with the proper state hospital for the mentally disordered. The affidavits of these two physicians shall be forwarded to the clerk of the superior court of the county in which said mentally disordered person is settled, without removal of the person from the hospital. On the basis of these affidavits the clerk may order the alleged mentally disordered person for the usual thirty-day observation period. (1945, c. 952, s. 34; 1947, c. 537, s. 19.)

Editor's Note.—The 1947 amendment rewrote this section.

§ 122-63.2. Reciprocal agreements with other states to set requirements to state hospital care.—The North Carolina hospitals board of control shall have the authority to negotiate with the proper state agencies of other states in regard to the legal residence of any alleged mentally disordered person who shall have been or may be committed to any state hospital of this state and alleged to be a legal resident of another state, or who shall have been committed to the state hospital of any other state and alleged to be a legal resident of this state, and to make reciprocal agreements with the proper agencies of the other states for the care of these mentally disordered persons by and in the proper state.

Where the law of another state sets a definite period of time during which a person must have resided continuously within that state to be considered a legal resident or to be entitled to care and treatment in a state mental hospital, this same definite period of time may be taken as the length of time required by this state in order for the mentally disordered person to be entitled to care and treatment in a state mental hospital in this state. (1947, c. 537, s. 20.)

Art. 4. Discharge of Patients.

§ 122-66. County commissioners may discharge mentally disordered person in county.—It shall be the duty of the board of county commissioners, by proper order to that effect, to discharge any ascertained mentally disordered person in their county, not admitted to the appropriate hospital, and not committed for crime, when it shall appear upon the certificate of two respectable physicians, and the chairman of their board, that such mentally disordered person ought to be discharged if in a hospital. (Rev., s. 4595; 1899, c. 1, s. 20; 1945, c. 952, s. 35; C. S. 6213.)

Editor's Note.—The 1945 amendment substituted "mentally disordered" for "insane."

§ 122-67. Release of patients from hospital; responsibility of county.—When it shall appear that any mentally disordered person under commitment to and confined in a hospital for the mentally disordered but not charged with a crime or under sentence shall have shown improvement in his mental condition as to be able to care for himself, or when he shall have become no longer dangerous to the community and to himself, or when it shall appear that suitable provision can be made for the alleged mentally disordered person so that he will not be injurious or dangerous to himself or the community, the superintendent of the hospital may in his discretion release him on probation to the care of his guardian, relative, friends or of any responsible person or agency in the community, and may receive him back into the hospital without further order of commitment during the continuance of the order of commitment which shall not have been terminated by the action of the superintendent in releasing him on probation. The superintendent of the hospital may require of the person assuming responsibility for the mentally disordered patient released on probation reports relative to the patient's condition and evidence and assurance of responsibility.

The superintendent may terminate the release of such mentally disordered patient and order his arrest and return to the hospital, and the person responsible for the mentally disordered patient's care may notify the superintendent of the hospital or the clerk of superior court of the county in which the mentally disordered patient has residence or is now located, and the clerk of superior court so notified may order the mentally disordered patient held pending his return to the hospital. The superintendent shall from time to time notify the clerk of superior court of the county of the patient's residence of the release or probation of a patient for more than thirty days.

When the patient is indigent, the county may be required to pay for the transportation of the patient to the county of his settlement.

It shall be the duty of the sheriff of the county to which a patient has been released, or in which he is found at the termination of his release on probation by the superintendent or by the clerk of superior court, to return him to the hospital to which he is under commitment; cost of such return shall be a charge on the county in which the mentally disordered patient is resident.

When a person under commitment has been released on probation to his own care or to his own family, and when he is no longer under the continued care and supervision of the hospital, as in a boarding home, and when he shall have been able to remain continuously out of the hospital without returning for the period of one year, he shall be regarded as recovered from his mental illness and no longer in need of care in a mental hospital, and shall be discharged from the order of commitment at the next succeeding discharge date of the hospital as provided by rules of the North Carolina hospitals board of control. (Rev., s. 4596; 1899, c. 1, s. 22; 1917, c. 150,

s. 1; 1945, c. 952, s. 36; 1947, c. 537, s. 21; C . S. 6214.)

Editor's Note.—The 1945 amendment substituted the words "mentally disordered" for the word "insane" and made other changes.

The 1947 amendment rewrote this section.

§ 122-68. Superintendent may discharge patient temporarily.—Each superintendent may, for the space of thirty days, discharge upon probation any patient, when in his opinion the same would not prove injurious to the patient or dangerous to the community. (Rev., s. 4597; 1899, c. 1, s. 23; 1945, c. 952, s. 37; C S. 6215.)

Editor's Note.—The 1945 amendment struck out, following the word "days" in line two, the words "or until the next meeting of the board of three directors provided for in the preceding section." The amendment also struck out the former second sentence relating to reporting probations.

§ 122-68.1. Superintendent must notify commissioner of mental health, and state hospitals board of control of unusually dangerous mentally disordered patients.—Whenever a person is found by the state hospital psychiatrists to be unusually dangerous to himself or others, the superintendent must notify the commissioner of mental health and the state hospitals board of control. Such a patient cannot be paroled without the agreement of the state hospitals board of control and the commissioner of mental health. If the commissioner of mental health finds that any patient in one of the state hospitals is unusually dangerous to himself or to others he may place the patient under the rules of this section. (1945, c. 952, s. 39.)

§§ 122-69 to 122-71: Repealed by Session Laws 1945, c. 952, s. 38.

Art. 5. Private Hospitals for the Mentally Disordered.

§ 122-72. Established under license and subject to control of board of charities.—It shall be lawful for any person or corporation to establish private hospitals, homes, or schools for the cure and treatment of mentally disordered persons, mental defectives, and feeble-minded persons and inebriates; but license to establish such hospitals, homes, or schools must, before the same are opened for patronage, be obtained from the state board of charities and public welfare, and such hospitals, homes, or schools shall at all times be subject to the visitation of the said board or any member thereof, and each hospital, home, or school shall make to the board a semiannual report on the first days of January and July of each year. (1945, c. 952, s. 41.)

Cross Reference.—As to authority of state board of health to establish sanitary standards and methods of inspection for private hospitals, etc., see §§ 130-280 to 130-292.

Editor's Note.—The 1945 amendment substituted "mentally disordered" for "insane" and "mental defectives" for "idiots" in the first sentence. As the rest of the section was not affected by the amendment it is not set out.

Prior to Session Laws 1945, c. 952, s. 40, the title of this article was "Private Hospitals for the Insane."

§ 122-73. Counties and towns may establish hospitals.—Any county, city, or town may establish a hospital for the maintenance, care, and treatment of such mentally disordered persons as cannot be admitted into a state hospital, and of mental defectives and feeble-minded persons upon like conditions and requirements as are above prescribed for the institution of private hospitals; and the state board of charities and public welfare is given the same authority over such hospitals as is given them by the preceding section for private hospitals. (Rev., s. 4601; 1899, c. 1, s. 61; 1945, c. 952, s. 42; C. S. 6220.)

Editor's Note.—The 1945 amendment substituted the words "mentally disordered" for the word "insane" and the words "mental defectives" for the word "idiots."

§ 122-75. Mentally disordered persons placed in private hospital.—Whenever any person shall be found to be mentally disordered in the mode hereinbefore prescribed, and such person shall be possessed of an income sufficient to support those who may be legally dependent for support on the estate of such mentally disordered person, and, moreover, to support and maintain such mentally disordered person in any named hospital without the state, or any private hospital within the state, and such mentally disordered person, if of capable mind to signify such preference, shall, in writing, declare his wish to be placed in such hospital instead of being in a state hospital (or in case such mentally disordered person is incapable of declaring such preference, then the same may be declared by his guardian), and two respectable physicians who shall have examined such mentally disordered person, shall deem it proper, then it may be lawful for the clerk, together with said physicians, to recommend in writing that such mentally disordered person shall be placed in the hospital so chosen, as a patient thereof. (Rev., s. 4603; 1899, c. 1, s. 39; 1945, c. 952, s. 43; C. S. 6222.)

Editor's Note.—The 1945 amendment substituted the words "mentally disordered" for the word "insane." It also struck out the words "with the clerk of the court or justice of the peace who made the examination" formerly appearing after the word "person" in line eighteen. The amendment further struck out the words "or justice" formerly appearing after the word "clerk" near the end of the section.

§ 122-76: Repealed by Session Laws 1945, c. 952, s. 44.

§ 122-77. Clerk to report proceedings to judge.—The clerk of the court shall lay the proceedings before the judge of the superior court of the district in which such mentally disordered person may reside or be domiciled, and if he approves them, he shall so declare in writing, and such proceedings, with the approval thereof, shall be recorded by the clerk. (Rev., s. 4605; 1899, c. 1, s. 42; 1945, c. 952, s. 45; C. S. 6224.)

Editor's Note.—The 1945 amendment substituted the words "mentally disordered" for the word "insane."

§ 122-78. Certified copy and approval of judge sufficient authority.—A certified copy of such proceedings, with the approval of a judge, shall be sufficient warrant to authorize any friend of such mentally disordered person appointed by the judge to remove him to the hospital designated. (Rev., s. 4606; 1899, c. 1, s. 43; 1945, c. 952, s. 46; C. S. 6225.)

Editor's Note.—The 1945 amendment substituted the words "mentally disordered" for the word "insane."

§ 122-79. Examination and commitment to private hospital.—When it is deemed advisable that any person, a citizen of North Carolina, or a citi-

zen of another state or country temporarily sojourning in North Carolina, should be detained in the private hospital to which the person is to be committed within the state, two persons, one of whom must be a physician and who shall not be connected with this private hospital, shall make affidavit before a clerk of the superior court of this state or a notary public that they have carefully examined the alleged mentally disorderd person; that they believe him to be a fit subject for commitment to a hospital for the mentally disordered, and that his detention and treatment will be for his benefit. This certificate shall be filed with and approved by the clerk of the superior court in the county in which the examination is held, or in the county in which the private hospital is located, and a certified copy of this certificate and approval of the clerk shall be deposited with the superintendent of the private hospital as his authority for holding the mentally disordered person. The clerk may, as he sees fit, order any mentally disordered person to be taken to a private hospital within the state instead of to one of the state hospitals and this order shall be sufficient authority for holding such mentally disordered person in such private hospital. Mental defectives, feeble-minded persons, and inebriates may be committed to and held in private hospitals or homes in this state in the manner hereinbefore prescribed for mentally disordered persons: Provided, that a period of detention in a private hospital or home of not less than one month and not more than six months shall be prescribed for inebriates, at the discretion of the clerk of the superior court approving the commitment. (Rev., s. 4607; 1903, c. 329, s. 2; 1945, c. 952, s. 47; 1949, c. 1060; C. S. 6226.)

Editor's Note.—The 1945 amendment substituted "mentally disordered" for "insane" and "mental defectives" for "idiots." It also rewrote the third sentence and made other changes.

Prior to the 1949 amendment the physician mentioned in the first sentence could not be connected with any private hospital, and the affidavit was to be made only before the clerk of the superior court. The amendment substituted in the third sentence the words "this order" for "his warrant."

§ 122-80. Patients transferred from state hospital to private hospital.—When it is deemed desirable that any patient of any state hospital be transferred to any licensed private hospital within the state, the executive committee may so order, and a certified copy of the commitment on file at the state hospital and the order of the executive committee shall be sufficient warrant for holding the mentally disordered person, mental defective, or inebriate by the officers of the private hospital. (Rev., s. 4608; 1903, c. 329, s. 3; 1945, c. 952, s. 50; C. S. 6227.)

Editor's Note.—The 1945 amendment substituted "patient" for "inmate," "mentally disordered" for "insane" and "mental defective" for "idiot."

§ 122-81. Guardian of mentally disordered person to pay expenses out of estate.—It shall be the duty of any person having legal custody of the estate of a mentally disordered person, mental defective, or inebriate legally held in a private hospital to supply funds for his support in the hospital during his stay therein and so long as there may be sufficient funds for that purpose over and beyond maintaining and supporting those persons who may be legally dependent on the estate. (Rev., s. 4610; 1899, c. 1, s. 40; 1903, c. 329, s. 4; 1945, c. 952, s. 51; C. S. 6228.)

Editor's Note.—The 1945 amendment substituted "mentally disordered" for "insane" and "mental defective" for "idiot."

§ 122-81.1. Commitment upon patient's application to private hospital.—Any person believing himself to be of unsound mind or threatened with mental disorder may voluntarily commit himself to a private hospital within the state according to the procedure prescribed under § 122-62. (1945, c. 952, s. 47½.)

§ 122-82.1. Superintendent must notify clerk of court when mentally disordered person is paroled or discharged.—Whenever a patient who has been committed to a private hospital is paroled or discharged the committing clerk of court must be notified by the superintendent of the private hospital as provided for in the statutes relating to the state hospitals. (1945, c. 952, s. 48.)

§ 122-82.2. Superintendent must notify of escape. — Whenever a patient who has been committed to a private hospital escapes from that hospital the committing clerk of court, committing physicians, and the sheriff of the county in which the patient is settled must be notified by the superintendent of the private hospital. (1945, c. 952, s. 49.)

Art. 6. Mentally Disordered Criminals.

§ 122-83. Mentally disordered persons charged with crime to be committed to hospital.—All persons who may hereafter commit crime while mentally disordered, and all persons who, being charged with crime, are adjudged to be mentally disordered at the time of their arraignment, and for that reason cannot be put on trial for the crimes alleged against them, shall be sent by the court before whom they are or may be arraigned for trial, when it shall be ascertained by due course of law that such person is mentally disordered and cannot plead, to the state hospital at Raleigh, if the alleged criminal is white, or to the state hospital at Goldsboro if the alleged criminal is colored, and if the alleged criminal is an Indian from Robeson county, to the state hospital at Raleigh, as provided for mentally disordered Indians from Robeson county, and they shall be confined therein under the rules and regulations prescribed by the board of directors under the authority of this article, and they shall be treated, cared for, and maintained in said hospital.

(1945, c. 952, s. 53.)

Cross Reference.—As to bringing insanity to attention of court and determination of present mental capacity, see note to § 122-84.

Editor's Note.—The 1945 amendment substituted in the first sentence "mentally disordered" for "insane." As the rest of the section was not affected by the amendment it is not set out.

Prior to Session Laws 1945, c. 952, s. 52, the title of this article was "Dangerous Insane."

§ 122-84. Persons acquitted of certain crimes or incapable of being tried, on account of mental disorder, committed to hospital.—When a person accused of the crime of murder, attempt at murder, rape, assault with the intent to commit rape, highway robbery, train wrecking, arson, or other crime, shall have escaped indictment or shall

have been acquitted upon trial upon the ground of mental disorder, or shall be found by the court to be without sufficient mental capacity to undertake his defense or to receive sentence after conviction, the court before which such proceedings are had shall detain such person in custody until an inquisition shall be had in regard to his mental condition.

(1945, c. 952, s. 54.)

Editor's Note.—
The 1945 amendment substituted "mental disorder" for "insanity" in line seven of the first sentence. As the rest of the section was not affected by the amendment it is not set out.

How Question of Present Insanity of Accused Brought to Attention of Court. — The general assembly has prescribed no procedure by which the question of the present insanity or mental disorder of the person accused of crime may be brought to the attention of the court, or for the investigation by the court preliminary to adjudicating the question whether accused is so mentally disordered as to be incapable of making a rational defense. Hence, in the absence of an applicable statute, the investigation of the present insanity or mental disorder to determine whether the accused shall be put on trial, and the form of the investigation ordered, are controlled by the common law. State v. Sullivan, 229 N. C. 251, 49 S. E. (2d) 458.

How Mental Capacity of Accused Determined.—The manner and form of an inquiry to determine whether a person accused of crime has the mental capacity to plead to the indictment and prepare a rational defense is for the determination of the trial court in the exercise of its discretion, and the court may submit an issue as to the present mental capacity of defendant and the issue of his guilt or innocence of the offense charged at the same time. State v. Sullivan, 229 N. C. 251, 49 S. E. (2d) 458, discussed in 27 N. C. Law Rev. 258.

§ 122-85. Convicts becoming mentally disordered committed to hospital.—All convicts becoming mentally disordered after commitment to the state prison, and the fact being certified as now required by law in the case of other mentally disordered persons, shall be admitted to the hospital designated in § 122-83. In case of the expiration of the sentence of any convict, mentally disordered person, while such person is confined to the said hospital, such person shall be kept until restored to his right mind or such time as he may be considered harmless and incurable. (Rev., s. 4619; 1899, c. 1, s. 66; 1923, c. 165, s. 5; 1945, c. 952, s. 55; C. S. 6238.)

Editor's Note.—
The 1945 amendment substituted "mentally disordered" for "insane."

§ 122-86. Persons acquitted of crime on account of mental disorder; how discharged from hospital.—No person acquitted of a capital felony on the ground of mental disorder, and committed to the hospital designated in § 122-83 shall be discharged therefrom unless an act authorizing his discharge be passed by the general assembly. No person acquitted of a crime of a less degree than a capital felony and committed to the hospital designated in § 122-83 shall be discharged therefrom except upon an order from the governor. No person convicted of a crime, and upon whom judgment was suspended by the judge on account of mental disorder, shall be discharged from said hospital except upon the order of the judge of the district or of the judge holding the courts of the district in which he was tried: Provided, that nothing in this section shall be construed to prevent such person so confined in the hospitals designated in § 122-83 from applying to any judge having jurisdiction for a writ of habeas corpus. No judge issuing a writ of habeas corpus upon the application of such person shall order his discharge until the superintendents of the several state hospitals shall certify that they have examined such person and find him to be sane, and that his detention is no longer necessary for his own safety or the safety of the public. (Rev., s. 4620; 1899, c. 1, s. 67; 1923, c. 165, s. 6; 1945, c. 952, s. 56; C. S. 6239.)

Editor's Note.—The 1945 amendment substituted "mental disorder" for "insanity."

§ 122-87. Proceedings in case of recovery of patient charged with crime.—Whenever a person confined in any hospital for the mentally disordered, and against whom an indictment for crime is pending, has recovered or has been restored to normal health and sanity, the superintendent of such hospital shall notify the clerk of the court of the county from which said person was sent, and the clerk will place the case against said person upon the docket of the superior or criminal court of his county for trial, and the person shall not be discharged without an order from said court.

(1945, c. 952, s. 57.)

Editor's Note.—The 1945 amendment substituted "mentally disordered" for "insane" in the first sentence. As the rest of the section was not affected by the amendment it is not set out.

§ 122-88. Ex-convicts with homicidal tendency committed to hospital. — Whenever any person who has been confined in the state prison under sentence for the felonious killing of another person, and who has been discharged therefrom at the expiration of his term of sentence, or as the result of executive clemency, shall thereafter so act as to justify the belief that he is possessed of a homicidal tendency, and shall be duly adjudged mentally disordered, in accordance with the provisions of article three of this chapter, the clerk of the superior court or other officer having jurisdiction of the proceedings in which such person shall be adjudged mentally disordered may, in his discretion, commit such person to the state hospital designated in § 122-83, as authorized and provided in this chapter. (1911, c. 169, s. 1; 1923, c. 165, s. 8; 1945, c. 952, s. 58; C. S. 6241.)

Editor's Note.—The 1945 amendment substituted "tendency" for "mania" and "mentally disordered" for "insane."

§ 122-89. Hospital authorities to receive and treat such patients.—It shall be the duty of the duly constituted authorities of the state hospitals designated in this law for the mentally disordered to receive all such mentally disordered persons as shall be committed to said institutions in accordance with the provisions of this law, and to treat and care properly for the same until discharged in accordance with the provisions of the law. (1911, c. 169, s. 2; 1923, c. 165, s. 9; 1945, c. 952, s. 59; C. S. 6242.)

Editor's Note.—The 1945 amendment substituted "mentally disordered" for "insane."

§ 122-91. Alleged criminal may be committed for observation.—Any alleged criminal indicted on a felony charge may, on the recommendations of the presiding judge of the superior court, be committed to a state hospital or to some other suitable

place for a period of not exceeding thirty days for observation. (1945, c. 952, s. 60.)

Art. 7. Camp Butner Hospital.

§ 122-92. Acquisition of Camp Butner Hospital authorized.—The state hospitals board of control is authorized to acquire by purchase, gift or otherwise the Camp Butner Hospital, including buildings, equipment, and land necessary for the operation of a modern up-to-date hospital for the care and treatment of the mentally sick of this state. (1947, c. 789, s. 2.)

Editor's Note.—For another act authorizing the acquisition of Camp Butner and the establishment of an institution similar to the other state hospitals, etc., see Session Laws 1947, c. 537, s. 1 set out in note to § 122-1. As to appropriation, etc., for acquisition and development of Camp Butner Hospital, see Session Laws 1947, c. 789, ss. 1, 3 and 4.

§ 122-93. Disposition of surplus real property.—The North Carolina hospitals board of control is authorized and empowered to sell, lease, rent or otherwise dispose of surplus real property located at Camp Butner, under such rules and regulations as may be adopted jointly by the North Carolina hospitals board of control and the advisory budget commission: Provided, however, that all conveyances of real property shall fully comply with the provisions of article 10, chapter 143 of the General Statutes and in particular §§ 143-146, 143-147, 143-148, 143-149, 143-150, 143-151. (1949, c. 71, s. 1.)

§ 122-94. Application of state highway and motor vehicle laws to roads, etc., at Camp Butner; penalty for violations.—All the provisions of chapter 20 of the General Statutes relating to the use of the highways of the state and the operation of motor vehicles thereon are hereby made applicable to the streets, alleys and driveways on the grounds of Camp Butner. Any person violating any of the provisions of said chapter in or on such streets, alleys or driveways shall, upon conviction thereof, be punished as therein prescribed. Nothing herein contained shall be construed as in any way interfering with the ownership and control of such streets, alleys and driveways on said grounds as is now vested by law in the state hospitals board of control. (1949, c. 71, s. 2.)

§ 122-95. Ordinances and regulations for enforcement of article.—The North Carolina hospitals board of control is authorized to make such rules and regulations and to adopt such ordinances, as it may deem necessary, to enforce the provisions of this article and to carry out its true purpose and intent, for the better administration of the Camp Butner Hospital and any adjacent territory owned by it, and in particular may make ordinances and adopt rules and regulations dealing with and controlling the following subjects:

1. To regulate the use of streets, alleys, driveways, and to establish parking areas.

2. To promote the health, safety, morals and general welfare of those residing on, occupying, renting or using any property or facilities within its limits, and those visiting and patronizing the hospital by:

a. Regulating the height, number of stories and size of buildings or other structures, the percentage of lot to be occupied, the size of yards and courts and other open spaces, the density of population, and the location and use of buildings, structures for trade, industry, residence or other purposes, to regulate markets, and prescribe at what place marketable products may be sold, and to condemn and remove all buildings, or cause them to be removed, at the expense of the owner, when dangerous to life, health or other property.

b. To prohibit, restrict and regulate theatres, carnivals, circuses, shows, parades, exhibitions of showmen and all other public amusements and entertainments and recreations.

c. To regulate, restrict or prohibit the operation of pool and billiard rooms and dance halls.

d. To regulate and prohibit the running at large of horses, mules, cattle, sheep, swine, goats, chickens and other animals and fowl of every description.

e. To prevent and abate nuisances whether on public or private property. (1949, c. 71, s. 3.)

§ 122-96. Recordation of ordinances and regulations; printing and distribution.—All ordinances, rules and regulations adopted pursuant to the authority of this article shall be recorded in the proceedings of the North Carolina hospitals board of control and printed copies shall be filed in the office of the secretary of state, and available for distribution to persons requesting the same. (1949, c. 71, s. 4.)

§ 122-97. Violations made misdemeanor.—Any person, firm or corporation violating any of the provisions of this article, or any ordinance, rule or regulation adopted pursuant thereto, shall be guilty of a misdemeanor and shall be punished by a fine not exceeding fifty dollars ($50.00) or imprisoned not exceeding thirty days or by both such fine and imprisonment. (1949, c. 71, s. 5.)

§ 122-98. Designation of special police officers.—To enable the North Carolina hospitals board of control to enforce the provisions of this article and any rule or regulation adopted pursuant thereto, the said North Carolina hospitals board of control is authorized to designate one or more special police officers who shall have the same powers as peace officers now vested in sheriffs and constables within the territory embraced by the Camp Butner Hospital site and any adjacent territory thereto owned or leased by the said North Carolina hospitals board of control. (1949, c. 71, s. 6.)

Chapter 125. Libraries.

Art. 1. State Library.

§ 125-1: Repealed by Session Laws 1947, c. 781.

§ 125-2. Trustees; duties and powers.—The governor, superintendent of public instruction, and secretary of state, and their respective successors in office, are appointed trustees of the state and document libraries. The board of trustees may make rules and regulations by which the librarian shall be governed for the protection and preservation of the books and library; and may make such distribution of the books, reports, and publications belonging to the state as in the judgment of the board is advisable and proper. (Rev., s. 5069; Code, s. 3612; 1871-2, c. 169, s. 3; 1903, cc. 104, 133; 1947, c. 781; C. S. 6574.)

Editor's Note.—The 1947 amendment substituted "may" for "shall" in line six.

§§ 125-8, 125-9: Repealed by Session Laws 1947, c. 781.

Art. 2. Document Library.

§ 125-15: Repealed by Session Laws 1947, c. 781.

Art. 3. Library Commission.

§ 125-21. Public libraries to report to commission.—Every public library in the state shall make an annual report to the commission, in such form as may be prescribed by the commission. The term "public library" shall, for the purpose of this article, include free public libraries, subscription libraries, college and university libraries, Young Men's Christian Association, legal association, medical association, supreme court, and state libraries. (1909, c. 873, s. 4; 1949, c. 232, s. 1; C. S. 6600.)

Editor's Note.—The 1949 amendment changed this section so as to exclude school libraries, it being the stated intent and purpose of the amendment to make it unnecessary for annual reports to be made to the library commission by "school" libraries.

§ 125-26. State policy as to public library service; annual appropriation therefor; library service; administration of fund.

4. For the necessary expenses of administration, allocation and supervision, a sum not to exceed seven per cent (7%) of the annual apropriation may annually be used by the North Carolina library commission.

(1949, c. 232, s. 2.)

Editor's Note.—The 1949 amendment changed the amount in subsection 4 from five to seven per cent. As the rest of the section was not affected by the amendment it is not set out.

Chapter 126. Merit System Council.

Sec.

126-2. Supervisor of merit examinations; rules and regulations; examinations.

§ 126-1. Appointment of members of merit system council; qualifications; terms; compensation.—The governor of North Carolina is hereby authorized to appoint a merit system council, which shall be composed of five members, all of whom shall be public spirited citizens of this state of recognized standing in the improvement of public administration and in the impartial selection of efficient government personnel for the employment security commission, the North Carolina medical care commission, the state board of health, the state board of charities and public welfare, employees of the North Carolina state hospitals board of control paid in whole or in part from federal funds granted by the surgeon general of the public health service by virtue of the National Mental Health Act, or by any other federal department or agency, and administered by the North Carolina state hospitals board of control as the state mental health authority in the mental health or mental hygiene program, and the state commission for the blind.

(1947, c. 598, s. 1; c. 933, s. 4; 1949, c. 492.)

Editor's Note.—The first 1947 amendment substituted "employment security commission" for "unemployment compensation commission" in the first sentence, and the second 1947 amendment inserted therein the words "the North Carolina medical care commission." The 1949 amendment inserted the provision as to employees of the hospitals board of control. As the rest of the section was not affected by the amendments it is not set out.

§ 126-2. Supervisor of merit examinations; rules and regulations; examinations.—The supervisor of merit examinations appointed under the provisions of article 2 of chapter 143 of the General Statutes, as amended and rewritten by the general assembly of 1949, in cooperation with the merit system council, and with the approval of the state personnel director, the state agencies affected by this chapter, as amended, and the federal security agency or other federal agency or department charged with the administration of the Federal Social Security Laws, shall prepare rules and regulations, job descriptions and specifications, and prepare and give examinations for and to all employees and applicants for employment and/or promotions of the agencies or departments affected by this chapter. Such rules and regulations shall be printed and made available for public inspection and for the use of employees and applicants for employment in said agencies or departments. (1941, c. 378, s. 2; 1949, c. 718, s. 2.)

Editor's Note.—The 1949 amendment rewrote this section.

§ 126-3. Organization of council; meetings; representation of state agencies; duties and pay of supervisor.—The said council shall meet as soon as practicable and organize by electing one of its members as chairman and one who shall act as secretary. The secretary shall keep the minutes of the proceedings of the said council and shall be guardian of all papers pertaining to the business of said council. Meetings of the council shall be held as often as necessary and practicable upon the call of the chairman. The state agencies shall have the right to be represented at all meetings of the council but such representation shall be without voting power. The supervisor of merit examinations, above provided for, shall keep a record of all examinations held, and shall per-

form such other duties as the council shall prescribe, for which he shall be paid compensation to be fixed by the state personnel director. (1941, c. 378, s. 3; 1949, c. 718, s. 3.)

Editor's Note. — The 1949 amendment substituted "state personnel director" for "director of the budget."

§ 126-15. Application of chapter.—Wherever the provisions of any law of the United States, or of any rule, order or regulation of any federal agency or authority, providing or administering federal funds for use in North Carolina, either directly or indirectly or as a grant-in-aid, or to be matched or otherwise, impose other or higher, civil service or merit standards or different classifications than are required by the provisions of this chapter, then the provisions of such laws, classifications, rules or regulations of the United States or any federal agency may be adopted by the council as rules and regulations of the council and shall govern the class of employment and employees affected thereby, anything in this chapter to the contrary notwithstanding. (1941, c. 378, s. 14; 1947, c. 781.)

Editor's Note.—The 1947 amendment added "s" to the word "State" in line two.

§ 126-16. Effect on certain existing laws.—Nothing in this chapter shall be construed as repealing any of the provisions of article 2 of chapter 143 of the General Statutes, as amended and rewritten by the general assembly of 1949, relating to the state personnel department, nor as relieving the state personnel director and the state personnel council of the duties and responsibilities prescribed therein for the state personnel director and the state personnel council. (1941, c. 378, s. 15; 1949, c. 718, s. 4.)

Editor's Note.—The 1949 amendment rewrote this section.

Chapter 127. Militia.

Art. 11. General Provisions.

Sec.

127-110.1. When officers authorized to administer oaths.

Art. 1. Classification of Militia.

§ 127-1. Composition of militia.—The militia of the state shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the United States, who shall be more than seventeen years of age and, except as hereinafter provided, not more than forty-five years of age, and the militia shall be divided into three classes: the national guard, the naval militia, and the unorganized militia. (1917, c. 200, s. 1; 1949, c. 1130, s. 1; C. S. 6701.)

Editor's Note. — The 1949 amendment substituted "seventeen" for "eighteen" in line six.

§ 127-2. Composition of national guard.—The national guard shall consist of the regularly enlisted militia between the ages of seventeen and forty-five years, organized, armed, and equipped as hereinafter provided, and of commissioned officers between the ages of twenty-one and sixty-four years. (1917, c. 200, s. 2; 1949, c. 1130, s. 1; C. S. 6792.)

Editor's Note. — The 1949 amendment substituted "seventeen" for "eighteen" in line three.

§ 127-3. Composition of naval militia.—The naval militia shall consist of the regularly enlisted militia between the ages of seventeen and forty-five years, organized, armed, and equipped as hereinafter provided, and commissioned officers between the ages of twenty-one and sixty-two years (naval branch), and twenty-one and sixty-four years (marine corps branch); but enlisted men may continue in the service after the age of forty-five years, and until the age of sixty-two years (naval branch), or sixty-four years (Marine corps branch), provided the service is continuous. (1917, c. 200, s. 3; 1949, c. 1130, s. 1; C. S. 6793.)

Editor's Note. — The 1949 amendment substituted "seventeen" for "eighteen" in line three.

§ 127-4. Composition of unorganized militia.—The unorganized militia shall consist of all other able-bodied male citizens of the state and all other able-bodied males who have or shall have declared their intention to become citizens of the United States, who shall be more than seventeen years of age, and, except as otherwise provided by law, not more than forty-five years of age. (1917, c. 200, s. 4; 1949, c. 1130, s. 1; C. S. 6794.)

Editor's Note. — The 1949 amendment substituted "seventeen" for "eighteen" in line five.

Art. 2. General Administrative Officers.

§ 127-12. Adjutant general.—The governor shall appoint an adjutant general, which appointment shall carry with it the rank of major general. No person shall be appointed as adjutant general who has had less than five years commissioned service in the national guard, naval militia, regular army, United States navy or marine corps, or organized reserve corps of the United States. The adjutant general, while holding such office, may be a member of the active national guard or naval militia, or organized reserve corps of the United States. (1917, c. 200, s. 14; 1925, c. 54; 1939, c. 14; 1949, c. 1225; C. S. 6802.)

Editor's Note.—The 1949 amendment rewrote this section.

Art. 3. National Guard.

§ 127-30. Retirement of officers.—Retirement of officers shall be regulated so as to conform to federal laws and regulations of the United States relating to retirement of national guard officers. (1917, c. 200, s. 29; 1949, c. 1130, s. 2; C. S. 6819.)

Editor's Note.—The 1949 amendment rewrote this section.

§ 127-42. Powers of courts-martial.—All courts-martial of the national guard, not in the service of the United States, including summary courts, shall have power to sentence to confinement in lieu of fines authorized to be imposed: Provided, that such sentences of confinement shall not exceed one day for each dollar of fine authorized. (1917, c. 200, s. 59; 1949, c. 1130, s. 3; C. S. 6829.)

Editor's Note.—The 1949 amendment rewrote this section and omitted the provision relating to confinement in jail.

Art. 7. Pay of Militia.

§ 127-79. Rate of pay for service.—The governor may, whenever the public service requires it,

order upon special or regular duty any officer or enlisted man of the national guard or naval militia, and the expenses and compensation therefor of such officer and enlisted man shall be paid out of the appropriations made to the adjutant general's department. Such officer and enlisted man shall receive the same pay as officers and enlisted men of the same grade and like service of the regular army or navy; but officers when on duty in connection with examining boards, efficiency boards, advisory boards, and courts of inquiry shall be allowed actual expenses and six dollars ($6.00) per diem for such duty. Officers serving on general or special courts-martial shall receive the base pay of their rank. No staff officer who receives a salary from the state as such shall be entitled to any additional compensation other than actual and necessary expenses incurred while traveling upon orders issued by the proper authority. (1917, c. 200, s. 51; 1935, c. 451; 1949, c. 1130, s. 4; C. S. 6865.)

Editor's Note. — The 1949 amendment increased the per diem from "four" to "six" dollars.

Art. 8. Privilege of Organized Militia.

§ 127-83. Leaves of absence for state officers and employees.—All officers and employees of the state, including superintendents, principals, and teachers in the public schools of the state, who shall be members of the national guard, naval militia, officers reserve corps, enlisted reserve corps, or the naval reserves shall be entitled to leaves of absence from their respective duties, without loss of pay, time, or efficiency rating, on all days during which they shall be engaged in field or coast-defense training ordered or authorized under the provisions of this chapter or as may be directed by the president of the United States. (1917, c. 200, s. 88; 1937, c. 224, s. 1; 1949, c. 1274; C. S. 6869.)

Editor's Note. — The 1949 amendment inserted the words "including superintendents, principals, and teachers in the public schools of the state."

Art. 10. Support of Militia.

§ 127-102. Allowances made to different organizations.—There shall be allowed each year to the following officers, under rules and regulations prescribed by the adjutant general, as follows: To the commanding general of a division, group and regimental commanders, commanding officers of separate battalions, squadrons, or similar organizations, not to exceed two hundred and twenty-five dollars ($225.00); to commanding officers of battalions or similar organizations being a part of the regiment, not to exceed one hundred dollars ($100.00); to commanding officers of companies, batteries, troops, detachments and similar units not to exceed two hundred dollars ($200.00); to lieutenants serving with units, not to exceed one hundred dollars ($100.00); to regimental adjutants, plans and training officers, and adjutants of separate battalions, squadrons, and similar organizations, not to exceed one hundred dollars ($100.00). No officer shall be entitled to receive any part of the amounts named herein unless he has performed satisfactorily all duties required of him by law and regulations and has pursued such course of instruction as may from time to time be required.

There shall be allowed annually to each company, battery, troop, and similar organizations federally recognized under regulations prescribed by the war department in its tables of organization for the national guard, not to exceed the sum of one thousand and five hundred dollars ($1,500.00), to be applied to the payment of armory rent, heat, light, stationery, postage, printing and other necessary expenses of the organization, in accordance with rules and regulations prescribed by the adjutant general.

(1949, c. 1130, s. 5.)

Editor's Note.—The 1949 amendment rewrote the first paragraph and substituted $1500.00 for $600.00 in the second paragraph. As the last four paragraphs were not changed they are not set out.

Art. 11. General Provisions.

§ 127-110 1. When officers authorized to administer oaths.—Officers of the national guard are authorized to administer oaths in all circumstances pertaining to any military matter whenever an oath is required. (1949, c. 1130, s. 6.)

Art. 12. State Guard.

§ 127-111. Authority to organize and maintain state guard of North Carolina.

2. Such military force shall be designated as the "North Carolina state guard" and shall be composed of men of the unorganized militia as shall volunteer for service therein, or as shall be drafted as provided by law. Membership in the North Carolina state guard shall be open to men of not less than eighteen and not more than fifty years of age; provided, however, that the members of the band may be composed of men of not less than sixteen and not more than fifty years of age. They shall be additional to and distinct from the national guard organized under existing law. They shall not be required to serve outside the boundaries of this state.

6. The North Carolina state guard shall be subject to the military laws of the state not inconsistent with or contrary to the provisions contained in this article with the following exceptions:

The provisions of §§ 127-84, 127-85 and 127-102, as amended, shall not be applicable to the personnel and units of the state guard.

(1945, c. 290, s. 1; c. 835.)

Editor's Note.—

The first 1945 amendment struck out "9-19" from the list of inapplicable sections in subsection 6, and the second 1945 amendment inserted the proviso in subsection 2. As the other subsections were not affected by the amendments they are not set out.

Chapter 128. Offices and Public Officers.

Art. 3. Retirement System for Counties, Cities and Towns.

Art. 1. General Provisions.

§ 128-9. Peace officers employed by state to give bond.—

Stated in Jordan v. Harris, 225 N. C. 763, 36 S. E. (2d) 270.

§ 128-10. Citizen to recover funds of county or town retained by delinquent official.

Resident Judge without Authority to Indemnify Plaintiffs.—In an action by taxpayers under this section to recover of county commissioners on account of public funds unlawfully expended, etc., plaintiffs disclaiming any right personally to participate in the recovery, it was held that after a recovery by plaintiffs and the entry of a consent judgment dismissing the appeals, wherein no mention was made of indemnifying plaintiffs for their services, the resident judge was without authority to entertain a petition of one of the original taxpayer plaintiffs for such reimbursement. Hill v. Stansbury, 224 N. C. 356, 30 S. E. (2d) 150.

Authority of Commissioners to Allow County Treasurer Additional Salary.—In a civil action by taxpayers against county commissioners and against the treasurer of the county to recover moneys paid to such treasurer in excess of his annual salary as fixed by law, where the evidence tended to show that the county treasurer's salary was fixed at $1,800 a year in 1927, and that in 1931, agreeable to the Machinery Act of that year (§ 105-271 et seq.), the commissioners designated the county treasurer to receive tax prepayments and for this extra service allowed him $1,200 per year additional, and again in 1939 allowed him $240 more per annum, both without legislative authority, judgment of nonsuit as to the commissioners was properly allowed under the express provisions of this section, there being no evidence of bad faith, etc., while such judgment as to the county treasurer was reversed. Hill v. Stansbury, 223 N. C. 193, 25 S. E. (2d) 604.

§ 128-15.1. Section 128-15 applicable to persons serving in present war.—All the provisions for preference rating and preference of employment to citizens who served the state or the United States, honorably in either the army, navy, marine corps or nurses' corps in time of war and to the widows of such veterans and the wives of disabled veterans provided in § 128-15 are hereby specifically made applicable to men and women who have served, are now serving, or shall serve in any branch of the armed services, coast guard and coast guard reserve or the nurses' corps during the present war, and are honorably discharged from such service, and to the widows of such veterans and the wives of disabled veterans of the present war. (1943, c. 168; 1947, c. 412.)

The 1947 amendment made this section applicable to the coast guard and coast guard reserve.

Art. 3. Retirement System for Counties, Cities and Towns.

§ 128-21. Definitions.

(2) "Employer" shall mean any county or incorporated city or town, or the light and water board or commission of any incorporated city or town, or the board of alcoholic control of any county or incorporated city or town participating in the retirement system. The North Carolina league of municipalities, housing authorities created and operated under and by virtue of chapter 157 of the General Statutes, and the office of the retirement system shall be classed as employers eligible to participate in the retirement system.

(3) "Employee" shall mean any person who is regularly employed in the service of and whose salary or compensation is paid by the employer as defined in subsection two of this section, including employees of any light and water board or commission, and full-time employees of any housing authority created and operating under and by virtue of chapter 157 of the General Statutes, whether employed or appointed for stated terms or otherwise, except teachers in the public schools and except such employees who hold office by popular election as are not required to devote a major portion of their time to the duties of their office. In all cases of doubt the board of trustees shall decide who is an employee.

(6) "Prior service" shall mean the service of a member rendered before the date he becomes a member of the system, certified on his prior service certificate and allowable as provided by § 128-26.

(1945, c. 526, s. 1; 1947, c. 833, ss. 1, 2; 1949, c. 231, ss. 1, 2; c. 1015.)

Local Modification.—Session Laws 1945, c. 526, amending §§ 128-21, 128-22, 128-26 through 128-30 and 128-36, provides in section 9 that it shall not apply to the counties of Buncombe, Gates, Granville, Lee, New Hanover, Onslow, Randolph, Rutherford and Vance or to the cities of Henderson and Wilmington. Subsequently Session Laws 1945, cc. 1077, 1086, 1089, 1091 and 1100 made the above amendatory act applicable to Rutherford, Granville, Vance and Buncombe counties, respectively. Session Laws 1945, c. 1100, in effect makes chapter 526 applicable to Randolph county, though its title only purports to make it applicable to the city of Asheboro. Session Laws 1947, c. 15, s. 1, amended Session Laws 1945, c. 526, s. 9, by striking out the reference to the city of Henderson; and Session Laws 1947, c. 943, struck out Lee from the list of counties. Thus it appears that only the counties of Gates, New Hanover and Onslow, and the city of Wilmington, are excepted from the operation of Session Laws 1945, c. 526. For counties excepted from repealing section, see note under §§ 128-37, 128-38.

Editor's Note.—

The 1945 amendment rewrote subsection (6) and the 1947 amendment inserted in subsections (2) and (3) the clauses relating to the light and water board or commission. The first 1949 amendment made subsection (2) applicable to housing authorities and subsection (3) applicable to employees of such housing authorities. The second 1949 amendment inserted in subsection (2) the following "or the board of alcoholic control of any county or incorporated city or town." As the rest of the section was not affected by the amendments it is not set out.

Session Laws 1947, c. 15, s. 2 made this article applicable to the city of Henderson. For act exempting from this article the uniformed employees of the fire department of the city of Charlotte, see Session Laws 1947, c. 926, amended by Session Laws 1949, c. 734.

§ 128-22. Name and date of establishment. — A retirement system is hereby established and placed under the management of the board of trustees for the purpose of providing retirement allowances and other benefits under the provisions of this article for employees of those counties, cities and towns or other eligible employers participating in the said retirement system. Following the filing of the application as provided in § 128-23(3), the board of trustees shall set a date not less than sixty and not more than ninety days thereafter, as of which date participation of the employer may

begin, which date shall be known as the date of participation for such employer: Provided, that in the judgment of the board of trustees an adequate number of persons have indicated their intention to participate; otherwise at such later date as the board of trustees may set.

It shall have the power and privileges of a corporation and shall be known as the "North Carolina local government employees' retirement system," and by such name all of its business shall be transacted, all of its funds invested. and all of its cash and securities and other property held. (1939, c. 390, s. 2; 1941, c. 357, s. 2; 1943, c. 535; 1945, c. 526, s. 2.)

Local Modification.—Gates, New Hanover, Onslow, and city of Wilmington: 1945, c. 526, s. 9.

Editor's Note.—

Prior to the 1945 amendment the second sentence provided that the retirement system was operative as of July 1, 1943.

§ 128-24. Membership.—The membership of this retirement system shall be composed as follows:

(1) All employees entering or reentering the service of a participating county, city, or town after the date of participation in the retirement system of such county, city, or town, except that law enforcement officers, as defined in subsection (m) of § 143-166 of the General Statutes, may elect to become members of the law enforcement officers' benefit and retirement fund or the North Carolina local governmental employees' retirement system.

(2) All persons who are employees of a participating county, city, or town except those who shall notify the board of trustees in writing, on or before ninety days following the date of participation in the retirement system by such county, city or town: Provided, that persons who are or who shall become members of any existing retirement system and who are or who may be thereby entitled to benefit by existing laws providing for retirement allowances for employees wholly or partly at the expense of funds drawn from the treasury of the state of North Carolina or of any political subdivision thereof, shall not be members: Provided, further, that employees of county welfare and health departments whose compensation is derived from federal, state, and local funds may be members of the North Carolina local governmental employees' retirement system to the full extent of their compensation. (1939, c. 390, s. 4; 1941, c. 357, s. 3; 1949, cc. 1011, 1013.)

Local Modification.—City of Charlotte: 1949, c. 990.

Editor's Note.—The first 1949 amendment added the exception at the end of subsection (1). And the second 1949 amendment rewrote the last proviso.

Who Excluded from Membership.—The exclusion from membership in the retirement system, as expressed in paragraph 2, will not be interpreted to apply only to those receiving retirement allowances from general funds in state treasury derived from general taxation, but is applicable to those entitled to benefits from any funds coming into the hands of the state treasurer by virtue of a state law. Gardner v. Board of Trustees, 226 N. C. 465, 38 S. E. (2d) 314, 316.

Cited in Hunter v. Board of Trustees, 224 N. C. 359, 30 S. E. (2d) 384 (con. op.).

§ 128-25. Membership in system.

Cited in Dillon v. Wentz, 227 N. C. 117, 41 S. E. (2d) 202.

§ 128-26. Allowance for service. — (1) Under such rules and regulations as the board of trustees shall adopt each member who was an employee at any time during the year immediately preceding the date of participation of his employer, and who becomes a member during the first year thereafter, shall file a detailed statement of all service as an employee rendered by him to his employer prior to such date of participation for which he claims credit.

(2) The board of trustees shall fix and determine by appropriate rules and regulations how much service in any year is equivalent to one year of service, but in no case shall more than one year of service be creditable for all service in one calendar year.

(3) Subject to the above restrictions and to such other rules and regulations as the board of trustees may adopt, the board of trustees shall verify, as soon as practicable after the filing of such statements of service, the service therein claimed.

In lieu of a determination of the actual compensation of the members that was received during such period of prior service, the board of trustees may use for the purpose of this article the compensation rates which if they had progressed with the rates of salary increase shown in the tables as prescribed in subsection fourteen of § 128-28 would have resulted in the same average salary of the member for the five years immediately preceding the date of participation of his employer, as the records show the member actually received.

(4) Upon verification of the statements of service the board of trustees shall issue prior service certificates certifying to each member the length of service rendered prior to the date of participation of his employer, with which he is credited on the basis of his statement of service. So long as membership continues a prior service certificate shall be final and conclusive for retirement purposes as to such service: Provided, however, that any member may, within one year from the date of issuance or modification of such certificate, request the board of trustees to modify or correct his prior service certificate.

When membership ceases, such prior service certificates shall become void. Should the employee again become a member, such employee shall enter the system as an employee not entitled to prior service credit except as provided in § 128-27, subsection five, paragraph (b).

(5) Creditable service at retirement on which the retirement allowance of a member shall be based shall consist of the membership service rendered by him since he last became a member, and also if he has a prior service certificate which is in full force and effect, the amount of the service certified on his prior service certificate. (1939, c. 390, s. 6; 1941, c. 357, s. 5; 1943, c. 535; 1945, c. 526, s. 3.)

Local Modification.—Gates, New Hanover, Onslow, and city of Wilmington: 1945, c. 526, s. 9.

Editor's Note.—

The 1945 amendment made changes in subsections (1), (3) and (4).

§ 128-27. Benefits.—Service Retirement Benefit. —(a) Any member in service may retire upon written application to the board of trustees setting forth at which time, not less than thirty days nor more than ninety days subsequent to the execution and filing thereof, he desires to be retired: Provided, that the said member at the time so specified for his retirement shall have attained the age of sixty years, or if a uniformed policeman or fire-

man he shall have attained the age of fifty-five years, and notwithstanding that, during such period of notification, he may have separated from service.

(b) Any member in service who has attained the age of sixty-five shall be retired at the end of the fiscal year unless the employing board requests such person to remain in the service, and notice of this request is given in writing thirty days prior to the end of the fiscal year.

(c) Any member in service who has attained the age of seventy years shall be retired forthwith: Provided, that with the approval of his employer he may remain in service until the end of the fiscal year following the date on which he attains the age of seventy years: Provided, further, that with the approval of the board of trustees and his employer, any member who has attained or shall attain the age of seventy years may be continued in service for a period of two years following each such request.

(2) Allowance for Service Retirement.—Upon retirement from service a member shall receive a service retirement allowance which shall consist of:

(a) An annuity which shall be the actuarial equivalent of his accumulated contributions at the time of his retirement; and

(b) A pension equal to the annuity allowable at the age of sixty years or at the actual age at retirement if prior thereto, computed on the basis of contributions made prior to the attainment of age sixty; and

(c) If he has a prior service certificate in full force and effect, an additional pension which shall be equal to the annuity which would have been provided at the age of sixty years, or at the actual age of retirement if prior thereto, by twice the contributions which he would have made during such period of service had the system been in operation and he contributed thereunder.

(1945, c. 526, s. 4.)

Local Modification.—Gates, New Hanover, Onslow, and city of Wilmington: 1945, c. 526, s. 9.

Editor's Note.—The 1945 amendment made changes in paragraph (a) of subsection (1) and paragraphs (b) and (c) of subsection (2). As the other subsections were not affected by the amendment they are not set out.

§ 128-28. Administration.—The general administration and responsibility for the proper operation of the retirement system and for making effective the provisions of this article are hereby vested in the board of trustees: Provided, that all expenses in connection with the administration of the North Carolina local governmental employees' retirement system shall be charged against and paid from the expense fund as provided in subsection five of § 128-30.

(1) Board of Trustees a Body Politic and Corporate; Powers and Authority; Exemption from Taxation.—The board of trustees shall be a body politic and corporate under the name board of trustees of the North Carolina local governmental employees' retirement system, and as a body politic and corporate shall have the right to sue and be sued, shall have perpetual succession and a common seal, and in said corporate name shall be able and capable in law to take, demand, receive and possess all kinds of real and personal property necessary and proper for its corporate purposes, and to bargain, sell, grant, alien, or dispose of all such real and personal property as it may lawfully acquire. All such property owned or acquired by said body politic and corporate shall be exempt from all taxes imposed by the state or any political subdivision thereof, and shall not be subject to income taxes.

(2) Members of Board.—The board shall consist of the board of trustees of the teachers' and state employees' retirement system and two other persons to be appointed by the governor; one a fulltime executive officer of a city or town participating in the retirement system, and one a fulltime officer of the governing body of a county participating in the retirement system, these to be appointed for a term of two years each. At the expiration of these terms of office, the appointment shall be for a term of four years.

(3) Compensation of Trustees. — The trustees shall be paid seven dollars ($7.00) per day during sessions of the board and shall be reimbursed from the expense appropriation for all necessary expenses that they may incur through service on the board.

(4) Oath.—Each trustee other than the ex officio members shall, within ten days after his appointment, take an oath of office, that, so far as it devolves upon him, he will diligently and honestly administer the affairs of the said board, and that he will not knowingly violate or willingly permit to be violated any of the provisions of law applicable to the retirement system. Such oath shall be subscribed to by the member making it, and certified by the officer before whom it is taken, and immediately filed in the office of the secretary of state.

(5) Voting Rights.—Each trustee shall be entitled to one vote in the board. Five affirmative votes shall be necessary for a decision by the trustees at any meeting of said board.

(6) Rules and Regulations.—Subject to the limitations of this chapter, the board of trustees shall, from time to time, establish rules and regulations for the administration of the funds created by this chapter and for the transaction of its business. The board of trustees shall also, from time to time, in its discretion, adopt rules and regulations to prevent injustices and inequalities which might otherwise arise in the administration of this chapter.

(7) Officers and Other Employees, Salaries and Expenses.—The board of trustees shall elect from its membership a chairman, and shall, by a majority vote of all the members, appoint a secretary, who may be, but need not be, one of its members. The board of trustees shall engage such actuarial and other service as shall be required to transact the business of the retirement system. The compensation of all persons engaged by the board of trustees, and all other expenses of the board necessary for the operation of the retirement system, shall be paid at such rates and in such amounts as the board of trustees shall approve.

(8) Actuarial Data.—The board of trustees shall keep in convenient form such data as shall be necessary for actuarial valuation of the various funds of the retirement system, and for checking the experience of the system.

(9) Record of Proceedings; Annual Report.—

The board of trustees shall keep a record of all of its proceedings which shall be open to public inspection. It shall publish annually a report showing the fiscal transactions of the retirement system for the preceding year, the amount of the accumulated cash and securities of the system, and the last balance sheet showing the financial condition of the system by means of an actuarial valuation of the assets and liabilities of the retirement system.

(10) Legal Adviser.—The attorney general shall be the legal adviser of the board of trustees.

(11) Medical Board. — The board of trustees shall designate a medical board to be composed of three physicians not eligible to participate in the retirement system. If required, other physicians may be employed to report on special cases. The medical board shall arrange for and pass upon all medical examinations required under the provisions of this chapter, and shall investigate all essential statements and certificates by or on behalf of a member in connection with an application for disability retirement, and shall report in writing to the board of trustees its conclusion and recommendations upon all the matters referred to it.

(12) Duties of Actuary.—The board of trustees shall designate an actuary who shall be the technical adviser of the board of trustees on matters regarding the operation of the funds created by the provisions of this chapter and shall perform such other duties as are required in connection therewith.

(13) Immediately after the establishment of the retirement system the actuary shall make such investigation of the mortality, service and compensation experience of the members of the system as he shall recommend and the board of trustees shall authorize, and on the basis of such investigation he shall recommend for adoption by the board of trustees such tables and such rates as are required in subsection fourteen, paragraphs (a) and (b), of this section. The board of trustees shall adopt tables and certify rates, and as soon as practicable thereafter the actuary shall make a valuation based on such tables and rates of the assets and liabilities of the funds created by this chapter.

(14) In the year one thousand nine hundred and forty-five, and at least once in each five-year period thereafter, the actuary shall make an actuarial investigation into the mortality, service and compensation experience of the members and beneficiaries of the retirement system, and shall make a valuation of the assets and liabilities of the funds of the system, and taking into account the result of such investigation and valuation, the board of trustees shall:

(a) Adopt for the retirement system such mortality, service and other tables as shall be deemed necessary; and

(b) Certify the rates of contributions payable by the participating units on account of new entrants at various ages.

(15) On the basis of such tables as the board of trustees shall adopt, the actuary shall make an annual valuation of the assets and liabilities of the funds of the system created by this chapter. (1939, c. 390, s. 8; 1941, c. 357, s. 6; 1945, c. 526, s. 7.)

Local Modification.—Gates, New Hanover, Onslow, and city of Wilmington: 1945, c. 526, s. 9.

Editor's Note.—
The 1945 amendment rewrote this section.

§ 128-29. Management of funds.

(2) Annual Allowance of Regular Interest.—The board of trustees annually shall allow regular interest on the mean amount for the preceding year in each of the funds with the exception of the expense fund. The amounts so allowed shall be due and payable to said funds, and shall be annually credited thereto by the board of trustees from interest and other earnings on the moneys of the retirement system. Any additional amount required to meet the interest on the funds of the retirement system shall be paid from the pension accumulation fund, and any excess of earnings over such amount required shall be paid to the pension accumulation fund. Regular interest shall mean interest at the rate of four per centum per annum with respect to all calculations and allowances on account of members' contributions and at the rate of three per centum per annum with respect to employers' contributions, with the right reserved to the board of trustees to set a different rate or rates from time to time.

(1945, c. 526, s. 5.)

Local Modification.—Gates, New Hanover, Onslow, and city of Wilmington: 1945, c. 526, s. 9.

Editor's Note.—
The 1945 amendment rewrote the last sentence of subsection (2). As the other subsections were not changed they are not set out.

§ 128-30. Method of financing.

(3) Pension Accumulation Fund.—The pension accumulation fund shall be the fund in which shall be accumulated all reserves for the payment of all pensions and other benefits payable from contributions made by employers and from which shall be paid all pensions and other benefits on account of members with prior service credit. Contributions to and payments from the pension accumulation fund shall be made as follows:

(a) Each participating employer shall pay to the pension accumulation fund monthly, or at such other intervals as may be agreed upon with the board of trustees, an amount equal to a certain percentage of the earnable compensation of each member, to be known as the "normal contribution" and an additional amount equal to a percentage of his earnable compensation to be known as the "accrued liability contribution." The rate per centum of such contributions shall be fixed on the basis of the liabilities of the retirement system as shown by actuarial valuation. Until the first valuation for any employer the normal contribution shall be three per cent for general employees and five per cent for firemen and policemen, and the accrued liability contribution shall be three per cent for general employees and six per cent for firemen and policemen.

(b) On the basis of regular interest and of such mortality and other tables as shall be adopted by the board of trustees, the actuary engaged by the board to make each valuation required by this article during the period over which the accrued liability contribution is payable, immediately after making such valuation, shall determine the uniform and constant percentage of the earnable compensation of the average new entrant throughout his entire period of active service which would be sufficient to provide for

the payment of any pension payable on his account and for the pro rata share of the cost of administration of the retirement system. The rate per centum so determined shall be known as the "normal contribution" rate. After the accrued liability contribution has ceased to be payable, the normal contribution rate shall be the rate per centum of the earnable salary of all members obtained by deducting from the total liabilities of the pension accumulation fund the amount of the funds in hand to the credit of that fund and dividing the remainder by one per centum of the present value of the prospective future salaries of all members as computed on the basis of the mortality and service tables adopted by the board of trustees and regular interest. The normal rate of contribution shall be determined by the actuary after each valuation.

(c) The "accrued liability contribution" shall be set for each employer on the basis of the prior service credits allowable to the employees thereof, who are entitled to prior service certificates, and shall be paid for a period of approximately thirty years, provided that the length of the period of payment for each employer after contributions begin shall be the same for all employers and shall be determined by the board of trustees as the result of actuarial valuations.

(d) At the end of the first year following the date of participation for each employer, the accrued liability payable by such employer shall be set, by deducting from the present value of the total liability for all pensions payable on account of all members and pensioners of the system who became participants through service for such employer, the present value of the future normal contributions payable, and the amount of any assets resulting from any contributions previously made by such employer. Then the "accrued liability contribution" rate for such employer shall be the per centum of the total annual compensation of all members employed by such employer which is equivalent to four per centum of the amount of such accrued liability. The expense of making such actuarial valuation to determine the accrued liability contribution for each employer shall be paid by such employer.

(e) The total amount payable in each year to the pension accumulation fund shall not be less than the sum of the rate per centum known as the normal contribution rate and the accrued liability contribution rate of the total compensation earnable by all members during the preceding year: Provided, however, that the amount of each annual accrued liability contribution shall be at least three per centum greater than the preceding annual accrued liability payment, and that the aggregate payment by employers shall be sufficient, when combined with the amount in the fund, to provide the pensions and other benefits payable out of the fund during the year then current.

(f) The accrued liability contribution shall be discontinued as soon as the accumulated reserve in the pension accumulation fund shall equal the present value, as actuarially computed and approved by the board of trustees, of the total liability of such fund less the present value, computed on the basis of the normal contribution rate then in force, of the prospective normal contributions to be received on account of all persons who are at that time members.

(g) All pensions, and benefits in lieu thereof, with the exception of those payable on account of members who received no prior service allowance, payable from contributions of employers, shall be paid from the pension accumulation fund.

(h) Upon the retirement of a member not entitled to credit for prior service, an amount equal to his pension reserve shall be transferred from the pension accumulation fund to the pension reserve fund.

(1945, c. 526, s. 6.)

Local Modification.—Gates, New Hanover, Onslow, and city of Wilmington: 1945, c. 526, s. 9.

Editor's Note.—
The 1945 amendment made changes in paragraphs (a), (c) and (d) of subsection (3). As only this subsection was affected by the amendment the rest of the section is not set out.

§ 128-36. Local laws unaffected; when benefits begin to accrue.—Nothing in this article shall have the effect of repealing any Public-Local or Private Act creating or authorizing the creation of any officers' or employees' retirement system in any county, city, or town or prohibiting the enactment of any Public-Local or Private Act creating or authorizing the creation of any officers' or employees' retirement system in any county, city, or town. No payment on account of any benefit granted under the provisions of § 128-27, subsections one to four inclusive, shall become effective or begin to accrue until the end of one year following the date the system is established nor shall any compulsory retirement be made during that period. The provisions of this article shall apply only to those counties, cities or towns whose governing authorities voluntarily elect to be bound by same. (1939, c. 390, s. 16; 1941, c. 357, s. 9B; 1945, c. 526, s. 7A.)

Local Modification.—Gates, New Hanover, Onslow, and city of Wilmington: 1945, c. 526, s. 9.

Editor's Note.—The 1945 amendment rewrote the last sentence.

§ 128-36.1. Participation of employees of regional library.—Under such rules and regulations as the board of trustees shall establish and promulgate, the boards of county commissioners of any group of counties operating a regional library may elect that employees of such library may be members of the North Carolina local governmental employees' retirement system to the extent of that part of their compensation paid by the various counties operating said regional library. (1949, c. 923.)

§ 128-37. Membership of employees of district health departments.—Under such rules and regulations as the board of trustees shall establish and promulgate, the boards of county commissioners of any group of counties composing a district health department may elect that employees of such district health department may be members of the North Carolina local governmental employees' retirement system to the extent of that part of their compensation paid by the various counties composing said district health department. (1949, c. 1012.)

Editor's Note.—Former § 128-37 was repealed by Session Laws 1945, c. 526, s. 8. See note to repealed § 128-38.

§ 128-38: Repealed by Session Laws 1945, c. 526, s. 8.

Editor's Note.—The repealing act, as amended by Session Laws 1947, c. 904, provides that the repealing section shall not apply to Chatham and Person counties and municipalities therein. For counties and city wholly excepted from the operation of Session Laws 1945, c. 526, see note under § 128-21.

Art. 4. Leaves of Absence.

§ 128-39. Leaves of absence for state officials.

Under this section any state official may be given a leave of absence to accept a temporary officer's commission in the United States Army or Navy, as prescribed in this section, without perforce vacating his civil office and without violation of the provisions of N. C. Constitution, Art. XIV, sec. 7. In re Yelton, 223 N. C. 845, 28 S. E. (2d) 567.

Where a judge of a superior court has been granted leave of absence under provisions of this section, his acceptance of appointment as judge of United States Zonal Court in Germany would contravene the provisions of the constitution, art. XIV, § 7 and ipso facto create a vacancy in his office. In re Advisory Opinion, 226 N. C. 772, 39 S. E. (2d) 217.

§ 128-40. Leaves of absence for county officials.

Cited in In re Yelton, 223 N. C. 845, 28 S. E. (2d) 567.

§ 128-41. Leaves of absence for municipal officers.

Cited in In re Yelton, 223 N. C. 845, 28 S. E. (2d) 567.

Chapter 130. Public Health.

SUBCHAPTER I. ADMINISTRATION OF PUBLIC HEALTH LAW.

Art. 1. State Board of Health.

§ 130-1. Membership of board. — The North Carolina board of health shall consist of nine members, four of which members shall be elected by the Medical Society of the State of North Carolina and five of which members shall be appointed by the governor. One of the members appointed by the governor shall be a licensed pharmacist and one a reputable dairyman. (Rev., s. 4435; Code, s. 2875; 1879, c. 177, s. 1; 1885, c. 237, s. 1; 1893, c. 214, s. 1; 1911, c. 62, s. 1; 1931, c. 177, s. 1; 1945, cc. 281, 1095; C. S. 7048.)

Editor's Note.—The first 1945 amendment, as changed by the second 1945 amendment, added the second sentence.

Art. 3. County Organization.

§ 130-18. County board of health; organization; terms of members; chairman.—1. All counties having a separate health department shall organize and operate a county board of health composed of three ex-officio members, the same being the

chairman of the board of county commissioners, mayor of the city or town which is the county seat (if there is no such mayor, then the clerk of the superior court of the county), and the county superintendent of public instruction; these ex-officio members shall hold an annual election meeting the first week in January in each year for the purpose of electing or appointing public members; the public members shall be four in number, one of whom shall be a dentist, one a physician, one a registered pharmacist, and the other one shall be a public spirited citizen. Where either of the three specified public members, namely a physician, or a dentist, or a pharmacist, cannot be elected because there is no such person resident in the county, this place shall be filled with a public spirited citizen. The first meeting of the ex-officio members for the election or appointment of public members shall be in the first week in January, one thousand nine hundred and forty-six, and at this meeting one of the public members shall be elected or appointed for a period of four years, one for three years, one for two years, and one for one year; thereafter one member shall be elected each year for a term of four years; in cases where more than one city or town participates by law in the financial support of the health department, the mayor of such participating city or town shall be an ex-officio member of the board of health; in any instance the ex-officio members shall elect the four public members as provided above; the board shall elect its own chairman, who shall not have the right to vote except in case of a tie; any four members of the board shall constitute a quorum and the county health officer shall act as secretary to such board of health; provided, that those counties which now have special city-county boards of health, as authorized by any private, local, or public-local act of the general assembly, for the purpose of carrying on a joint health program shall be exempted from the terms of this section, unless the special city-county board of health shall vote by a two-thirds majority of all members to dissolve said special board of health, and shall so notify the state health officer, in writing, in which event the provisions of this paragraph shall apply.

(a) All vacancies in membership of the public members of a county board of health shall be filled by the county board of health at its next regular meeting following the creation of the vacancy. In case any public member appointed to fill a vacancy is a public official or officer, his duties as a member of said county board of health shall be deemed to be ex officio.

2. The rules, regulations and ordinances of the county board of health shall apply to municipalities within the county but the board of health shall not have the power to pass special ordinances covering a municipality only, such authority being implicit in and retained by the governing body of the municipality. The duties and the responsibilities of the county board of health shall be as set forth in § 130-19 except as may be modified by the provisions of this section. (Rev., s. 4444; 1901, c. 245, s. 3; 1911, c. 62, s. 9; 1931, c. 149; 1941, c. 185; 1945, c. 99; c. 1030, s. 2; 1947, c. 474, s. 3; C. S. 7064.)

Editor's Note.—
The first 1945 amendment added a pharmacist to the county board of health, and the second 1945 amendment rewrote the section.

The 1947 amendment added paragraph (a) of subsection 1.

§ 130-21. To elect county physician and health officer.—The county board of health shall elect a health officer meeting the qualifications set forth by the merit system council and subject to the provisions of chapter one hundred and twenty-six of the General Statutes. The term of office of the county health officer shall be at the pleasure of the county board of health. Emergency and temporary appointments may be made when necessary with the approval of the state health officer. When, in the case of a vacancy, the county board of health fails to elect a health officer within sixty days after receiving notification from the state health officer that a vacancy exists, it shall be the duty of the state health officer to appoint a health officer for the county. The county health officer may also be the county physician. Election of a county physician in counties having a county board of health shall be by such board. Such election shall take place during January of the odd years of the calendar for a two-year term. The salary of the county physician shall be paid by the board of county commissioners at such time and in such sum or amount as may be mutually agreed upon between the board of county commissioners and county physicians. The members of the county board of health while on duty shall receive a per diem of four dollars ($4.00). (Rev. ss. 4444, 4446; 1897, c. 201, s. 1; 1901, c. 245, s. 3; 1911, c. 62, s. 9; 1913, c. 181, s. 1; 1915, cc. 214, 233; 1945, c. 1030, s. 3; C. S. 7067.)

Editor's Note.—The 1945 amendment rewrote this section.

Art. 6. Sanitary Districts in General

§ 130-37. Election and terms of office of sanitary district boards.

Editor's Note.—
The second historical citation to this section in original should be "1943, c. 602."

§ 130-39. Corporate powers.

10. After adoption of a plan as provided in § 130-44, the sanitary district board may, in its discretion, alter or modify such plan if, in the opinion of the state board of health, such alteration or modification does not constitute a material deviation from the objective of such plan. Such alteration or modification may provide among other things for the construction of a water line for the supply of any person, firm, corporation, city, town, village or political subdivision of the state either within and/or without the corporate limits of the district instead of a sewage disposal line and other improvements, where such alteration or modification would permit the disposal of sewage at a point nearer the district either within and/or without the corporate limits, thereby contaminating the prevailing water supply of the person, firm, corporation, city, town, village or political subdivision of the state to whom the water is to be supplied and would effect a saving to the district, and the sanitary district board may appropriate or reappropriate money of the district for carrying out such plan as altered or modified.

15. To use the income of the district, and if necessary, to cause taxes to be levied and collected upon all the taxable property within the

district sufficient to pay the costs of collecting and disposing of garbage, waste and other refuse, and to provide fire protection in said district, all as provided in this article.

16. To establish a capital reserve fund for the district in accordance with the following provisions:

(a) The district board shall pass a resolution declaring that a capital reserve fund is thereby established, which resolution shall state that said fund shall consist of unencumbered balances and unappropriated surplus revenues evidenced by money derived from collections of ad valorem taxes of the district and/or from service charges and rates applied by the district board in accordance with law and/or from proceeds of the sale of real or personal property of the district, that it shall take effect when the provisions thereof are approved by the local government commission, and the district board shall designate therein some bank or trust company as depositary in which the capital reserve fund shall be placed to the credit of a special account to be known as "———— District, Capital Reserve Fund."

(b) Upon adoption of a resolution by the district board providing therefor and with the approval of the local government commission, the capital reserve fund may be increased at any time with money from like source or sources as those stated in the establishing resolution.

(c) Withdrawal from the capital reserve fund shall be of two kinds, temporary and permanent. Temporary withdrawal may be made (1) in anticipation of the collections of taxes and other revenues of the district of the current fiscal year in which such withdrawal is made and for the purpose of paying principal and/or interest of bonds of the district falling due within three months, but the amount of such withdrawal shall be repayable to the capital reserve fund not later than thirty days after the close of the fiscal year in which such withdrawal is made, and (2) for investment or reinvestment in bonds, notes or certificates of indebtedness of the United States of America, in bonds or notes of the state of North Carolina, in bonds of the district, or in bonds of any city, town or county in North Carolina. Permanent withdrawal may be made for the purpose of acquiring property for the district by purchase or otherwise, or for extending, enlarging, improving, replacing or reconstructing any properties of the district incident to or deemed necessary for the exercise of the powers granted by law to the district board. Each withdrawal shall be authorized by resolution of the district board and approved by the local government commission and shall be by check drawn on the designated depositary of the capital reserve fund upon which such approval by the commission shall be endorsed by the secretary of the commission or by an assistant designated by him for that purpose: Provided, however, the state of North Carolina shall not be liable for misapplication of any moneys withdrawn from the capital reserve fund by reason of such endorsement, such endorsement only being prima facie evidence of approval of the withdrawal authorized. No permanent withdrawal shall be made unless, after such withdrawal, there shall remain in the capital reserve fund an amount equal to the sum of the principal and interest of bonds of the district maturing either in the fiscal year in which the withdrawal is made or in the ensuing fiscal year, whichever is greater.

(d) All moneys stated in the establishing resolution or in a resolution providing for increase of the capital reserve fund, when the provisions of such resolutions are approved by the local government commission, and all realizations and earnings from temporary withdrawals shall be deposited in the designated depository of the capital reserve fund by the officer or officers having the charge and custody of such moneys, and it shall be the duty of such officer or officers to simultaneously report each of such deposits to the local government commission.

17. To make rules and regulations in the interest of and for the promotion and protection of the public health and the welfare of the people within the sanitary district, and for such purposes to possess the following powers:

(a) To require any person, firm or corporation owning, occupying or controlling improved real property within the district to connect with the water and/or sewage systems of the district.

(b) To require any person, firm or corporation owning, occupying or controlling improved real property within the district where the water or sewage systems of the district are not immediately available or it is impractical to connect therewith to install sanitary toilets, septic tanks and other health equipment or installations.

(c) To require any person, firm or corporation to abate any nuisance detrimental or injurious to the public health of the district.

(d) To abolish, regulate and control the use and occupancy of all pig sties and other animal stockyards or pens within the district and for an additional distance of 500 feet beyond the outer boundaries of the district, unless such 500 feet to be within the corporate limits of some city or town.

(e) That upon the non-compliance by any person, firm or corporation of any rule and regulation promulgated and enacted hereunder, the district sanitary board shall cause to be served upon the person, firm or corporation who fails to so comply a notice setting forth the rule and regulation and wherein the same is being violated, and such person, firm or corporation shall have at least thirty days from the service of such notice in which to comply with such rule and regulation. The sanitary district board is authorized to grant, in its discretion, additional time for compliance.

(f) Upon failure to comply with such rule and regulation within thirty days as directed in said notice or within the time extended by the sanitary district board, such person, firm or corporation shall be guilty of a misdemeanor and fined and imprisoned in the discretion of the court.

(g) The sanitary district board is authorized to enforce the rules and regulations enacted or promulgated hereunder by criminal action or civil action, including injunctive relief.

18. For the purpose of promoting the public health, safety, morals, and the general welfare of the state, the sanitary district boards of the various sanitary districts of the state are hereby empowered, within the areas of said districts and not under the control of the United States or the state of North Carolina or any agency or instrumentality thereof, to designate, make, establish

and constitute as zoning units any portions of said sanitary districts in accordance with the manner, method and procedure as follows:

(a) No sanitary district board, under the provisions of this subsection, shall designate, make, establish and constitute any area in their respective sanitary districts a zoning area until a petition signed by two-thirds (2/3) of the qualified voters in said area as shown by the registration books used in the last general election, together with a petition signed by two-thirds (2/3) of the owners of the real property in said area as shown by the records in the office of the register of deeds for the county on the date said petition is filed with any sanitary district board, and a public hearing after twenty days' notice has been given. Such notice must be published in a newspaper of general circulation in said county at least two times, and a copy of said notice posted at the courthouse of said county and in three other public places in the sanitary district for twenty days before the date of the hearing. The petition must be accompanied by a map of any proposed zoning area.

(b) When any portion of any sanitary district has been made, established and constituted a zoning area, as herein provided, the sanitary district boards as to any such zoning areas shall have, exercise and perform all of the rights, privileges, powers and duties granted to municipal corporations under article 14, chapter 160, of the General Statutes of North Carolina, as amended, provided, however, the sanitary district boards shall not be required to appoint any zoning commission or board of adjustment, and upon the failure to appoint either said sanitary district boards shall have, exercise and perform all the rights, privileges, powers and duties granted to said zoning commission and board of adjustment.

(c) The governing body of any city, town or sanitary district is hereby authorized to enter into agreements with any other city, town or sanitary district for the establishment of a joint zoning commission, and to co-operate fully with each other.

(d) The sanitary district boards are hereby authorized to appropriate such amounts of money as they deem necessary to carry out the effective provisions of this subsection, and are authorized to enforce its rules and regulations in order to give effect to this subsection, and for such purposes to use the income of the district or cause taxes to be levied and collected upon the taxable property within the district to pay such costs.

(e) None of the provisions of chapter 176 of the Public Laws of North Carolina, Session 1931 (the proviso to § 160-173), shall apply to any sanitary district.

(f) This subsection shall apply only to sanitary districts which adjoin and are contiguous to cities having a population of fifty thousand or more. (1927, c. 100, s. 7; 1933, c. 8, ss. 1, 2; 1935, c. 287, ss. 1, 2; 1941, c. 116; 1945, c. 651, ss. 1, 2; 1947, c. 476; 1949, c. 880, s. 1; cc. 1133, 1145.)

Local Modification.—Caswell: 1945, c. 20; Rockingham: 1947, cc. 565, 849.

Editor's Note.—

The 1945 amendment added subsection 16 and inserted a reference thereto in the former last paragraph of the section which formerly followed subsection 15. The 1947 amendment struck out said paragraph. The 1949 amendments rewrote subsection 10 and added subsections 17 and 18. As the rest of the section was not changed only subsections 10 and 15 through 18 are set out.

§ 130-44. Consideration of reports and adoption of a plan.—The report or reports filed by the engineers pursuant to § 130-43 shall be given careful consideration by the sanitary district board, and said board shall adopt a plan, but before adopting such plan said board may, in its discretion, hold a public hearing, giving due notice of the time and place thereof, for the purpose of considering objections to such plan. The plan adopted as aforesaid shall be submitted by the sanitary district board to the state board of health and shall not become effective unless and until it is approved by the state board of health.

The provisions of this section and of § 130-43 shall apply when it shall have been determined by the sanitary district board that consummation of the plan is predicated upon the issuance of bonds of the district, except that they shall not apply in a proposed purchase of fire-fighting equipment and apparatus. Failure to observe or comply with said provisions shall not, however, affect the validity of any bonds of a sanitary district which may be hereafter issued pursuant to this article. (1927, c. 100, s. 12; 1949, c. 880, s. 1.)

Editor's Note.—The 1949 amendment rewrote this section.

§ 130-45. Resolution authorizing bond issue and purposes for which bonds may be issued.—Either before or after the adoption of the plan as aforesaid, the sanitary district board may adopt a resolution authorizing the issuance of bonds of the sanitary district for one of the following purposes, which purpose may include land, rights in land or other rights necessary for the accomplishment thereof, viz.:

(a) Acquisition, construction, reconstruction, enlargement of, additions or extensions to a water system or systems, including interest on the bonds during construction if deemed advisable by the sanitary district board, water purification or treatment plant or plants and/or acquisition, construction, reconstruction, enlargement of or additions or extensions to a sanitary sewer system or systems and/or a sewage treatment plant or plants.

(b) Construction, reconstruction or acquisition of an incinerator or incinerators or other facilities for the disposal of garbage, waste and other refuse.

(c) Purchase of fire-fighting equipment and apparatus.

Such resolution shall state,

1. In brief and general terms, the purpose for which the bonds are to be issued.

2. The maximum aggregate principal amount of the bonds.

3. That a tax sufficient to pay the principal and interest of the bonds when due shall be annually levied and collected on all taxable property within the sanitary district.

4. That the resolution shall take effect when and if it is approved by the voters of the sanitary district at an election.

Such resolution shall be published once a week for three successive weeks: Provided, however, the first of such publications shall be not later than the first publication of the notice of election required in § 130-46. A statement in substantially the following form (the blanks being first properly filled in), with the printed signature of

the secretary of the sanitary district board appended thereto, shall be published with the resolution:

The foregoing resolution was adopted by the sanitary district board of ..... Sanitary District on the ..... day of ..... 19...., and was first published on the ..... day of ..... 19..... Any action or proceeding questioning the validity of said resolution must be commenced within thirty days after its first publication.

.....
Secretary, ... Sanitary District Board.

(1927, c. 100, s. 13; 1949, c. 880, s. 1.)

Editor's Note.—The 1949 amendment rewrote this section.

§ 130-45.1. Limitation of action to set aside a bond resolution.—Any action or proceeding in any court to set aside a bond resolution adopted pursuant to this article, or to obtain any other relief upon the ground that such resolution is invalid, must be commenced within thirty days after the first publication thereof as provided in § 130-45. After the expiration of such period of limitation, no right of action or defense founded upon the invalidity of the resolution shall be asserted, nor shall the validity of such resolution be open to question in any court upon any ground whatever, except in an action or proceeding commenced within such period. (1949, c. 880, s. 1.)

§ 130-45.2. Publication of resolution, notice and statement.—A resolution or notice or statement required by this article to be published shall be published in a newspaper published in the county in which the district lies, or if the district lies in two or more counties, in a newspaper published in each such county, or if there is no newspaper published in a county in which the whole or a part of the district lies, then and in lieu of a newspaper published in such county, in a newspaper which, in the opinion of the sanitary district board, has general circulation within the district. (1949, c. 880, s. 1.)

§ 130-46. Call for election.—Following the adoption of a bond resolution by the sanitary district board the said board shall call upon the board or boards of county commissioners in the county or counties in which the district or any portion thereof is located to name election officers, set date, name polling places, and cause to be held an election within the district on the proposition of issuing bonds as set forth in such bond resolution. If, at such election a majority of the registered voters who shall vote thereon at such election shall vote in favor of the proposition submitted, the bonds set forth in the bond resolution may be advertised, sold and issued in the manner provided by law. Should the proposition of issuing bonds submitted at any election as provided under this article fail to receive the required number of votes, the sanitary district board may, at any time after the expiration of six months, cause another election to be held for the same objects and purposes or for any other objects and purposes. The expenses of holding bond elections shall be paid from the funds of the sanitary district.

The board of commissioners of the county in which said sanitary district is located, if wholly located in a single county, may in their discretion at any special election held under the provisions of this article make the whole sanitary district a voting precinct, or may create therein one or more voting precincts as to them seems best to suit the convenience of voters, the said precinct not to be the general election precinct unless the boundaries of the sanitary district are co-terminal with one or more whole general election precincts. If said sanitary district is located in more than one county, the election precincts therein shall be fixed by the board of the particular county in which the portion of the sanitary district is located.

The said board or boards of commissioners shall provide registration and polling books for each precinct in the sanitary district, the cost of the same to be paid from the funds of the sanitary district. The notice of the election shall be given by publication once a week for three successive weeks. It shall set forth the boundary lines of the district and the amount of bonds proposed to be issued. The first publication shall be at least thirty days before the election. At the first election after the organization of the sanitary district, a new registration of the qualified voters within the same shall be ordered and notice of such new registration shall be deemed to be sufficiently given if given by publication once in some newspaper published or circulated in said district at least thirty days before the close of the registration books. The notice of registration may be considered one of the three notices required of the election. Time of such registration shall as near as may be conform with that of the registration of voters in municipal elections as provided in § 160-37. The published notice of registration shall state the days on which the books shall be open for registration of voters and place or places on which they will be open on Saturdays. The books of such new registration shall close on the second Saturday before the election. The Saturday before the election shall be challenge day and except as otherwise provided in this article, such election shall be held in accordance with the law governing general elections.

A ballot shall be furnished to each qualified voter in said election, which ballot may contain the words "For approval of the bond resolution adopted by the sanitary district board of .... Sanitary District on the ..... day of ..... 19...., authorizing the issuance of not exceeding $..... of bonds of said sanitary district (briefly stating the purpose of such bonds), and the levy of a tax for the payment thereof," and the words "Against approval of the bond resolution adopted by the sanitary district board of ..... Sanitary District on the ..... day of ..... 19...., authorizing the issuance of not exceeding $..... of bonds of said sanitary district (briefly stating the purpose of such bonds), and the levy of a tax for the payment thereof," with squares opposite said affirmative and negative forms of the proposition submitted to the voters, in one of which squares the voter may make a cross (X) mark, but this form of ballot is not prescribed. Two or more bond resolutions adopted by the sanitary district board, each for a separate purpose as provided in § 130-45, may be submitted at the same election and

each may be stated on the same ballot as a separate proposition. After the election and after the vote has been counted, canvassed and returned to the board or boards of county commissioners, the election books shall be deposited in the office of the clerk of the superior court as polling books for the particular sanitary district involved. At any subsequent election, whether upon the recall of an officer as provided in § 130-53 or for an additional bond issue in the particular district, a new registration may or may not be ordered as may be determined by the board of county commissioners interested in said election.

A statement of results of an election on the proposition of issuance of bonds showing the date of such election, the proposition submitted, the number of voters who voted for the proposition and declaring the result of the election shall be prepared and signed by a majority of the members of the sanitary district board and deposited with the clerk of the superior court of the county in which the district lies, or, if parts of the district lie in two or more counties, with the clerk of the superior court of each such county. Such statement shall be published once. No right of action or defense founded upon the invalidity of such election shall be asserted, nor shall the validity of the election be open to question in any court upon any ground whatever, except in an action or proceeding commenced within thirty days after the publication of such statement. (1927, c. 100, s. 14; 1949, c. 880, s. 1.)

Editor's Note. — The 1949 amendment made changes in the first paragraph, rewrote the second sentence of the third paragraph and added the last paragraph. It also struck out the first sentence of the fourth paragraph and inserted in lieu thereof the present first two sentences. For a brief comment on the amendment, see 27 N. C. Law Rev. 454.

§ 130-47. Bonds.—The sanitary district board shall, subject to the provisions of this article, and under competent legal and financial advice prescribe by resolution the form of bonds and the interest coupons attached thereto, the denominations of the bonds and the date and place at which they shall become payable. These bonds shall not be sold at less than par nor bear an interest rate in excess of six per cent. The bonds shall be signed by the chairman and secretary of the sanitary district board, and the seal of the board shall be affixed thereto. In the event coupon bonds are issued, the coupons thereof may be signed by the secretary alone, or he may have lithographed, engraved, or printed thereon a facsimile of his signature. The proceeds from the sale of such bonds shall be placed in a bank in the state of North Carolina to the credit of the sanitary district board, and payments therefrom shall be made by vouchers signed by the chairman and secretary of the sanitary district board. The officer or officers having charge or custody of funds of the district shall require said bank to furnish security for the protection of deposits of the district as provided in § 159-28.

Bonds issued for any purpose pursuant to this article shall mature within the period of years as hereinafter provided, each such period being computed from the date of the election upon the issuance thereof held under the provisions of § 130-46. Such periods shall be for the purposes stated by clauses in § 130-45 as follows: clause (a), forty years; clause (b), twenty years; clause (c), ten years. Such bonds shall mature in annual installments or series, the first of which shall be made payable not more than five years after the date of the first issued bonds of such issue, and the last within the aforesaid period. No such installment or series shall be more than two and one-half times as great in amount as the smallest prior installment or series of the same bond issue. If all of the bonds of any issue are not issued at the same time, the bonds at any one time outstanding shall mature as aforesaid. Such bonds may be issued either all at one time or from time to time in blocks, and different provisions may be made for different blocks. Bonds issued pursuant to this article shall be subject to the provisions of the Local Government Act. The cost of preparing, issuing, and marketing bonds shall be deemed to be one of the purposes for which the bonds are issued. (1927, c. 100, s. 15; 1949, c. 880, s. 1.)

Editor's Note.—The 1949 amendment rewrote the part of the first paragraph now constituting the last sentence thereof. It also added the second paragraph.

§ 130-48. Additional bonds.—Whenever the proceeds from the sale of bonds issued by any district as in this article authorized shall have been expended or contracted to be expended and the sanitary district board shall determine that the interest or necessity of the district demands that additional bonds are necessary for carrying out any of the objects of the district, the board may again proceed as in this article provided to have an election held for the issuance of such additional bonds and the issue and sale of such bonds and the expenditure of the proceeds therefrom shall be carried out as hereinbefore provided. In the event the proceeds of the sale of the bonds shall be in excess of the amount necessary for the purpose for which they were issued, such excess shall be applied to the payment of principal and interest of said bonds. (1927, c. 100, s. 16; 1933, c. 8, s. 4; 1949, c. 880, s. 1.)

Editor's Note.—The 1949 amendment rewrote the last sentence.

§ 130-49. Valuation of property; determining annual revenue needed.

The sanitary district board shall determine the number of cents per $100 necessary to raise the said amount and so certify to the board or boards of county commissioners. The board or boards of county commissioners in their next annual levy shall include the number of cents per $100 so certified by the sanitary district board in the levy against all taxable property within the district, which tax shall be collected as other county taxes are collected and every ninety days the amount of tax so collected shall be remitted to the sanitary district board and deposited by said board in a bank in the state of North Carolina separately from other funds of the district. The officer or officers having charge or custody of the funds of the district shall require said bank to furnish security for protection of such deposits as provided in § 159-28.

(1949, c. 880, s. 1.)

Editor's Note.—The 1949 amendment rewrote the last sentence of the second paragraph. As only this paragraph was affected by the amendment, the first and third paragraphs are not set out.

§ 130-56. Procedure for extension of district.

—The boundaries of any sanitary district may, with the approval of the sanitary district board, be extended under the same procedure as herein provided for the creation of a sanitary district: Provided, however, that twenty-five per cent or more of the resident freeholders within the territory proposed to be annexed institute by petition the proceedings for annexation, or that ten per cent of the freeholders resident in the district to be annexed are authorized to petition for an election upon the subject of annexation, and if such petition is filed with the sanitary district board, such election shall be held within the territory to be annexed under the rules and regulations hereinbefore provided. However, if the owners of all of the real property in the territory to be annexed petition any sanitary district board to include such real property within the boundaries of said district, then and in that event no election shall be necessary and such sanitary district board is authorized and empowered to enlarge its boundaries so as to include such property in the district upon the approval of its actions by the board of county commissioners of any county or counties within which said sanitary district lies, and with the further approval of the state board of health. (1927, c. 100, s. 24; 1943, c. 543; 1947, c. 463, s. 1.)

Editor's Note.—
The 1947 amendment added the last sentence.

§ 130-57.01. Validating acts of state board of health in creating certain sanitary districts.—All acts heretofore done or proceedings heretofore taken by the state board of health for the purpose of creating or establishing any sanitary district are hereby legalized and validated notwithstanding any lack of power to perform such acts or to take such proceedings and notwithstanding any defect or irregularity in such acts or proceedings, provided such sanitary districts shall have heretofore issued bonds to finance improvements therein and provided said state board of health purporting to act in reliance upon chapter one hundred of the Public Laws of one thousand nine hundred and twenty-seven [§§ 130-33 to 130-56], shall have adopted a resolution creating or establishing such sanitary district after holding, through its representative, a public hearing concerning the creation of such sanitary district, and a notice of such hearing, stating the time and place at which it would be held, shall have been published at least five times in a newspaper published in or near such sanitary district and having a general circulation therein. Any such district shall be, and hereby is declared to be, a body politic and corporate and shall have all the powers conferred by law upon sanitary districts. (1945, c. 89, s. 1.)

§ 130-57.02. Validating acts of certain sanitary district boards.—All acts heretofore done or proceedings heretofore taken by the sanitary district board of any such sanitary district for the purpose of issuing bonds of such sanitary district and any bonds heretofore issued by or on behalf of such sanitary district, are hereby legalized and validated notwithstanding any lack of power to perform such acts or to take such proceedings or to issue such bonds and notwithstanding any defect or irregularity in such acts or proceedings or in the issuance of said bonds or in calling, holding or canvassing the result of any special election at which the question of issuing said bonds was submitted to the voters of such sanitary district and notwithstanding any defect or irregularity in the election, appointment or qualification of any of the members of such sanitary district board or other officers of such sanitary district, provided a majority of the qualified voters voting at an election held in such sanitary district prior to the issuance of such bonds shall have voted for the issuance of such bonds and a notice stating the date and place of such election shall have been published once at least thirty days prior to the date of such election in a newspaper published in or near such sanitary district and having a general circulation therein, and provided the aggregate principal amount of all such bonds does not exceed the maximum amount of the bonds as stated in such notice of election, and provided the local government commission shall have heretofore approved the issuance of such bonds. All such bonds issued by any such sanitary district shall be, and are hereby declared to be, legal and binding obligations of such sanitary district. (1945, c. 89, s. 2.)

§ 130-57.03. Authorizing certain sanitary district boards to levy taxes.—The sanitary district board of any such sanitary district is hereby authorized to levy, or cause to be levied, annually a special tax ad valorem on all taxable property in such sanitary district for the special purpose of paying the principal of and interest on any such bonds, and such tax shall be sufficient for such purpose and shall be in addition to all other taxes which may be levied upon the taxable property in said sanitary district. (1945, c. 89, s. 3.)

§ 130-57.2. Validation of annexation of territory to sanitary districts.—All acts heretofore done or proceedings heretofore taken by the state board of health, any board of county commissioners, and any sanitary district board for the purpose of extending the boundaries of any sanitary district where said territory which was annexed contained no resident freeholders, and where the owner or owners of the real property annexed requested of such sanitary district board that said territory be annexed to and be within the boundaries of such sanitary district, are hereby legalized and validated, notwithstanding any lack of power to perform such acts or to take such proceedings, and notwithstanding any defect or irregularity in such acts or proceedings. (1947, c. 463, s. 2.)

Art. 7. Special-Tax Sanitary Districts.

§ 130-58. Question of special sanitary tax submitted; district formed.

In case a majority of the qualified voters who shall vote thereon at the election shall vote in favor of the tax, the same shall be annually levied and collected in the manner prescribed for the levy and collection of other taxes.

(1949, c. 880, s. 2.)

Editor's Note.—The 1949 amendment rewrote the next to the last sentence so as to make the election governed by a majority of those voting. Only the changed sentence is set out. For brief comment on the amendment, see 27 N. C. Law Rev. 454.

§ 130-59. Election as to enlarging district.—Upon the written request of a majority of the health committee of any special-tax district, the county

board of health may enlarge the boundaries of any special-tax district established under this article, so as to include any contiguous territory, and an election in such new territory may be ordered and held in the same manner as prescribed in this article for elections in special-tax districts; and in case a majority of the qualified voters who shall vote thereon at such election in such new territory shall vote in favor of a special tax of the same rate as that voted and levied in the special-tax district to which said territory is contiguous, then the new territory shall be added to and become a part of the said special-tax district; and in case a majority of the qualified voters who shall vote thereon shall vote against said tax, the district shall not be enlarged. (1913, c. 154, s. 1; 1949, c. 880, s. 2; C. S. 7079.)

Editor's Note.—Prior to the 1949 amendment the election depended upon the vote of a majority of the qualified voters in such new territory. For brief comment on the amendment, see 27 N. C. Law Rev. 454.

§ 130-60. Election to abolish or to restore district or increase tax.

If at such election the majority of the qualified voters who shall vote thereon in said district shall vote "Against Special Tax," said tax shall be deemed revoked and shall not be levied, and said district shall be discontinued.

(1949, c. 880, s. 2.)

Editor's Note.—The 1949 amendment inserted in the second sentence the words "who shall vote thereon." As the rest of the section was not affected by the amendment it is not set out. For brief comment on the amendment, see 27 N. C. Law Rev. 454.

Art. 8. Local and District Health Departments.

§ 130-66. Local and district health departments authorized.—1. Creation of Departments Authorized.—The state board of health is hereby authorized to use any available funds at its command, not otherwise appropriated, to establish fulltime local and district health department service for any town, city and county, or group of such units in the state where the local governing powers desire the formation of such a department and are willing to assist financially in the enterprise, to an amount at least equal to the amount of state financial assistance.

2. When District Health Departments Including More Than One County Shall Be Formed.—Under the rules and regulations established by the state board of health of North Carolina, district health departments or units including more than one county may be formed when the following conditions exist:

(a) When the funds derived from the tax levy made under the authority of § 130-29 or such greater rate as a county may levy, plus available state and other funds, are insufficient to provide a minimum standard department of one medical officer, two nurses, one sanitary officer, one clerk, and a regular dental program.

(b) When in the opinion of the state board of health of North Carolina special problems or special projects arise which can be handled more advantageously on a district basis and the consolidation is approved by the state health officer and the health department or board of health of each county involved.

3. Organization Plans for District Health Departments.—Where two or more counties are combined into a district health department, the state health officer shall choose three or more ex-officio members, naming at least one from each participating county, including one chairman of a county board of commissioners, one mayor of a town which is the county seat, and one county superintendent of schools. These ex-officio members shall be appointed by the state health officer during the first week of each December following the general election in which members of the general assembly are elected and shall serve for a period of two years from and after date of appointment. The terms or appointments of all ex-officio members heretofore made prior to March 25, 1947, shall end on the 30th day of November, 1948. These ex-officio members shall hold an annual election meeting the first week in January of each year for the purpose of electing public members; the public members shall be four in number, one of whom shall be a dentist, one a physician, one a registered pharmacist, and the other one shall be a public spirited citizen. Where either of the three specified public members, namely a physician, or a dentist, or a pharmacist, cannot be elected because there is no such person resident in the county, this place shall be filled with a public spirited citizen. The first election meeting of the ex-officio members shall be the first week in January, one thousand nine hundred and forty-six, and at this meeting one of the public members shall be elected or appointed for a period of four years, one for three years, one for two years, and one for one year; thereafter one member shall be elected each year for a term of four years; in cases where more than three counties are combined into a district there shall be at least one ex-officio member, who is a chairman of the board of county commissioners, mayor of the town which is the county seat, or a county superintendent of schools, from each county; in cases where more than one city in a county participates by law in the support of the health department, the mayor of each such participating city or town shall be ex-officio a member of the board of health; in all instances the ex-officio members shall elect four members as hereinbefore provided; the board of health shall elect its chairman who shall not have the right to vote except in case of a tie; a majority of the members of the district board of health shall constitute a quorum and the district health officer shall act as secretary to such board of health.

(a) All vacancies in the ex-officio membership of a district board of health caused by death, resignation or any other reason, shall be filled by appointments made by the state health officer. Such appointments shall be made from any of the public officers or officials of the county of the member causing the vacancy, and the duties of such public officials as members of said district board of health shall be ex-officio duties. Such appointments to fill vacanies of ex-officio members shall be for the unexpired term of the member or members causing the vacancy or vacancies and shall extend until the time for the next regular appointments of ex-officio members. All vacancies in membership of the public members of a district board of health shall be filled by the district board of health at its next regular meeting

following the creation of the vacancy. The member or members appointed to fill a vacancy of a public member shall be from the same county as the member causing the vacancy. In case any public member so appointed is a public officer or official, his membership and duties on the district board of health as a public member shall be deemed to be ex-officio.

4. Regulations.—The rules, regulations and ordinances of the district board of health shall apply to municipalities within a county or counties composing the district, but the district board of health shall not have power to pass special ordinances covering a municipality only, such authority being implicit in and retained by the governing body of the municipality. The district board of health shall have the immediate care and responsibility of the health interests of its district. It shall meet annually in some city or town in the district designated by it, and three members of the board are authorized to call a meeting of the board whenever in their opinion the public health interests of the district require it. It shall make such rules and regulations, and pay all lawful fees and salaries, and enforce such penalties as in its judgment shall be necessary to protect and advance the public health. If any person shall violate the rules and regulations made and established by a district health department, he shall be guilty of a misdemeanor and fined not exceeding fifty dollars ($50.00) or imprisoned not exceeding thirty days.

5. District Health Officer.—The district board of health shall elect a health officer meeting the qualifications set forth by the merit system council as provided by chapter one hundred and twenty-six of the General Statutes of North Carolina, and also subject to the approval of the state health officer. The term of office shall be at the pleasure of the district board of health. Emergency and temporary appointments may be made when necessary with the approval of the state health officer. When, in the case of a vacancy, the district board of health fails to elect a health officer within sixty days after receiving notification from the state health officer that a vacancy exists, it shall be the duty of the state health officer to appoint a health officer for the district. In counties composing a district the election of a county physician shall be by the board of commissioners of each county and the resident members of the district board of health in a joint session. Such election shall take place during January of the odd years of the calendar and shall be for a two-year term. The salary of the county physician shall be paid by the board of county commissioners at such time and in such sum or amount as may be mutually agreed upon between the board of county commissioners and the county physician. The members of the district board of health while on duty shall each receive a per diem of four dollars ($4.00). (1935, c. 142, s. 1; 1945, c. 1030, s. 1; 1947, c. 474, ss. 1, 2; 1949, c. 159.)

Local Modification.—McDowell, as to last sentence of subsection 4: 1949, c. 849.

Editor's Note.—The 1945 amendment added subsections 2 through 5.

The 1947 amendment inserted the second and third sentences of subsection 3 and added paragraph (a) thereto.

The 1949 amendment added the last sentence of subsection 4.

A district board of health is a creature of the legislature and has only such powers and authority as are given it by the legislature. State v. Curtis, 230 N. C. 169, 52 S. E. (2d) 364.

It is without authority to prescribe criminal punishment for the violation of its rules and regulations promulgated under subsection 4 of this section, since such board is without power and authority to make laws, and if the statute be deemed sufficiently broad to grant it such authority, the delegation of such power is unconstitutional. State v. Curtis, 230 N. C. 169, 52 S. E. (2d) 364.

While a district board of health is given power and authority to make rules and regulations, and to enforce penalties, it is not given the power and authority to make laws. Thus in declaring it to be unlawful for any person to sell milk in the district without having first obtained a permit, and in prescribing criminal punishment for a violation of the requirement, a district board of health exceeded its authority. Id.

The 1949 Amendment Is Not Retroactive.—The 1949 act, amendatory of subsection 4 is not applicable to a prior violation of a rule or regulation established by a district board of health. State v. Curtis, 230 N. C. 169, 52 S. E. (2d) 364.

SUBCHAPTER II. VITAL STATISTICS.

Art. 9. Registration of Births and Deaths.

§ 130-79. Contents of death certificate.—The certificate of death shall contain, as a minimum, those items prescribed and specified on the standard certificate of death as prepared by the national agency in charge of vital statistics and as the same may be changed or amended by the North Carolina state registrar of vital statistics.

The personal and statistical particulars shall be authenticated by the signature of the informant, who may be any competent person acquainted with the facts.

The statement of facts relating to the disposition of the body shall be signed by the undertaker or person acting as such.

The medical certificate shall be made and signed by the physician, if any, who last treated the deceased for the disease or injury which caused death, and such physician shall specify the time in attendance, the time he last saw the deceased alive, and the hour of the day at which death occurred, and he shall further state the cause of death. Indefinite and unsatisfactory terms, denoting only symptoms of disease or conditions resulting from disease, will not be held sufficient for the issuance of a burial or removal permit; and any certificate containing any such indefinite or unsatisfactory terms, as defined by the state registrar, shall be returned to the physician or person making the medical certificate for correction and more definite statement. In deaths in hospitals, institutions, or of nonresidents, the physician shall supply the information required above, if he is able to do so, and may state where, in his opinion, the disease was contracted. (1913, c. 109, s. 7; 1949, c. 161, s. 1; C. S. 7094.)

Editor's Note.—The 1949 amendment rewrote this section.

§ 130-80.1. Preparation of death certificates for members of the armed forces killed outside of the United States.—The state registrar of vital statistics, upon presentation of an official notice of death from the United States government for a member of the armed forces killed outside of the United States, shall prepare a death certificate showing such facts pertaining to such death as may be available from the government notice. Such certificate shall be placed on file in the office of the state registrar and shall be permanently preserved. The state registrar of vital statistics

shall forward a copy of such certificate to the register of deeds of the county of the last known residence of such deceased person. Certified copies of such certificates shall be prepared by the state registrar or his duly authorized agent, upon request, and such copies shall be accepted as prima facie evidence of the facts stated therein. (1949, c. 174.)

§ 130-88.1. Register of deeds may perform notarial acts.—The register of deeds is hereby authorized to take acknowledgments, administer oaths and affirmations, and to perform all other notarial acts necessary for the registration of a birth certificate four years or more after the birth.

All acknowledgments taken, affirmations or oaths administered, or other notarial acts performed by the register of deeds, prior to the ratification of this section, relative to the registration of birth certificates four years or more after birth, are hereby validated. (1945, c. 100.)

§ 130-89. Contents of birth certificate.—The certificate of birth shall contain, as a minimum, those items prescribed and specified on the standard certificate of birth as prepared by the national agency in charge of vital statistics and as the same may be amended or changed by the North Carolina state registrar of vital statistics: Provided, that in case of an illegitimate birth, the father's name shall not be shown on the certificate without his written consent and, provided further, that in case of an illegitimate birth, the last name of the child shall be the same as that of the mother or, if requested in writing, the name of the child shall be the same as the person or persons caring for the child when such request is made by both the mother of the child and the person or persons caring for the child, or, if the mother of the child is deceased, then the person or persons caring for such child may make such a request for such change. (1913, c. 109, s. 14; 1949, c. 161, s. 2; C. S. 7102.)

Editor's Note.—The 1949 amendment rewrote this section.

§ 130-93.1. Certificate of identification for child of foreign birth.—In the event that a new birth certificate cannot be obtained for an adopted child born in a foreign country and having legal settlement in this state, the information pertaining to the birth as provided for in § 130-102 may be filed for such child with the state registrar, provided that the country of birth shall be specified in lieu of the state of birth. (1949, c. 160, s. 2.)

§ 130-94. State registrar to supply blanks; to perfect and preserve birth certificates.

No persons other than those authorized by the state registrar shall have access to the original birth and death records. (1913, c. 109, s. 17; 1941, c. 297, s. 2; 1949, c. 160, s. 3; C. S. 7105.)

Editor's Note.—The 1949 amendment added the above sentence at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

§ 130-99.1. State registrar to forward copies of certificates of nonresidents.—Upon receipt of the original certificates of birth, death, and stillbirth from the local registrars of vital statistics, the state registrar shall prepare a copy of each certificate except in the case of a child born out of wedlock that was filed in a county other than the county of residence. Such copies shall be forwarded within thirty days to the register of deeds of the county of residence. (1949, c. 133.)

§ 130-101. Pay of local registrars.—Each local registrar shall be paid the sum of fifty cents for each birth certificate and each death certificate properly and completely made out and registered with him, correctly recorded and promptly returned by him to the state registrar, as required by this article. And in case no births or deaths were registered during any month, the local registrar shall be entitled to be paid the sum of fifty cents for each report to that effect, but only if such report be made promptly as required by this article. The compensation of local registrars for services required of them by this article shall be paid by the county treasurers. The state registrar shall certify every six months to the treasurers of the several counties the number of births and deaths properly registered, with the names of the local registrars and the amounts due each at the rates fixed herein. (1913, c. 109, s. 19; Ex. Sess. 1913, c. 15, s. 1; 1915, c. 85, s. 3; 1919, c. 210, s. 1; Ex. Sess. 1920, c. 58, s. 2; 1949, c. 306; C. S. 7110.)

Local Modification.—Bladen: 1949, c. 480.

Editor's Note.—The 1949 amendment struck out the former provisions relating to incorporated municipalities.

§ 130-102. Certified or photostatic copy of records; fee.—The state registrar shall, upon request, supply to any applicant a certified copy of the record of any birth or death registered under provisions of this article, for the making and certification of which he shall be entitled to a fee of fifty cents, to be paid by the applicant. Such certified copy of the birth record shall be issued in the form of a birth registration card which shall include only the full name, birth date, state of birth, race, sex, date of filing, and birth certificate number: Provided, that a full and complete copy of the birth certificate shall be supplied upon request to the registrant, if of legal age; or to the parent or parents; or to public welfare or public health agencies; or to duly licensed private welfare agencies upon the approval of the state registrar; or to any other person, for good cause shown, upon the order of a judge of the superior court. Such birth registration card, properly certified by the state registrar or his duly authorized agent, shall be prima facie evidence of the facts stated therein. The United States census bureau may, however, obtain, without expense to the state, transcripts or certified copies of births and deaths without payment of the fees herein prescribed, and for transcripts so furnished the state registrar may receive from the census bureau such compensation for this service, as the state board of health may approve. Any copy of the record of a birth or death, properly certified by the state registrar, shall be prima facie evidence in all courts and places of the facts therein stated. For any search of the files and records when no certified copy is made, the state registrar shall be entitled to a fee of fifty cents for each hour or fractional part of an hour of time of search, said fee to be paid by the applicant. And the state registrar shall keep a true and correct account of all fees by him received under these provisions, and turn the same over to the treasurer of the state board of health. Provided, that upon the receipt of a certificate of birth

as provided in § 130-99, unless said child was born out of wedlock, the state registrar shall within three months forward a certified copy thereof for the child to the address of the mother, if living; and if not, to the father or person standing in loco parentis to said child. No fee shall be collected for supplying this certificate.

In lieu of a certified copy of the record of any birth or death registered under the provisions of this article, the state registrar may, upon request, supply to any applicant a photostatic copy of such record with a photostatic copy of the certificate of the state registrar signed by a facsimile of his signature; and such photostatic copy of the record of a birth or death shall be prima facie evidence in all courts and places of the facts therein stated. The state registrar shall have the power and authority to appoint one or more employees or agents of the North Carolina state board of health; and upon such appointment by the state registrar, said employees or agents shall have the power and authority to issue a certified copy of the record of any birth or death registered under the provisions of this article and to sign the name of or affix a facsimile of the signature of the state registrar to the certification of said copy; and any copy of a record of a birth or a death, with the certification of same, so signed or the facsimile of the state registrar affixed thereto shall be prima facie evidence in all courts and places of the facts therein stated. (1913, c. 109, s. 20; Ex. Sess. 1913, c. 15, s. 2; 1919, c. 145, s. 25; 1941, c. 297, s. 4; 1947, c. 473; 1949, c. 160, s. 1; C. S. 7111.)

Editor's Note.—
The 1945 amendments added the proviso and sentence at the end of the first paragraph and the 1947 amendment added the second paragraph.

The 1949 amendment inserted the second and third sentences of the first paragraph.

§ 130-103. Information furnished to officers of American Legion or other veterans' organization. —Upon application to the Bureau of Vital Statistics made by the Adjutant or any officer of a local post of the American Legion, or by any officer of any other veterans' organization chartered by Congress or organized and operating on a state-wide or nation-wide basis, it shall be the duty of the Bureau of Vital Statistics to furnish immediately to such applicant the vital statistical records and necessary copies thereof, made up in the necessary forms for the use of such applicant, without charge. This section shall apply only to members or former members of the armed forces of the United States who served in the First or Second World War and members of their families and/or beneficiaries under Government insurance or adjusted compensation certificate issued to such member or former member of the armed forces of the United States: Provided, that the state registrar shall furnish to any American Legion Post in this state, upon application therefor in connection with junior baseball, certified copies of birth certificates, without the payment of the fees prescribed in this section. (1931, c. 318; 1939, c. 353; 1945, c. 996.)

Editor's Note.—
The 1945 amendment made this section applicable to officers of other veterans' organizations besides the American Legion and to veterans of the Second World War.

§ 130-104. Violations of article; penalty.
5. Being a state registrar, a chairman of a board of county commissioners, a mayor of a city or town, a local registrar, a deputy registrar, or sub-registrar, shall fail, neglect, or refuse to perform his duty as required by this article and by the instructions and direction of the state registrar thereunder;

Shall be deemed guilty of a misdemeanor, and upon conviction thereof shall for the first offense be fined not less than five dollars nor more than fifty dollars, and for each subsequent offense not less than ten dollars nor more than fifty dollars, or be imprisoned in the county jail not more than thirty days. (1913, c. 109, s. 21; 1919, c. 210, s. 2; C. S. 7112.)

Editor's Note.—The portion of this section beginning with paragraph 5 is reprinted merely to show the proper typographical arrangement. The section in the original volume is somewhat confusing in that the penal provision appears as an integral part of paragraph 5 when in fact it applies equally to all of the paragraphs.

SUBCHAPTER III. SANITATION AND PROTECTION OF PUBLIC.

Art. 10. Water Protection.

§ 130-117. Discharge of sewage into water supply prohibited.

This section applies only when a public drinking-water supply is taken from the stream, in which instance proof of any injurious effect upon plaintiff's water supply is not required. Banks v. Burnsville, 228 N. C. 553, 46 S. E. (2d) 559.

In a suit by private individuals to restrain a municipality from emptying untreated sewage into a stream from which a public drinking-water supply is not taken, a complaint which fails to allege that plaintiffs' own land along or adjacent to the stream and that the acts complained of constitute a nuisance resulting in continuing, irreparable damages, is demurrable. Id.

Art. 14. Infectious Diseases Generally.

§ 130-173. Physicians to report infectious diseases.

Editor's Note.—
In the second line in original the word "office" should read "officer".

§ 130-174. Parents and householders to report.

Editor's Note.—
The word "office" in the third line of this section should read "officer."

Art. 15. Smallpox.

§ 130-183. Immunization against smallpox.—(1) All children in North Carolina are required to be immunized against smallpox before attending any public, private, or parochial school.

(2) A parent, guardian, or person in loco parentis, of any such child not previously immunized, shall present the child to a physician licensed in North Carolina and request the physician to administer the necessary vaccine for immunization against smallpox.

(3) If the person is unable to pay for the services of a private physician, the child may be taken to the county health officer or county physician of the county in which the child resides where such service shall be provided free.

(4) The physician administering the smallpox vaccine shall submit a certificate to the local health or quarantine officer and give a copy to the parent, guardian, or person in loco parentis, of the child.

Forms for the certificate shall be supplied by the state board of health.

(5) No principal or teacher shall permit any child to enter a public, private or parochial school without the certificate provided for in subsection (4), or some other acceptable evidence of immunization against smallpox; provided this section shall not apply to children whose parent or parents or guardian are bona fide members of a recognized religious organization whose teachings are contrary to the practices herein required, and no certificate for admission to any public, private or parochial school shall be required as to them.

(6) If any physician licensed in North Carolina certifies that such vaccination is detrimental to a child's health, the requirements of this section shall be inapplicable until such vaccination is found no longer to be detrimental.

(7) The wilful violation of any part of this section is a misdemeanor punishable by a fine of not more than fifty dollars or by imprisonment for not more than thirty days in the discretion of the court. (1911, c. 62, s. 23; 1913, c. 181, s. 11; 1945, c. 495; C. S. 7162.)

Editor's Note.—The 1945 amendment rewrote this section.

Art. 16. Diphtheria.

§ 130-189. Article applicable to cities and towns. —The provisions of §§ 130-186 to 130-190 shall apply to cities and towns upon the same conditions as it does to counties. (1909, c. 389, s. 4; C. S. 7168.)

Editor's Note.—This section was reprinted to correct a typographical error.

§ 130-190. Immunization of children.

The physician administering the prophylactic diphtheria agent shall submit a certificate to the local health or quarantine officer, and give a copy to the parent, guardian, or person in loco parentis, of the child. Furthermore, no principal or teacher shall permit any child to enter a public, private, or parochial school without this certificate or some other acceptable evidence of immunization against diphtheria; provided this act shall not apply to children whose parent or parents or guardian are bona fide members of a recognized religious organization whose teachings are contrary to the practices herein required, and no certificate for admission to any public, private or parochial school shall be required as to them.

(1945, c. 494.)

Editor's Note.—
The 1945 amendment rewrote the fifth paragraph. As the rest of the section was not affected by the amendment it is not set out.

Art. 16A. Whooping Cough.

§ 130-190.1. Immunization against whooping cough.—(1) Required for Young Children.—All children in North Carolina are required to be immunized against whooping cough before reaching the age of one year.

(2) Procedure.—A parent, guardian, or person in loco parentis, of any such child not previously immunized, shall present the child to a physician licensed in North Carolina and request the physician to administer to such child a sufficient dosage of a prophylactic whooping cough agent. All whooping cough prophylactic agents used in compliance with this section must meet the standards required by the state board of health.

(3) Free Services for Needy Persons.—If the person is unable to pay for the services of a private physician, or for the prophylactic agent, the child may be taken to the county health officer or county physician of the county in which the child resides where such prophylactic agent shall be provided and administered free. The county appropriating body shall make available sufficient funds for the purchase of such immunizing agent for such cases.

(4) Certificate of Immunization.—The physician administering the whooping cough dosage shall submit a certificate to the local health or quarantine officer and give a copy to the parent, guardian, or person in loco parentis, of the child. Forms for the certificate shall be supplied by the state board of health.

(5) Prohibiting Nonimmunized Children from Attending School.—No principal or teacher shall permit any child to enter a public, private or parochial school without the certificate provided for in subsection (4), or some other acceptable evidence of immunization against whooping cough.

(6) Dosage Detrimental to Health. — If any physician, licensed to practice in North Carolina, certifies that such dosage is detrimental to a child's health, the requirements of this section shall be inapplicable until such dosage is found no longer to be detrimental.

(7) Violation a Misdemeanor; Exceptions.—The wilful violation of any part of this section is a misdemeanor punishable by a fine of not more than fifty dollars or by imprisonment for not more than thirty days in the discretion of the court; provided this section shall not apply to children whose parent or parents or guardian are bona fide members of a recognized religious organization whose teachings are contrary to the practices herein required, and no certificate for admission to any public, private or parochial school shall be required as to them. (1945, c. 528.)

Art. 19A. Prevention of Spread of Tuberculosis.

§ 130-225.1. Failure to comply with instructions a misdemeanor.—Any person having tuberculosis in the communicable form who, after being instructed by an agent of the county or city board of health as to precautions necessary to be taken to protect the members of such person's household or the community from becoming infected by tuberculosis communicated by such person, shall wilfully refuse to follow such instructions shall be guilty of a misdemeanor, and, upon conviction thereof, shall be imprisoned in the prison department of the North Carolina sanatorium; or, if the defendant is a female, such female shall be imprisoned in the hospital section of the woman's division of the state's prison until provision is made for caring for female prisoners at the North Carolina sanatorium. For the first offense the term of imprisonment shall be from two to six months, to be determined by the superintendent of the sanatorium as to those confined there, and by the superintendent of the state's prison as to those confined there. For any subsequent offense, such persons may be sentenced for indeterminate

sentences in the discretion of the court. (1943, c. 357; 1945, c. 583.)

Editor's Note.—The 1945 amendment added the provision as to female defendant and rewrote the provision as to punishment.

For comment on this section, see 21 N. C. Law Rev. 353.

Art. 22. Surgical Operations on Inmates of State Institutions.

§ 130-243.1. Permission for surgical operations where emergency exists.—Notwithstanding the provisions of §§ 130-242 and 130-243, when in the opinion of the medical staff or medical superintendent or director of a state institution, a patient, inmate or prisoner is suffering from an acute medical or surgical condition which if allowed to continue without surgical operation will within the space of a few hours seriously endanger the life of the aforesaid patient, inmate or prisoner, and where it has not been possible within a reasonable length of time to notify, and to secure permission for the operation from some responsible member of the family for the surgical operation deemed necessary, the medical superintendent, surgical consultant, and local health officer of the county in which the institution is located shall constitute a board to pass upon the seriousness of the condition of the aforesaid patient, inmate, or prisoner and may by unanimous agreement authorize the surgical operation deemed necessary including the administration of an anesthetic and the surgical consultant may proceed with the surgical operation without further consent being necessary.

The description of the medical and surgical condition of the patient and the measures taken to obtain permission for the operation shall be made a part of the medical record of the institution, signed by the medical superintendent or director, the surgical consultant, and the local health officer and copies of this shall be furnished the surgical consultant and the local health officer. (1947, c. 537, s. 24.)

Art. 25. Regulation of the Manufacture of Bedding.

§ 130-272. Enforcement funds.—The state health officer is hereby charged with the administration and enforcement of this article, and he shall provide specially designated adhesive stamps for use under § 130-270. Upon request he shall furnish no less than five hundred said stamps to any person paying in advance eight dollars ($8.00) per five hundred stamps. State institutions engaged in the manufacture of mattresses for their own use or that of another state institution shall not be required to use such stamps.

(1949, c. 636.)

Editor's Note.—The 1949 amendment reduced the price of bedding stamps from ten dollars to eight dollars per five hundred. As only the first paragraph was changed by the amendment the rest of the section is not set out.

Art. 27. Private Hospitals and Educational Institutions.

§ 130-280. Regulation of sanitation by state board of health.—To safeguard the health of patients, residents and students of private hospitals, sanitariums, sanatoriums and educational institutions in North Carolina, the state board of health is hereby authorized and empowered to make rules and regulations governing the sanitation of all such establishments and to provide a system of grading applicable thereto. (1945, c. 829, s. 1.)

§ 130-281. Inspection.—The officers, sanitarians and agents of the state board of health are hereby empowered and authorized to enter any private hospital, sanitarium, sanatorium, or educational institution for the purpose of making inspections, and it is hereby made the duty of every owner, superintendent, manager, agent or person in charge of such establishment to afford free access to every part of such establishment, and to render all aid and assistance necessary to enable the sanitarians or agents of the state board of health to make a complete examination thereof, but the privacy of no person may be violated without his consent. The sanitarian or agent shall leave with the management, or person in control, a copy of the report and a grade card showing the grade of such place, and it shall be the duty of said owner, superintendent, manager, agent or person in charge, to post said card in a conspicuous place where it may be readily observed by the patients, residents or students. The grade card shall not be removed by anyone, except an authorized sanitarian or agent of the state board of health, or upon its instruction. If any establishment receives a grade below the minimum standard set by the state board of health, a reasonable time shall be given by the state board of health in which to make the alterations necessary to raise the grade. If the alterations are not made within the time set, the owner, superintendent, manager, agent or other person in charge shall be subject to the penalties provided by § 130-282. (1945, c. 829, s. 2.)

§ 130-282. Violation a misdemeanor.—Any owner, superintendent, manager, agent, or person in charge of any hospital, educational institution, sanitarium, sanatorium, or any other person who wilfully obstructs, hinders or interferes with a sanitarian, agent, or officer of the state board of health, in the proper discharge of his duty, or who shall be found guilty of violating any other provision of this article, or any of the rules and regulations that may be provided under this article, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten dollars ($10.00), nor more than fifty dollars ($50.00), or imprisoned for not more than thirty (30) days. Each day the provisions of this article are violated shall constitute a separate offense. (1945, c. 829, s. 3.)

Art. 28. Cancer Control Program.

§ 130-283. State board of health to administer program.—The state board of health shall administer a program for the prevention and cure of cancer to the extent specified in this article, and to that end shall have the powers and duties hereinafter set forth. (1945, c. 1050, s. 1.)

Editor's Note.—The act from which this article was codified became effective July 1, 1945.

§ 130-284. Financial aid for diagnosis, hospitalization and treatment.—The state board of health shall furnish to cancer patients and such other low income citizens, legal residents of North Carolina, who comply with the rules and regulations specified by the state board of health, such finan-

cial aid within the appropriations made in this article, for diagnosis, hospitalization and treatment, as may be approved for said patients found by the state board of health to be entitled thereof. Such diagnosis, hospitalization and treatment shall be given said patients in any hospital in this state which meets the minimum requirements for cancer control established by the state board of health as the hospital where such diagnosis, hospitalization and treatment shall be given. In order to administer such financial aid in the manner which will afford the greatest benefit to said cancer patients and to the people of the state, the state board of health is hereby authorized to promulgate rules and regulations specifying the terms and conditions upon which cancer patients may receive such financial aid, and act upon such applications in the manner which in its judgment will best effectuate the purposes of this article. The state board of health may develop with the state board of public welfare procedures for determining the needs of indigent and other low income applicants for financial aid in carrying out the purposes of this article. (1945, c. 1050, s. 2.)

§ 130-285. Cancer clinics.—The state board of health is authorized to establish and designate minimum standards and requirements for the organization, equipment and conduct of cancer clinics or departments in general hospitals in this state to the end that said hospitals may intelligently prepare and equip their institutions adequately to diagnose, prevent and treat cancer. Provided that any clinic, group, organization or department set up, established or sponsored by the state board of health as set forth by this article shall,

1. Meet the minimum requirements of the American college of surgeons for tumor clinics; or the minimum requirements of the division of cancer control, North Carolina state board of health.

2. Each physician who shall staff such organization, board, or clinic, must be a diplomate of the American board of the specialty of medicine in which he is engaged, or one who has been approved by his county medical society or its duly appointed representative, and the division of cancer control, North Carolina state board of health. (1945, c. 1050, s. 3; 1949, c. 1071.)

Editor's Note.—The 1949 amendment added that part of subsection 1 appearing after the semicolon, and that part of subsection 2 appearing after the word "engaged" in line four of said subsection.

§ 130-286. Educational program. — The state board of health shall collect information relating to the prevention and cure of cancer and shall sponsor an educational program for the purpose of aiding and informing the people of the state, as well as physicians and hospitals, in the prevention and cure of cancer, in the early diagnosis of cancer, and in its proper treatment. (1945, c. 1050, s. 4.)

§ 130-287. Gifts for program.—The state board of health is authorized to receive gifts or donations of money, securities, radium, X-ray, or other equipment or supplies, real estate, or any other property of any kind or description which may be used in the program for the prevention and cure of cancer. Any funds or intangibles donated for such purposes are to be deposited with the state treasurer and to be used in the cancer control work. (1945, c. 1050, s. 5.)

§ 130-288. Acquisition of hospitals, laboratories, etc.—The state board of health is authorized to acquire, by gift, purchase (within the limits of appropriations available for such purposes), devise or otherwise, such laboratories, hospitals, equipment and supplies, or any other property, real or personal, as said board shall deem needful to afford proper treatment and care to cancer patients in this state, and to carry out the program for the prevention and cure of cancer. (1945, c. 1050, s. 6.)

§ 130-289. Tabulation of records. — The state board of health shall compile, tabulate and preserve statistical, clinical, and other records relating to the prevention and cure of cancer. (1945, c. 1050, s. 7.)

§ 130-289.1. Reporting of cancer required.—It shall be the duty of every physician to notify the local health officer of the name, address and such other items as may be specified by the state health officer of any person by whom such physician is consulted professionally and who is found to have cancer of any type, or who is suspected of having cancer of any type. The report shall be made within five days after the diagnosis of cancer is established, or within five days after obtaining reasonable evidence for believing that such person is so afflicted. The forms used for reporting shall be prepared and supplied by the state board of health. The local health officer shall forward to the state board of health all report cards within five days of their receipt from the physician. (1949, c. 499.)

§ 130-290. Assistance to hospitals and physicians. — The state board of health shall assist general hospitals in the state in organizing and conducting cancer clinics as a part of the cancer control program, and shall assist physicians and hospitals in establishing the early diagnosis of cancer and in preparing themselves to render the most efficient service in the cancer control program. (1945, c. 1050, s. 8.)

§ 130-291. Cancer committee of North Carolina medical society.—In formulating the plans and policies of the program for the prevention and cure of cancer, the state board of health shall consult with the cancer committee of the North Carolina medical society, which shall consist of one physician from each congressional district, to the end that the cancer control program shall most effectively serve the welfare of the people of the state, and such plans and policies shall be presented to and approved by said cancer committee. (1945, c. 1050, s. 9.)

Art. 29. Infants Prematurely Born.

§ 130-292. Notification of premature births to be given.—If an infant is born prematurely in a place other than a hospital equipped to care for prematurely born infants, and weighs five pounds and eight ounces (2500 grams) or less at birth, the physician or midwife having charge of the birth of such infant shall forthwith give notification thereof to the local health department for

the county in which such infant was born. In case there is no local health department operating or functioning for the county in which such infant was born, then such notification shall be given to the county physician of the county in which such infant was born. The notification shall state the name of the mother of such infant and the street address, or other address, where the infant is at the time of such notification. Such notification shall be given as soon as practicable after birth occurs and by telephone if possible, and if not then, a written report shall be filed within twenty-four hours after such birth with the local health department or the county physician of the county in which such infant was born in case there is no functioning health department. In the case of such an infant prematurely born in a hospital equipped to care for prematurely born infants, the superintendent, or other person in charge of such hospital, shall forthwith file with the local health department or the county physician of the county if there is no local health department for the county, such notification of the birth of such infant within twenty-four hours. After notification of proper agency or county physician, such agency or county physician shall take such steps as are necessary to provide proper care for said infant in accordance with best medical practice and to utilize, when possible, such state agencies as are available, including the North Carolina state board of health's program for premature care. (1949, c. 490.)

Chapter 131. Public Hospitals.

Art. 2A. The County Hospital Act.

Art. 2B. County-City Hospital Facilities for the Poor.

Art. 11. Sanatorium for Tubercular Prisoners.

Art. 12. Hospital Authorities Law.

Art. 13. Medical Care Commission and Program of Hospital Care.

Art. 13A. Hospital Licensing Act.

§ 131-28.1. Title of article.—This article shall be known and may be cited as "The County Hospital Act." (1945, c. 506, s. 1.)

§ 131-28.2. Conveyance of hospitals to counties; assumption of indebtedness approved by voters.—The governing body of any political subdivision or public hospital corporation or agency in the state is authorized to convey any hospital owned by it to the county in which such political subdivision or public hospital corporation or agency is located, upon such county assuming all outstanding indebtedness of such political subdivision or public hospital corporation or agency which was incurred for the purpose of erecting or purchasing such hospital, and any county is hereby authorized to acquire any such hospital and, subject to the provisions of this section, to assume such indebtedness. The board of commissioners of any such county is hereby authorized and empowered to call an election of the qualified registered voters of the county on the question of the assumption by such county of the outstanding indebtedness of such political subdivision or public hospital corporation or agency which was incurred for the purpose of erecting or purchasing such hospital, and the levy of a county-wide property tax without limitation as to rate or amount for the payment of the principal of and the interest on such indebtedness. Such election shall be called and conducted in accordance with the laws of North Carolina governing elections for the issuance of county bonds, and it shall be lawful to vote on other matters at such election. If a majority of the qualified registered voters of the county who shall vote on such assumption shall vote in favor thereof, then it shall be the duty of the board of commissioners of such county to include in the annual county budget beginning with the fiscal year next succeeding such election, a sum sufficient to meet the payment of the principal of and the interest on such indebtedness; provided, however, that said board shall have the same power and authority to fund or refund such indebtedness as it has to fund or refund other indebtedness of the county. Taxes levied under the terms of this section are hereby declared to be for a special purpose within the meaning of section six of article V of the constitution of North Carolina, and the levy of such taxes for said special purpose is hereby given the special approval of the general assembly. Upon the assumption of such indebtedness by the county, all funds on hand for the payment of the principal of and the interest on such indebtedness, and all funds subsequently collected from taxes already levied in such political subdivision on account of such indebtedness, shall be paid over to the county and used to reduce the amount of the county-wide tax levy authorized by such election. Upon ap-

proval of the assumption of such indebtedness by the county, such indebtedness shall become, to all intents and purposes, indebtedness of such county; and it is hereby specifically declared that all payments on account of the principal of such indebtedness which shall be made after such assumption shall be construed as a reduction of the outstanding indebtedness of the county within the meaning of section four of article V of the constitution of North Carolina. (1945, c. 506, s. 2; 1949, c. 358, s. 1.)

Editor's Note.—The 1949 amendment substituted in the fourth sentence the words "who shall vote on such assumption shall vote in favor thereof" for the words "shall vote in favor of such assumption." For brief comment on amendment, see 27 N. C. Law Rev. 454.

§ 131-28.3. Counties authorized to erect, purchase and operate hospitals.—Each county in the state is hereby authorized to erect, remodel, enlarge and purchase hospitals, to finance the same as provided in this article, and to provide for the operation thereof. (1945, c. 506, s. 3.)

§ 131-28.4. Issuance of bonds subject to approval of voters.—Subject to the approval by the vote of a majority of the qualified registered voters of the county who shall vote thereon at an election to be called and conducted in accordance with the laws of North Carolina, any county, through its board of commissioners, is hereby authorized and empowered to issue bonds of the county for the special purpose of erecting, remodeling, enlarging or purchasing hospitals, including the acquisition of necessary land and necessary equipment, and to levy property taxes for the payment of such bonds and the interest thereon. Any bonds so voted, and any bond anticipation notes which may be issued to anticipate the receipt of the proceeds of such bonds, shall be issued in accordance with the provisions of the county finance act, as amended, and the local government act, as amended. (1945, c. 506, s. 4; 1949, c. 358, s. 2.)

Editor's Note.—The 1949 amendment inserted the words "who shall vote thereon" in line three. For brief comment on the amendment, see 27 N. C. Law Rev. 454.

§ 131-28.5. Referendum on question of tax to maintain hospital.—At any election at which the question of assumption by the county of hospital indebtedness pursuant to § 131-28.2, or at any election at which the question of issuing bonds of the county pursuant to § 131-28.4, shall be submitted to the qualified registered voters of the county, or at any other general or special election, there may be submitted to a vote of the qualified registered voters of such county the question of levying and collecting annually an ad valorem tax for the special purpose of maintaining any such hospital or hospitals from year to year, not greater than five cents on the one hundred dollars assessed valuation of taxable property in the county as shall be determined by the board of commissioners of such county, and if a majority of the qualified registered voters of the county who shall vote thereon shall vote in favor of levying and collecting such tax, the board of commissioners of such county shall be and hereby is authorized to levy and collect the same. The general assembly does hereby give its special approval to the levy of the tax for the special purpose referred to in this section. (1945, c. 506, s. 5; 1949, c. 358, s. 3.)

Editor's Note.—The 1949 amendment inserted the words "who shall vote thereon" in lines seventeen and eighteen. For brief comment on the amendment, see 27 N. C. Law Rev. 454.

§ 131-28.6. New registration may be ordered for election held under article.—A new registration may be ordered for any election to be held under this article, and in the event a new registration is ordered the same shall be called and conducted in accordance with the provisions of the laws of North Carolina governing the calling and conducting of elections for the issuance of county bonds. (1945, c. 506, s. 6; 1949, c. 358, s. 4.)

Editor's Note.—The 1949 amendment rewrote this section.

§ 131-28.7. Result of election to be published; time to assert invalidity.—The board of commissioners of the county shall prepare a statement showing the number of votes cast for and against each question submitted under the provisions of this article, and the number of voters qualified to vote in each election at which any one or more of such questions shall be submitted, and declaring the result of the election on each such question, which statement shall be signed by a majority of the members of the board of commissioners and delivered to the clerk of said board, who shall record it in the minutes of the board and file the original in his office and publish it once. No right of action or defense founded upon the invalidity of any such election shall be asserted, nor shall the validity of any such election be open to question in any court upon any ground whatever, except in an action or proceeding commenced within thirty days after the publication of such statement of result as provided herein. (1945, c. 506, s. 7.)

§ 131-28.8. Appointment of board of trustees; terms of office; vacancies.—Should a majority of the qualified registered voters of any county who shall vote thereon at an election called and held as above provided approve the assumption by the county of hospital indebtedness or the issuance of bonds of the county for the special purpose of erecting, remodeling, enlarging or purchasing a hospital or hospitals, the board of commissioners of the county shall proceed at once to appoint from the citizens of the county three trustees from each township in which a hospital or hospitals are to be acquired or erected hereunder, and one trustee from each of the remaining townships in the county, such trustees to be chosen with special reference to their fitness for such office. In the event that a hospital is thereafter acquired or erected hereunder in any of said remaining townships the board of commissioners shall thereupon appoint two additional trustees from such township. The trustees so appointed shall constitute a board of trustees for the hospital or hospitals acquired or erected under the provisions of this article. The first trustees from each township from which there shall be three trustees shall be appointed by the board of commissioners for terms of one, two and three years, respectively. The first trustees from the remaining townships shall be appointed for terms of one, two and three years, respectively, so that the terms of at least one third of the trustees from such remaining townships shall expire each year. As the term of each trustee expires a successor trustee shall be appointed from the same township for a term of

three years. Each trustee shall serve until his or her successor is appointed and qualified. No trustee shall succeed himself or herself. Any vacancy in the board of trustees shall be filled by the board of commissioners of the county for the unexpired term. (1945, c. 506, s. 8; 1949, c. 358, s. 5.)

Local Modification.—Pitt: 1949, c. 877, s. 4.

Editor's Note.—The 1949 amendment inserted the words "who shall vote thereon" in line three.

§ 131-28.9. Organization of board; bond, compensation and duties of hospital treasurer; annual audit; reimbursement for expenses.—The trustees shall, within ten days after their appointment, qualify by taking the oath of civil officers and organize as a board of hospital trustees by the election of one of their number as chairman, and by the election of such other officers and committees as they shall deem necessary, including a treasurer for each hospital under the jurisdiction and control of such board, but none of such officers except the hospital treasurers shall be required to give bond. Each hospital treasurer shall give a bond in such amount as shall be fixed by the board of commissioners of the county, and shall receive such compensation, payable solely from hospital income, as shall be determined by the board of hospital trustees. The treasurer for each hospital shall receive all income of such hospital, including all moneys paid for the use of the facilities and services thereof, and shall pay out the same and account therefor as directed by the board of hospital trustees. He shall make a monthly report of his receipts and disbursements to the board of commissioners of the county and the board of hospital trustees. An annual audit shall be made of the receipts and disbursements of each hospital by a certified public accountant selected by the board of commissioners of the county and copies of such audit shall be furnished the board of commissioners of the county and the board of hospital trustees, and a condensed copy of such audit shall be published in a newspaper of general circulation in the county. No trustee shall receive any compensation for services performed by him but he may receive reimbursement, from such hospital funds as the board of hospital trustees shall determine, for any cash expenditures actually made for personal expenses incurred as such trustee, and an itemized statement of all such expenses and moneys paid out shall be made under oath by each of such trustees and filed with the board of hospital trustees and allowed by the affirmative vote of all the trustees present at any meeting of the board. (1945, c. 506, s. 9.)

§ 131-28.10. Board to adopt by-laws, rules and regulations; control of expenditures.—The board of hospital trustees shall make and adopt such by-laws, rules, and regulations for their own guidance and for the government of the hospital or hospitals under their jurisdiction and control as may be deemed expedient for the economic and equitable conduct and operation thereof, not inconsistent with this article or the ordinances of the city or town wherein such hospital or hospitals shall be located. The board of hospital trustees shall have the exclusive control of the expenditure of all moneys provided pursuant to the provisions of this article for the purpose of erecting, remodeling, enlarging, or purchasing hospitals, including the acquisition of necessary land and necessary equipment, and all moneys collected through the operation of such hospitals and all moneys provided for the maintenance and operation thereof, but no moneys provided for the payment of the hospital indebtedness of the county shall be subject to the control of such hospital board. (1945, c. 506, s. 10.)

§ 131-28.11. Appointment and removal of superintendent and other personnel; carrying out intent of article.—The board of hospital trustees shall have power to appoint suitable superintendents or matrons, or both, and necessary assistants, and to fix their compensation, and shall also have power to remove such appointees, and such board shall in general carry out the spirit and intent of this article in establishing and maintaining a county hospital or hospitals, with equal rights to all and special privileges to none. (1945, c. 506, s. 11.)

§ 131-28.12. Meetings of board; quorum; visitation; reports; pecuniary interest in purchase of supplies.—The board of hospital trustees shall hold meetings at least once every three months, and shall keep a complete record of all its proceedings. A majority of the members of the board shall constitute a quorum for the transaction of business. At least two of the trustees shall visit and examine the hospital or hospitals at least twice each month. The board of hospital trustees shall, during the first week in January of each year, file with the board of commissioners of the county a report of its proceedings with reference to such hospital or hospitals, and a statement of all receipts and expenditures during the year, and shall at such times certify the amount necessary in its opinion to maintain and improve each hospital for the ensuing year. No trustee shall have a personal pecuniary interest, either directly or indirectly, in the purchase of any supplies for any county hospital, unless the same are purchased by competitive bidding. (1945, c. 506, s. 12.)

§ 131-28.13. Deposit and withdrawal of funds.—All moneys received for the credit of each hospital shall be deposited by the hospital treasurer in a special fund for such hospital, and shall be paid out only upon warrants drawn by such hospital treasurer or other proper officer designated by the board of hospital trustees upon due authorization by such board. (1945, c. 506, s. 13.)

§ 131-28.14. Condemnation proceedings.—If the board of hospital trustees and the owners of any property desired by the board for hospital purposes cannot agree as to the price to be paid therefor, the board shall report the fact to the board of commissioners of the county, and condemnation proceedings shall be instituted by such board of commissioners and prosecuted in the name of the county under the provisions of law for the condemnation of land for railroads. (1945, c. 506, s. 14.)

§ 131-28.15. Plans for buildings; advertising bids.—No hospital buildings shall be erected, remodeled or enlarged until the plans and specifications have been made therefor and adopted by the board of hospital trustees, and bids advertised for according to law for other county buildings. (1945, c. 506, s. 15.)

§ 131-28.16. Donations and gifts.—Any person, firm, corporation or society desiring to make donations of money, personal property, or real estate for the benefit of any hospital acquired or erected hereunder shall have the right to vest title to the property so donated in the county, to be controlled, when accepted, by the board of hospital trustees according to the terms of the deed, gift, devise or bequest of such property. (1945, c. 506, s. 16.)

§ 131-28.17. Persons entitled to benefit of hospital; charges for treatment; exclusion for violation of rules.—Every hospital acquired or constructed under this article shall be for the benefit of the inhabitants of the county and of any person falling sick or being injured or maimed within the limits of the county; but every person using the facilities or services of any such hospital who is not a pauper shall pay a reasonable compensation for occupancy, nursing, care, medicine, or attendance, according to the rules and regulations prescribed by the board of hospital trustees, such hospital or hospitals always being subject to such reasonable rules and regulations as the board may adopt for the purpose of rendering the use of such hospital or hospitals of the greatest benefit to the greatest number. The board of hospital trustees may exclude from the use of any such hospital all persons who shall wilfully violate such rules and regulations. Such board may extend the privileges and use of any such hospital to persons residing outside of the county upon such terms and conditions as may be prescribed from time to time by its rules and regulations. (1945, c. 506, s. 17.)

§ 131-28.18. Persons and articles subject to rules and regulations.—When such hospital or hospitals are established as county public hospitals the physicians, nurses, attendants, the persons sick therein, and all persons approaching or coming within the limits of the same, and all furniture and other articles used therein or brought thereto, shall be subject to such rules and regulations as the board of hospital trustees may prescribe. (1945, c. 506, s. 18.)

§ 131-28.19. Regulation of physicians and nurses.—The board of hospital trustees shall determine the conditions under which the privileges of practice within the hospitals under its jurisdiction and control shall be available to physicians, and the board shall promulgate reasonable rules and regulations governing the conduct of physicians and nurses while on duty in said hospitals. (1945, c. 506, s. 19.)

§ 131-28.20. Training school for nurses.—The board of hospital trustees may establish and maintain, in connection with and as a part of any hospital under its jurisdiction and control, a training school or training schools for nurses. (1945, c. 506, s. 20.)

§ 131-28.21. Powers granted are additional.—The powers granted by this article are in addition to and not in substitution for existing powers of counties in the state of North Carolina. (1945, c. 506, s. 21.)

§ 131-28.22. Validation of elections.—All elections heretofore called or held for the issuance of county hospital bonds and all elections heretofore held for levying and collecting annually an ad valorem tax for the special purpose of maintaining county hospitals, which could have been held under the provisions of this article had the same then been in effect and operation, are hereby ratified, approved and confirmed, and all county hospital bonds heretofore issued pursuant to any such election are hereby ratified, approved and confirmed. (1945, c. 506, s. 22.)

Art. 2B. County-City Hospital Facilities for the Poor.

§ 131-28.23. Counties authorized to provide facilities in conjunction with certain cities.—Authority is hereby granted to the board of commissioners of any county in the state now or hereafter having a population of one hundred thousand or over and a city within its borders now or hereafter having population of seventy-five thousand or over to provide adequate hospital facilities for the care of the sick and afflicted poor of such county. The exercise of the authority hereby granted through the contracts herein referred to, and the appropriations and taxes for the construction, installation, and maintenance of such facilities are hereby declared to be for necessary expenses and for a special purpose within the meaning of the constitution of North Carolina and for which the special approval of the general assembly of North Carolina is hereby given, and shall be valid and binding without a vote of the majority of the qualified voters of the county, and are expressly exempted and excepted from any limitation, condition or restriction prescribed by the county fiscal control act and acts amendatory thereof. The full faith and credit of any such county shall be deemed to be pledged for the payment of the amounts due under said contracts and the special approval of the general assembly of North Carolina is hereby given to the execution thereof and to the levy of a special ad valorem tax not to exceed ten cents (10c) on the one hundred dollars ($100.00) value of property, in addition to other taxes for general purposes authorized by law, for the special purpose of the payment of the amounts to become due thereunder. The board of aldermen of any such city is also authorized to levy, for the purposes herein provided, a special ad valorem tax not to exceed ten cents (10c) on the one hundred dollars ($100.00) value of property, in addition to other taxes for general purposes authorized by law. The term "board of aldermen," as used in this article, shall be deemed to include any governing body of any municipality coming within the provisions of this article by whatever name designated. (1945, c. 516, s. 1.)

§ 131-28.24. Agreement between governing bodies upon plan of hospital care.—The authority hereby granted shall be exercised only by agreement between the board of commissioners of the county and the board of aldermen of the city upon a plan of hospital care for the sick and afflicted poor of the county as herein provided. Such plan shall be embodied in a resolution, adopted by a majority vote of each board before becoming effective, and may be enlarged, diminished or altered from time to time by a majority vote of each board not inconsistent herewith. The plan shall provide for (a) the time when it shall become effective, (b) the election of a city-county hospital

commission to administer the hospitals covered by the plan, (c) the respective financial obligations of the county and the city with respect to the construction of any hospitals covered by the plan and the operation of any hospitals covered by the plan, and (d) such other arrangements, provisions, and details as may be deemed necessary, requisite or proper to provide adequate hospital facilities for the sick and afflicted poor of the county. (1945, c. 516, s. 2.)

§ 131-28.25. Powers and regulations; inclusion of municipal hospital within plan; limitations on payments by county.—If the governing bodies of any such county and city deem it advisable to include within the plan any existing municipal hospital or any new hospital which the city proposes to erect with the proceeds of a bond issue approved by the registered voters thereof, then in that event, the commissioners of such county are authorized to contract with the city for the construction of additional hospital facilities, over and above those to be paid for by the city with the funds derived from such bond issue and from other sources, for the hospitalization of the sick and afflicted poor of the county upon such terms and conditions as may be agreed upon and embodied in said plan by the governing bodies of the county and the city, provided the annual payments by the county to the city toward the cost of constructing such additional hospital facilities shall not exceed fifteen per cent of the total cost thereof, and provided further that the annual deficit, if any, in the operation of such hospital or in the operation of any other hospital covered by the plan for the treatment of the sick and afflicted poor of the county shall be borne and paid by the city and county in such proportion as may be agreed upon by their governing bodies. In no event shall the annual payment of the city exceed two thirds of such annual deficit. In the event a new hospital is constructed as hereinbefore provided, it shall be located within the corporate limits of the city, and the name of the hospital and the site selected and all contracts for the construction thereof shall be approved by a majority vote of the governing boards of the city and county meeting in joint session, each body voting as a unit, but in the event of disagreement the majority vote of the board of aldermen of the city shall prevail. One third of all beds in the hospitals covered by the plan shall be reserved for the treatment of the indigent sick. (1945, c. 516, s. 3.)

§ 131-28.26. City-county hospital commission.—Following the adoption of the agreement covering a plan of hospitalization for the sick and afflicted poor of the county, the county commissioners and the governing board of the city shall meet in a joint session in the county court house and elect a city-county hospital commission, to be composed of nine members, six of whom shall be residents of the city and three of whom shall be residents of other sections of the county. Three members of the commission shall be elected to serve for a term of two years, three for a term of four years, and three for a term of six years, and thereafter three members shall be elected biennially for a term of six years. Vacancies from any cause shall be filled by the two governing bodies meeting in joint session.

The mayor of the participating city shall be chairman and the chairman of the board of commissioners of the county shall be vice chairman. At the first meeting, the commission shall elect a secretary who need not be a member of the commission. The commission shall meet at least once a month and special meetings may be called by the chairman at such other times as he may designate. It shall be the duty of the chairman to call a special meeting of the commission upon written request of a majority of the members thereof. The secretary shall keep written minutes of all meetings of the commission and report to the governing bodies. The members of the commission shall serve without compensation.

The city-county hospital commission shall make recommendations to the county commissioners of the county and the board of aldermen of the city regarding the operation of any hospital covered by the city-county hospital plan or system and shall discharge such other duties as the county commissioners of the county and the board of aldermen may impose upon the commission. In addition, such commission shall have all powers and discharge all duties now vested in any hospital commission of any such city by the ordinances or charter thereof not inconsistent herewith.

Not later than June first of each year the city-county hospital commission shall prepare and submit to the governing bodies of the county and city a proposed budget for the operation and maintenance of each hospital covered by the plan agreed upon by the governing bodies of the city and county. On or before June fifteenth of each year, the county commissioners and the board of aldermen shall adopt in a joint meeting the budget under which the several hospitals covered by the plan shall operate during the next fiscal year. (1945, c. 516, s. 4.)

§ 131-28.27. Superintendent of hospitals.—At a joint meeting of the board of commissioners and the board of aldermen, at which the city-county hospital commission is elected, there shall also be elected a superintendent of hospitals to serve for a term of twelve months. The compensation of the superintendent and of the personnel of the several hospitals covered by the plan shall be fixed by the commissioners of the county and the board of aldermen of the city in a joint meeting. The superintendent shall be subject to removal by the commissioners and by the board of aldermen at will in joint meeting, provided two thirds of the membership of both boards vote in favor of such removal.

The superintendent of hospitals shall have supervision of the operation of the hospitals covered by the plan and shall have the powers now prescribed by the ordinances of the city and he shall likewise enforce all rules and regulations prescribed by the governing bodies of the county and the city. (1945, c. 516, s. 5.)

§ 131-28.28. Revenue.—The board of commissioners of the county and the board of aldermen of the city are hereby respectively authorized and empowered to levy a tax on property in addition to other taxes for general purposes, not to exceed ten cents (10c) on the one hundred dollars ($100.00) value of property annually, to provide hospital care for the sick and afflicted poor of the

county and the city. All revenue so derived shall be carried by each governing body as a separate fund and expenditures for such purpose shall be charged respectively against such fund. Other revenues received from the operation of the hospitals covered by the plan shall be carried in the same funds. The funds of the county and the city for the operation and maintenance of such hospital facilities shall be applied by the governing bodies toward the payment of any annual deficit arising from the treatment of the sick and afflicted poor in any of the hospitals covered by the plan agreed upon by the governing bodies, subject to the limitations hereinbefore provided, and shall be disbursed by the finance officer of the city on vouchers approved by the superintendent of hospitals, provided appropriations for such expenditures have been made and a sufficient balance is available. All purchases shall be made through the purchasing department of the city. The portion of the funds charged to the county shall be paid not later than thirty days from the close of each fiscal year to the finance officer of the city, to be applied as hereinbefore provided.

The governing bodies of the county and city meeting in joint session shall set aside each year out of the hospital plan revenues a sum not to exceed ten per cent of the original cost of the hospital plants covered by the plan, including land, buildings and equipment, for future expansion and modernization of building and appurtenances, the funds so set aside to be deposited with the sinking fund commission of the city and kept separate by it from other funds handled by it, and the investments of such funds to be governed by the laws pertaining to the city sinking funds. The expenditure of all or any part of said accumulated funds shall be made upon recommendation of the city-county hospital commission to both governing bodies, meeting in joint session.

In anticipation of the annual payments to be made by the county toward the cost of constructing the additional facilities hereinbefore referred to, the city is authorized to advance such additional funds and if necessary to issue its short-term securities for that purpose. If such short-term securities are issued by the city, interest thereon shall be paid by the county. (1945, c. 516, s. 6.)

Art. 3. County Tuberculosis Hospitals.

§ 131-31. Board of managers; term of office; compensation.

Local Modification.—Guilford: 1945, c. 135.

Art. 11. Sanatorium for Tubercular Prisoners.

§ 131-88. Guarding and disciplining of prisoners.—The prison division of the state highway and public works commission shall have the same powers, duties and responsibilities in the guarding and disciplining of tubercular prisoners or convicts as it now has as to other prisoners and inmates under its supervision and control. (1923, c. 127, s. 6; 1949, c. 1136; C. S. 7220(e).)

Editor's Note.—The 1949 amendment rewrote this section.

§ 131-89. Feeding prison staff; medical and dietetic treatment and care of convicts.—The North Carolina sanatorium for the treatment of tuberculosis shall provide food for the prison staff and have the same duties and responsibilities in providing medical and dietetic treatment and care of the inmates of said sanatorium for the treatment of tubercular prisoners or convicts as it had prior to the passage of this section. (1923, c. 127, s. 1; 1949, c. 1136; C. S. 7220(f).)

Editor's Note.—This section as rewritten by the 1949 amendment was passed on April 22, 1949.

Art. 12. Hospital Authorities Law.

§ 131-90. Short title.

For comment on this article, see 21 N. C. Law Rev. 354.

§ 131-116. Article controlling.

Local Modification.—Wayne and city of Goldsboro: 1947, c. 969.

§ 131-116.1. Article applicable to city of High Point.—All the provisions of this article shall apply to the city of High Point, Guilford county, North Carolina, as fully as if the population of such city exceeded seventy-five thousand (75,000) inhabitants. (1947, c. 349.)

Art. 13. Medical Care Commission and Program of Hospital Care.

§ 131-117. North Carolina medical care commission.—There is hereby created a state agency to be known as "The North Carolina medical care commission," which shall be composed of twenty members nominated and appointed as follows:

Three members shall be nominated by the medical society of the state of North Carolina; one member by the North Carolina hospital association; one member by the North Carolina dental society; one member by the North Carolina nurses' association; one member by the North Carolina pharmaceutical association, and one member by the Duke foundation, for appointment by the governor.

Ten members of said commission shall be appointed by the governor and selected so as to fairly represent agriculture, industry, labor, and other interests and groups in North Carolina. In appointing the members of said commission, the governor shall designate the term for which each member is appointed. Four of said members shall be appointed for a term of one year; four for a term of two years; four for a term of three years; five for a term of four years; and thereafter, all appointments shall be for a term of four years. All vacancies shall be filled by the governor for the unexpired term. The commissioner of public welfare, and the secretary of the state board of health shall be ex officio members of the commission, without voting power.

The commission shall elect, with the approval of the governor, a chairman and a vice chairman. All members, except the commissioner of public welfare, and the secretary of the state board of health shall receive a per diem of seven dollars ($7.00) and necessary travel expenses. (1945, c. 1096.)

§ 131-118. Commission authorized to employ executive secretary.—The North Carolina medical care commission is authorized and empowered to employ, subject to the approval of the governor, an executive secretary, and to determine his or her salary under the provisions of the personnel act. The executive secretary may employ such additional persons as may be required to carry out the provisions of this article, subject to approval of the commission, and the provisions of the person-

nel act. Office space for the commission shall be provided by the board of public buildings and grounds, in Raleigh. (1945, c. 1096.)

§ 131-119. Contribution for indigent patients.—The North Carolina medical care commission, in accordance with rules and regulations promulgated by it, is hereby authorized and empowered to contribute not exceeding one dollar ($1.00) per day for each indigent patient hospitalized in any hospital approved by it, provided the balance of the costs shall be provided by the county or city having responsibility for the care of such indigent patient, or from other sources. The commission shall promulgate rules and regulations for determining the indigency of the persons hospitalized and the basis upon which hospitals and health centers shall qualify to receive the benefits of this section.

For the purpose of carrying out the provisions of this section, there is hereby appropriated from the general fund to the North Carolina medical care commission for the fiscal year ending June thirtieth, one thousand nine hundred and forty-six the sum of five hundred thousand dollars ($500,000.00); and for the fiscal year ending June thirtieth, one thousand nine hundred and forty-seven, the sum of five hundred thousand dollars ($500,000.00), provided that the benefits of this section shall apply only to hospitals publicly owned, or operated by charitable, non-profit, non-stock corporations, and on and after July 1st, 1949, the benefits of this section shall apply only to hospitals publicly owned, or owned and operated by charitable, non-profit, non-stock corporations; and provided further that these appropriations provided in this section shall not be available until all provisions of section twenty-three and one half of the committee substitute for house bill number eleven, the general appropriations bill of one thousand nine hundred and forty-five, relating to the emergency salary for the public school teachers and state employees shall have been completely and fully provided for. (1945, c. 1096; 1947, c. 933, s. 1.)

Editor's Note.—The 1947 amendment struck out the words "owned and" formerly appearing before the word "operated" in line twelve of the second paragraph. It also inserted in said paragraph the provision as to benefits on and after July 1, 1949.

§ 131-120. Construction and enlargement of local hospitals.—The North Carolina medical care commission is hereby authorized and empowered to begin immediate surveys of each county in the state to determine:

(a) The hospital needs of the county or area;

(b) The economic ability of the county or area to support adequate hospital service;

(c) What assistance by the state, if any, is necessary to supplement all other available funds, to finance the construction of new hospitals and health centers, additions to existing hospitals and health centers, and necessary equipment to provide adequate hospital service for the citizens of the county or area; and to report this information, together with its recommendations, to the governor, who shall transmit this report to the next session of the general assembly for such legislative action as it may deem necessary to effectuate an adequate state-wide hospital program.

The North Carolina medical care commission is hereby authorized and empowered to act as the agency of the state of North Carolina for the purpose of setting up and administering any state-wide plan for the construction and maintenance of hospitals, public health centers and related facilities, and to receive and administer any funds which may be provided by the general assembly of North Carolina and/or by the congress of the United States for such purpose; and the commission, as such agency of the state of North Carolina with the advice of the state advisory council set up as hereinafter provided, shall have the right to promulgate such state-wide plans for the construction and maintenance of hospitals, medical centers and related facilities, or such other plans as may be found desirable and necessary in order to meet the requirements and receive the benefits of any federal legislation with regard thereto. The said commission shall be authorized to receive and administer any funds which may be appropriated by any act of congress or of the general assembly of North Carolina for the construction of hospitals, medical centers and related activities or facilities, which may at any time in the future become available for such purposes; said commission shall be further authorized to receive and administer any other federal funds, or state funds, which may be available, in the furtherance of any activity in which the commission is authorized and empowered to engage in under the provisions of this article establishing said commission, and in connection therewith the commission is authorized to adopt such rules and regulations as may be necessary to carry out the intent and purposes of this article; to adopt such reasonable and necessary standards with reference thereto as may be proper to fully cooperate with the surgeon general or other agency or department of the United States with the approval of the federal advisory council in the use of funds provided by the federal government, and at all times make such reports and give such information to the surgeon general or other agency or department of the United States as may be required.

The governor is hereby authorized and empowered to set up and establish a state advisory council to the North Carolina medical care commission, to consist of five members, who shall each serve for a term of four years, with the right on the part of the governor to fill vacancies for unexpired terms, said council to include representatives of non-government organizations or groups, and of state agencies, concerned with the operation, construction, or utilization of hospitals or medical centers, or allied facilities, which advisory council, when set up by the governor, shall advise with the North Carolina medical care commission with respect to carrying out the purposes and provisions of this article. The members of the state advisory council to the North Carolina medical care commission shall receive a per diem of seven dollars ($7.00) and necessary travel expenses except that this shall not apply to members of the state advisory council to the North Carolina medical care commission who are representatives of a state agency or department and who receive a regular salary paid by appropriations to their agency or department; but such representatives of such state agencies or departments shall be entitled to necessary subsistence and travel expenses.

The North Carolina medical care commission and the said state advisory council set up by the governor as herein authorized, shall be fully authorized and empowered to do all such acts and things as may be necessary, to authorize the state of North Carolina to receive the full benefits of any federal laws which are or may be enacted for the construction and maintenance of hospitals, health centers or allied facilities.

Out of the funds appropriated and made available by the state, the North Carolina medical care commission shall make grants-in-aid to counties, cities, towns and subdivisions of government to acquire real estate and construct thereon hospital facilities, including the reconstruction, remodeling or addition to any hospital facilities which have been or may be acquired by such municipalities or subdivisions of government for use as community hospitals. The appropriations and funds made available by the state shall be allocated, apportioned and granted for the purposes above set forth and for such other related objects or purposes as shall be determined in each case by the North Carolina medical care commission in accordance with the standards, rules and regulations as determined, adopted and promulgated by the North Carolina medical care commission. The North Carolina medical care commission may furnish financial and other types of aid and assistance to any non-profit hospital owned and operated by a corporation or association, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual, upon the same terms and conditions as such aid and financial assistance is granted to municipalities and subdivisions of government: Provided, that hospitals now in the course of construction and approved by the North Carolina medical care commission and the appropriate federal authority shall be entitled to receive financial assistance on the same basis as any hospital of the same classification and type that may be hereafter constructed and approved by the North Carolina medical care commission and the appropriate federal authority. (1945, c. 1096; 1947, c. 933, ss. 3, 5; 1949, c. 592.)

Editor's Note.—The 1947 amendment added to the third paragraph following "(c)" the sentence as to per diem and travel expenses. It also rewrote the last paragraph.

The 1949 amendment rewrote the second paragraph of subsection (c).

§ 131-121. Medical and other students; loan fund.—The North Carolina medical care commission is hereby authorized and empowered, in accordance with such rules as it may promulgate, to make loans to students who may wish to become physicians, dentists, pharmacists, or nurses and who are accepted for enrollment in any standard school or college giving approved courses in medicine, denistry, pharmacy or nursing, and is approved by the commission provided such student or students shall agree, that upon graduation and being duly licensed, to practice medicine, dentistry, pharmacy or nursing in some rural area of North Carolina for at least four years. Rural area, for the purpose of this section, shall mean any town or village having less than 2,500 population according to the last decennial census, or area outside and around such towns or villages. Such loans shall bear such rate of interest as may be fixed by the commission, not to exceed four per cent (4%) per annum.

For the purpose of carrying out the provisions of this section, there is hereby appropriated from the general fund for the fiscal year ending June thirtieth, one thousand nine hundred and forty-six, to the North Carolina medical care commission the sum of fifty thousand dollars ($50,000.00). The state treasurer shall set up on his records an account to which shall be deposited said amount, and from which withdrawals shall be made upon vouchers made by the state auditor upon request of the North Carolina medical care commission. This appropriation shall not lapse at the end of any biennium, but shall remain available for the purposes herein stated.

The North Carolina medical care commission is hereby authorized and empowered to establish and promulgate rules and regulations fixing fair and reasonable standards, systems and plans whereby physicians, dentists, pharmacists, and nurses receiving loans under this section shall receive a credit on the principal and/or interest of such loan in an amount fixed by such commission for each year, or other period of time as fixed by regulation, of practicing his or her profession in a rural area as defined in this section. (1945, c. 1096; 1947, c. 933, s. 2; 1949, c. 1019.)

Editor's Note.—The 1947 amendment rewrote the first paragraph to make it applicable to students who may wish to become dentists, pharmacists or nurses.

The 1949 amendment added the last paragraph.

§ 131-122. Expansion of medical school of the University of North Carolina.—In order to carry forward the state-wide plan of hospital and medical care, the board of trustees of the University of North Carolina, by and with the approval of the governor and the North Carolina medical care commission is hereby authorized and empowered to expand the two-year medical school of the University of North Carolina into a standard four-year medical school. The North Carolina medical care commission is authorized and directed to make a complete survey of all factors involved in determining the location of the expanded medical school, giving especial attention to the advantages and disadvantages of locating said school in one of the large cities of the state, and shall render a report of their findings to the governor and board of trustees of the University of North Carolina.

Provided that no action shall be taken under this provision of this section, other than the work of the commission, until a survey has been made and a report submitted to the governor and medical care commission by the Rockefeller Foundation or some other accredited agency with experience in the field of surveying large areas in connection with medical education and medical care. The report of such agency is to be submitted to the governor and the medical care commission in a reasonable time in advance of the report of the governor and the commission to the board of trustees. (1945, c. 1096.)

§ 131-123. Appropriations for expenses of the North Carolina medical care commission.—In order to provide funds for the expenses of the North Carolina medical care commission, there is hereby appropriated from the general fund for the fiscal year ending June thirtieth, one thousand nine hundred and forty-six, the sum of fifty thou-

sand dollars ($50,000.00) and for the fiscal year ending June thirtieth, one thousand nine hundred and forty-seven, the sum of fifty thousand dollars ($50,000.00). (1945, c. 1096.)

§ 131-124. Medical training for negroes.—The North Carolina medical care commission shall make careful investigation of the methods for providing necessary medical training for negro students, and shall report its findings to the next session of the general assembly. In addition to the benefits provided by § 116-110, the North Carolina medical care commission is hereby authorized to make loans to negro medical students from the fund provided in § 131-121, subject to such rules, regulations, and conditions as the commission may prescribe. (1945, c. 1096.)

§ 131-125. Acceptance of gifts, grants and donations.—The North Carolina medical care commission is hereby authorized and empowered to accept and administer gifts, grants, or donations which may be made by the federal government or by any person, firm, or corporation for the purpose of carrying out the objects of this article, provided the acceptance of such gifts, grants, or donations shall be made without requiring the surrender of authority or control in the administration thereof by the North Carolina medical care commission. (1945, c. 1096.)

§ 131-126. Hospital care associations.—The North Carolina medical care commission is hereby authorized to encourage the development of group insurance plans, the blue cross plan, and other plans which provide for insurance for the public against the costs of disease and illness. (1945, c. 1096.)

Art. 13A. Hospital Licensing Act.

§ 131-126.1. Definitions.—As used in this article:

(a) "Hospital" means an institution devoted primarily to the rendering of medical, surgical, obstetrical, or nursing care, which maintains and operates facilities for the diagnosis, treatment or care of two or more nonrelated individuals suffering from illness, injury or deformity, or where obstetrical or other medical or nursing care is rendered over a period exceeding twenty-four hours.

The term "hospital" for clarification purposes, includes, but not by way of limitation, an institution that receives patients and renders for them diagnostic, medical, surgical and nursing care; and "hospital" means also an allied institution that provides for patients diagnostic, medical, surgical and nursing care in branches of medicine such as obstetric, pediatric, orthopedic, and eye, ear, nose, and throat and cardiac services, and in the diagnosis and treatment of mental and neurological ailments, and in the diagnosis and treatment and care of chronic diseases and transmissible diseases.

The term "hospital" as used in this article does not apply to a welfare institution, the primary purpose of which is to provide domiciliary and/or custodial care to its residents, and it does not apply to an infirmary which such institution may maintain to provide medical and nursing care for its residents.

Further to distinguish a "hospital" from a "welfare institution," as the term is used in this article, the latter means orphanages; penal and correctional institutions; homes for the county or city poor, aged, and infirm; nursing homes for the mentally and physically infirm; homes for the aged; and convalescent and rest homes; and homes for pregnant women who require public assistance and/or custodial care or obstetrical and nursing care in such home, or nursing care prior to or subsequent to delivery in a "hospital".

(b) "Person" means any individual, firm, partnership, corporation, company, association, or joint stock association; and includes any trustee, receiver, assignee or other similar representative thereof.

(c) "Governmental unit" means the state, or any county, municipality, or other political subdivision or any department, division, board or other agency of any of the foregoing.

(d) "Commission" means the North Carolina medical care commission as established by chapter 1096 of the Session Laws of 1945, as amended, and as the same may be hereafter amended. (1947, c. 933, s. 6; 1949, c. 920, s. 1.)

Editor's Note.—The 1949 amendment rewrote subsection (a).

§ 131-126.2. Purpose.—The purpose of this article is to provide for the development, establishment and enforcement of basic standards

(1) for the care and treatment of individuals in hospitals and

(2) for the construction, maintenance and operation of such hospitals, which, in the light of existing knowledge, will ensure safe and adequate treatment of such individuals in hospitals, provided, that nothing in this article shall be construed as repealing any of the provisions of article 27 of chapter 130 of the General Statutes of North Carolina. (1947, c. 933, s. 6.)

§ 131-126.3. Licensure.—After July 1st, 1947, no person or governmental unit, acting severally or jointly with any other person or governmental unit shall establish, conduct or maintain a hospital in this state without a license. (1947, c. 933, s. 6.)

§ 131-126.4. Application for license.—Licenses shall be obtained from the commission. Applications shall be upon such forms and shall contain such information as the said commission may reasonably require, which may include affirmative evidence of ability to comply with such reasonable standards, rules and regulations as may be lawfully prescribed hereunder. (1947, c. 933, s. 6; 1949, c. 920, s. 3.)

Editor's Note.—The 1949 amendment struck out the former last sentence relating to license fee accompanying application.

§ 131-126.5. Issuance and renewal of license.—Upon receipt of an application for license, the commission shall issue a license if it finds that the applicant and hospital facilities comply with the provisions of this article and the regulations of the said commission. Each such license, unless sooner suspended or revoked, shall be renewable annually without charge upon filing of the license, and approval by the commission, of an annual report upon such uniform dates and containing such information in such form as the commission shall prescribe by regulation. Each license shall be issued only for the premises and persons or governmental units named in the application and shall not be transferable or assignable except with the written

approval of the commission. Licenses shall be posted in a conspicuous place on the licensed premises as prescribed by regulation of the said commission. (1947, c. 933, s. 6; 1949, c. 920, s. 4.)

Editor's Note.—The 1949 amendment struck out the words "and the license fee" formerly appearing after the word "license" in line one.

§ 131-126.6. Denial or revocation of license; hearings and review.—The commission shall have the authority to deny, suspend or revoke a license in any case where it finds that there has been a substantial failure to comply with the provisions of this article or the rules, regulations or minimum standards promulgated under this article.

Such denial, suspension, or revocation shall be effected by mailing to the applicant or licensee by registered mail, or by personal service of, a notice setting forth the particular reasons for such action. Such denial, suspension, or revocation shall become effective thirty days after the mailing or service of the notice, unless the applicant or licensee, within such thirty-day period shall give written notice to the commission requesting a hearing, in which case the notice shall be deemed to be suspended. If a hearing has been requested, the applicant or licensee shall be given an opportunity for a prompt and fair hearing before the commission. At any time at or prior to the hearing, the commission may rescind the notice of denial, suspension or revocation upon being satisfied that the reasons for the denial, suspension, or revocation have been or will be removed. On the basis of any such hearing, or upon default of the applicant or licensee the determination involved in the notice may be affirmed, modified, or set aside, by the commission. A copy of such decision, setting forth the finding of facts and the particular reasons for the decision shall be sent by registered mail, or served personally upon, the applicant or licensee. The decision shall become final thirty days after it is so mailed or served, unless the applicant or licensee, within such thirty-day period, appeals the decision to the court, pursuant to § 131-126.14 hereof.

The procedure governing hearings authorized by this section shall be in accordance with rules promulgated by said commission with the advice of the hospital advisory council. A full and complete record shall be kept of all proceedings, and all testimony shall be reported but need not be transcribed unless the decision is appealed pursuant to § 131-126.14 hereof. A copy or copies of the transcript may be obtained by an interested party on payment of the cost of preparing such copy or copies. Witnesses may be subpoenaed by either party and shall be allowed fees at a rate prescribed by the aforesaid rules. (1947, c. 933, s. 6.)

§ 131-126.7. Rules, regulations and enforcement.—The commission with the advice of the hospital advisory council, shall adopt, amend, promulgate and enforce such rules, regulations and standards with respect to the different types of hospitals to be licensed hereunder as may be designed to further the accomplishment of the purposes of the article. (1947, c. 933, s. 6.)

§ 131-126.8. Effective date of regulations.—Any hospital which is in operation at the time of promulgation of any applicable rules or regulations or minimum standards under this article shall be given a reasonable time, not to exceed one year from the date of such promulgation, within which to comply with such rules and regulations and minimum standards. (1947, c. 933, s. 6.)

§ 131-126.9. Inspections and consultations.—The commission shall make or cause to be made such inspections as it may deem necessary. The commission may delegate to any state officer, agent, board, bureau or division of state government authority to make such inspections as the commission may designate and according to rules and regulations promulgated by the commission. The commission may revoke such delegated authority in its discretion and make its own inspections according to the powers granted hereunder. The commission may prescribe by regulations that any licensee or prospective applicant desiring to make specified types of alteration or addition to its facilities or to construct new facilities shall before commencing such alteration, addition or new construction, submit plans and specifications therefor to the commission for preliminary inspection and approval or recommendations with respect to compliance with the regulations and standards herein authorized. (1947, c. 933, s. 6.)

§ 131-126.10. Hospital advisory council.—The commission may appoint a hospital advisory council which shall consist of the executive secretary of the commission who shall serve as chairman ex officio, the commissioner of the state board of public welfare, ex officio, the state health officer, ex officio, the superintendent of mental hygiene, ex officio, and the following: One or more individuals of recognized ability in the field of hospital administration; one or more individuals of recognized ability in the fields of medicine and surgery, nursing, welfare, public health, architecture, or allied professions in the field of health; one or more individuals with broad civic interests representing consumers of hospital services.

In each of these three aforesaid groups, members shall be appointed for terms of one, two, three and four years respectively, and their successors shall be appointed for terms of four years, except when appointed to complete an unexpired term. Members whose terms expire shall hold office until appointment of their successors. The members of the hospital advisory council to the North Carolina medical care commission shall receive a per diem of seven dollars ($7.00) and necessary travel expenses except that this shall not apply to members of the hospital advisory council who are representatives of a state agency or department and who receive a regular salary paid by appropriations to their agency or department; but such representatives of such state agencies or departments shall be entitled to necessary subsistence and travel expenses. (1947, c. 933, s. 6.)

§ 131-126.11. Functions of hospital advisory council.—The hospital advisory council shall have the following responsibilities and duties:

(a) To consult and advise with the commission in matters of policy affecting administration of this article, and in the development of rules, regulations and standards provided for hereunder.

(b) To review and make recommendations with respect to rules, regulations and standards authorized hereunder prior to their promulgation by the commission as specified herein. The council

shall meet not less than once each year, and additionally at the call of the chairman or at the request of any five of its members. (1947, c. 933, s. 6.)

§ 131-126.12. Information confidential. — Information received by the commission through filed reports, inspection, or as otherwise authorized under this article, shall not be disclosed publicly in such manner as to identify individuals or hospitals, except in a proceeding involving the question of licensure or the denial, suspension or revocation of a license. (1947, c. 933, s. 6.)

§ 131-126.13. Annual report of commission. — The commission shall prepare and publish an annual report of its activities and operations under this article. (1947, c. 933, s. 6.)

§ 131-126.14. Judicial review.—Any applicant or licensee who is dissatisfied with the decision of the commission as a result of the hearing provided in § 131-126.6 may, within thirty (30) days after the mailing or serving of notice of the decision as provided in said section, file a notice of appeal to the superior court in the office of the clerk of the superior court of the county in which the hospital is located or to be located, and serve a copy of said notice of appeal upon the commission. Thereupon the commission shall promptly certify and file with the court a copy of the record and decision, including the transcript of the hearings on which the decision is based. Findings of fact by the commission shall be conclusive unless contrary to the weight of the evidence but upon good cause shown the court may remand the case to the commission to take further evidence, and the commission may thereupon make new or modified findings of facts or decision. The court shall have power to affirm, modify or reverse the decision of the commission and either the applicant or licensee or the commission may appeal to the supreme court. Pending final disposition of the matter the status quo of the applicant or licensee shall be preserved, except as the court shall otherwise order in the public interest. (1947, c. 933, s. 6.)

§ 131-126.15. Penalties.—Any person establishing, conducting, managing, or operating any hospital without a license shall be guilty of a misdemeanor, and upon conviction thereof shall be liable to a fine of not more than fifty dollars ($50.00) for the first offense and not more than five hundred dollars ($500.00) for each subsequent offense, and each day of a continuing violation after conviction shall be considered a separate offense. (1947, c. 933, s. 6.)

§ 131-126.16. Injunction.—Notwithstanding the existence or pursuit of any other remedy, the commission may, in the manner provided by law, maintain an action in the name of the state for injunction or other process against any person or governmental unit to restrain or prevent the establishment, conduct, management or operation of a hospital without a license. (1947, c. 933, s. 6.)

§ 131-126.17. Article not applicable to §§ 122-72 to 122-75.—The provisions of this article shall not apply to §§ 122-72 through 122-75, inclusive, of the General Statutes, which give to the state board of public welfare, in addition to other responsibilities, authority to license privately owned and operated hospitals for the mentally disordered. (1947, c. 933, s. 6; 1949, c. 920, s. 2.)

Editor's Note.—The 1949 amendment rewrote this section.

Art. 13B. Additional Authority of Subdivisions of Government to Finance Hospital Facilities.

§ 131-126.18. Definitions.—As used in this article: (a) "Municipality" means any county, city, town or other political subdivision of this state, or any hospital district created pursuant to article 13C of chapter 131 of the General Statutes.

(b) "Municipal" means pertaining to a municipality as herein defined.

(c) "Hospital facility" means any type of hospital, clinic or public health center, housing or quarters for local public health departments, including relating facilities such as laboratories, out-patient departments, nurses' home and training facilities, and central service facilities operated in connection with hospitals.

(d) "Non-profit association" means any corporation or association, no part of the net earnings of which inures or may lawfully inure to the benefit of any private shareholder or individual.

(e) "Governing authority of hospital district" means the board of county commissioners of any county in which there is located wholly within the boundaries of the county a hospital district created under the provisions of article 13C of chapter 131 of the General Statutes. (1947, c. 933, s. 6; 1949, c. 766, ss. 1, 2, 4.)

Editor's Note.—The 1949 amendment added at the end of subsection (a) the words "or any hospital district created pursuant to article 13C of chapter 131 of the General Statutes." It inserted in subsection (c) the words "housing or quarters for local public health departments." It also added subsection (e).

§ 131-126.19. Purpose.—It is the purpose of this article to confer additional authority upon municipalities for the furnishing of hospital, clinic and similar services to the people of this state, through the construction, operation, and maintenance of hospital facilities and otherwise; and to this end to authorize municipalities to cooperate with other public and private agencies and with each other, and to accept assistance from agencies of this state or the federal government or from other sources. This article shall be liberally construed to effect these purposes. (1947, c. 933, s. 6.)

§ 131-126.20. General powers of municipalities in the construction, acquisition, operation and maintenance of hospital facilities.—(a) In addition to authority provided by existing laws, every municipality is authorized, out of any appropriations or other moneys made available for such purposes, to construct, operate, and maintain hospital facilities. For such purposes the municipality may use any available property that it may now or hereafter own or control and may, by purchase, grant, gift, devise, lease, condemnation or otherwise, acquire real or personal property or any interest therein. The municipality may make reasonable charges for the use of any such hospital facilities or may make them available without charge to such classes of persons as it considers necessary or desirable to carry out the purposes of this article.

(b) Any municipality may, by purchase, gift, devise, lease, condemnation or otherwise, acquire any existing hospital facilities.

(c) Any municipality may enter into a contract or other arrangement with any other municipality or other public agency of this or any other state or of the United States or with any individual, private organization or non-profit association for the provision of hospital, clinic, or similar services. Pursuant to such contract or other arrangement, the municipality may pay for such services out of any appropriations or other moneys made available for such purposes. A municipality may lease any hospital facilities to any non-profit association on such terms and subject to such conditions as will carry out the purposes of this article. (1947, c. 933, s. 6.)

§ 131-126.21. Board of managers.—Any authority vested by this article in the municipality for the planning, establishment, construction, maintenance or operation of hospital facilities may be vested by resolution of the governing body of the municipality in an officer or board or other municipal agency whose powers, duties, compensation, and tenure shall be prescribed in the resolution; provided, however, that the expense of such planning, establishment, construction, maintenance or operation shall be a responsibility of the municipality. (1947, c. 933, s. 6.)

§ 131-126.22. Appropriations and taxation.—(a) The governing body of any municipality having power to appropriate and raise money is hereby authorized to appropriate and to raise by taxation and otherwise sufficient moneys to carry out the provisions and purposes of this article.

(b) Notwithstanding any constitutional limitation or limitation provided by any general or special law, taxes may be levied by the governing body of a municipality for the special purposes of this article, for which special approval is hereby given, provided that the levy of such taxes shall be approved by the vote of a majority of the qualified voters of such municipality who shall vote on the question of levying such taxes in an election held for such purpose. Such election as to counties may be held at the same time and in the same manner as elections held under the provisions of article 9 of chapter 153 of the General Statutes, the same being designated as the County Finance Act, beginning with § 153-69 of the General Statutes and sections following, or such election as to cities and towns may be held under the Municipal Finance Act, the same being article 28 of chapter 160 of the General Statutes, beginning with § 160-377 of the General Statutes and sections following, or said elections may be held at any time fixed by the governing body of the municipality. (1947, c. 933, s. 6; 1949, c. 497, s. 5.)

Editor's Note.—The 1949 amendment, effective March 22, 1949, rewrote the proviso at the end of the first sentence of subsection (b). See § 153-92.1.

§ 131-126.23. Financing cost of construction, acquisition and improvement; bond issues.—(a) The cost of planning and acquiring, establishing, developing, constructing, enlarging, improving, or equipping any hospital facility or the site thereof may be paid for by appropriation of moneys available therefor or wholly or partly from the proceeds of the sale of bonds or other obligations of the municipality as the governing body of the municipality shall determine. For such purposes a county may issue general obligation bonds, as authorized by the County Finance Act, the same being article 9 of chapter 153 of the General Statutes and a city or town as authorized by the Municipal Finance Act, the same being subchapter III of chapter 160 of the General Statutes and consisting of articles 25, 26, 27, 28, 29, 30, 31 and 32 of chapter 160 of the General Statutes, and any municipality may issue revenue bonds as authorized by article 34 of chapter 160 of the General Statutes, the same being designated as the Revenue Bond Act of 1938.

(b) Notwithstanding any limitations provided by the constitution or by any general or special law as to the amount of bonds or obligations that may be issued, a municipality may issue bonds or obligations in excess of any such limitations for the purposes authorized by this article; provided, that such amount in excess of such constitutional limitation is referred to and approved by a majority of the qualified voters of said municipality voting in an election on such question.

(c) Notwithstanding any constitutional limitation or limitation provided by any general or special law, taxes may be levied by the governing body of a municipality for the purpose of financing the cost of operation, equipment and maintenance of any hospital facility authorized by this article; and the special approval of the general assembly is hereby given for the levying of taxes for such purposes; provided, that the levy of such taxes shall be approved by the vote of a majority of the qualified voters of such municipality who shall vote on the question of levying such taxes in an election held for such purpose. The rate or amount of such taxes for which a levy may be made hereunder shall be determined by the governing body of the municipality; and a ballot shall be furnished to each qualified voter at said election, which ballot may contain the words "For Hospital Facility Maintenance Tax (Briefly stating any other pertinent information)," and "Against Hospital Facility Maintenance Tax (Briefly stating any other pertinent information)," with squares in front of each proposition, in one of which squares the voter may make a cross mark (X); but any other form of ballot containing adequate information and properly stating the question to be voted upon shall be construed as being in compliance with this subsection. Such election as to counties may be held at the same time and in the same manner as elections held under article 9 of chapter 153 of the General Statutes, the same being designated as the County Finance Act, beginning with § 153-69 of the General Statutes and sections following, or such election as to cities and towns may be held under the Municipal Finance Act, the same being article 28 of chapter 160 of the General Statutes, beginning with § 160-377 of the General Statutes and sections following, or said elections may be held at any time fixed by the governing body of the municipality. The question of levying a tax for the operation and maintenance of hospital facilities as provided by this subsection may be submitted at the same time the question of issuing bonds is submitted as provided in this article or the question of a levy of taxes for operation and maintenance purposes may be submitted in a separate election according to the discretion and judgment of the governing body of the municipality. (1947, c. 933, s. 6; 1949, c. 497, s. 6.)

Editor's Note.—The 1949 amendment, effective March 22,

1949, rewrote the proviso at the end of the first sentence of subsection (c). See § 153-92.1. For brief comment on the amendment, see 27 N. C. Law Rev. 454.

§ 131-126.24. Condemnation.—In the condemnation of property authorized by this article, the municipality shall proceed in the manner provided in chapter 40 of the General Statutes of North Carolina, or the charter of the municipality. For the purpose of making surveys and examinations relative to any condemnation procedures, it shall be lawful to enter upon any land doing no unnecessary damage. Notwithstanding the provisions of any other statute or of any applicable municipal charter, the municipality may take possession of any property to be condemned at any time after commencement of the condemnation procedure. The municipality shall not be precluded from abandonment of the condemnation of any such property in any case where possession thereof has not been taken. (1947, c. 933, s. 6.)

§ 131-126.25. Federal and state aid.—(a) Every municipality or non-profit association is authorized to accept, receive, receipt for, disburse and expend federal and state moneys and other moneys, public or private, made available by grant, loan, gift or devise, to accomplish, in whole or in part, any of the purposes of this article. All federal moneys accepted under this section shall be accepted and expended by a municipality or non-profit association upon such terms and conditions as are prescribed by the United States and as are consistent with state law; and all state moneys accepted under this section shall be accepted and expended by the municipality or non-profit association upon such terms and conditions as are prescribed by the state and/or North Carolina medical care commission. Unless otherwise prescribed by the agency from which such moneys were received, the chief financial officer of the municipality shall, on its behalf, deposit all moneys received pursuant to this section and shall keep them in separate funds designated according to the purposes for which the moneys were made available, in trust for such purposes.

(b) Out of funds made available by the state, the North Carolina medical care commission shall make grants-in-aid, as provided in this subsection, to municipalities and/or non-profit associations to acquire real estate and construct thereon hospital facilities, including the reconstruction, remodeling or addition to any hospital facilities which have been or may be acquired by such municipalities and/or non-profit associations for use as community hospitals. The amount of state funds to be granted hereunder shall be determined in each case by the North Carolina medical care commission in accordance with standards, rules and regulations as determined by the North Carolina medical care commission.

Application for a grant under this subsection shall be made to the North Carolina medical care commission by any municipality, acting separately or with one or more other municipalities, or by any non-profit association, on such forms and in such manner as may be prescribed by the North Carolina medical care commission. The North Carolina medical care commission may establish such reasonable requirements for approval as it deems necessary or desirable to effectuate the purposes of this article. The North Carolina medical care commission shall give preference to applications in accordance with their priority in the hospital construction program established pursuant to the Federal Hospital Survey and Construction Act. (1947, c. 933, s. 6.)

§ 131-126.26. Mutual aid. — If the governing body of any municipality determines that the public interest and the interests of the municipality will be served by assisting any other municipality or municipalities or non-profit association or non-profit associations in exercising the powers and authority granted by this article, such municipality may furnish assistance by gift of real or personal property, or lease or loan thereof with or without rental or charge, or by gift of money, or loan thereof with or without interest. In appropriating such property or money and providing for such assistance by taxation, the issuance of bonds, or other means, the municipality may exercise all of its powers as though used for its own direct purposes as provided in this article. (1947, c. 933, s. 6.)

§ 131-126.27. Joint operations. — All powers, privileges and authority granted to any municipality by this article may be exercised and enjoyed jointly with any other municipality. To this end any two or more municipalities may enter into agreements with each other for the acquisition, construction, improvement, maintenance, or operation of hospital facilities. Such agreement may provide for:

(a) The appointment of a board, composed of representatives of the parties to the agreement, to supervise and manage such hospital facilities;

(b) The authority and duties of such board and the compensation of its members;

(c) The proportional share of the costs of acquisition, construction, improvement, maintenance, or operation of the hospital facilities and the provision of funds therefor;

(d) Duration, amendment, and termination of the agreement and the disposition of property on its termination; and

(e) Such other matters as are necessary or desirable in the premises. (1947, c. 933, s. 6.)

§ 131-126.28. Public purpose; county and municipal purpose.—The acquisition of any land or interest therein pursuant to this article, the planning, acquisition, establishment, development, construction, improvement, maintenance, equipment, operation, and regulation of hospital facilities and the exercise of any other powers herein granted to municipalities, to be severally or jointly exercised, are hereby declared to be public and governmental functions, exercised for a public purpose, and matters of public necessity; and in the case of any county, are declared to be county functions and purposes as well as public and governmental; and in the case of any municipalities other than a county, are declared to be municipal functions and purposes as well as public and governmental. All land and other property and privileges acquired and used by or on behalf of any county or other municipality in the manner and for the purpose enumerated in this article shall and are hereby declared to be acquired and used for public and governmental purposes as a matter of public necessity, and for county or municipal purposes, respectively. (1947, c. 933, s. 6.)

§ 131-126.29. Implied incidental powers.—In addition to the general and special powers conferred by this article, every municipality is authorized to exercise such powers as are necessarily incidental to the exercises of such general and special powers. All powers granted by this article to municipalities are specifically declared to be granted to the counties of this state, any other statute to the contrary notwithstanding. (1947, c. 933, s. 6.)

§ 131-126.30. Short title.—This article may be cited as the "Municipal Hospital Facilities Act." (1947, c. 933, s. 6.)

Art. 13C. Creation of Hospital Districts with Authority to Issue Bonds and Levy Taxes for Hospital Purposes.

§ 131-126.31. Petition for formation of hospital district; hearing.—Upon receipt of a petition signed by not less than one hundred citizens of the territory described in such petition, praying that such territory be created into a hospital district and that bonds and/or notes be issued under the provisions of this article, the North Carolina medical care commission, with the approval of the board of county commissioners of the county in which such proposed hospital district is located, shall cause notice to be given by posting at the courthouse door, and at three public places in such proposed hospital district, and by three weekly publications in a newspaper circulating in such proposed hospital district, that on a date to be named in such notice, which shall not be earlier than twenty days after the first posting and publication of such notice, it will hold a public hearing at a designated place within the proposed hospital district or some designated place within the county in which the district is to be created, upon the question of creating a hospital district comprising the territory described in such petition and set forth in such notice, and that any taxpayer or other interested person may appear and be heard at the time and place set forth in such notice. At the time and place set forth in such notice, the North Carolina medical care commission, or its duly authorized representative who shall be a member of said commission, shall hear all interested persons and may adjourn the hearing from time to time. (1949, c. 766, s. 5.)

§ 131-126.32. Result of hearing; name of district.—The North Carolina medical care commission may deny such petition, or it may grant such petition and enter an order creating a hospital district, comprising either the territory described in such petition or a part of such territory and additional territory, and the order of the North Carolina medical care commission creating such hospital district shall define the boundaries thereof: Provided, however, that all the territory embraced in a new hospital district shall be located in one county. Each hospital district so created shall be designated by the North Carolina medical care commission as the "..... Hospital District of ..... County," inserting in the blank spaces some name identifying the locality and the name of the county. (1949, c. 766, s. 5.)

§ 131-126.33. Election for bond issue; method of election.—Whenever five hundred or more adult residents of such hospital district shall file with the board of county commissioners of the county in which such hospital district is located a petition requesting an election, the board of county commissioners shall order a special election to be held in any such hospital district for the purpose of voting upon the question of issuing bonds and/or notes and levying a sufficient tax for the payment thereof for the purpose of and/or the cost of planning and acquiring, establishing, developing, constructing, enlarging, improving or equipping any type of hospital, clinic or public health center, including relating facilities such as laboratories, out-patient departments, nurses' homes and training facilities operated in connection with hospitals and purchasing sites in such district for any one or more of said purposes, including any public or non-profit hospital facility. In all such elections, the board of county commissioners of such county shall designate the polling place or places, appoint the registrars and judges, and canvass and judicially determine the results of the election upon filing with it of the election returns by the officers holding the election and shall record such determination on their records. The notice of election shall be given by publication at least three times in some newspaper published or circulating in such hospital district. The notice shall state the date of the election, the place or places at which the election will be held, the boundary lines of such hospital district unless the hospital district is coterminous with a township in said county (in which event the notice shall so state), the maximum amount of bonds and/or notes to be issued, the purpose or purposes for which the bonds and/or notes are to be issued, and the fact that a sufficient tax will be levied on all taxable property within the hospital district for the payment of the principal and interest of the bonds and/or notes. The first publication of the notice shall be at least thirty days before the election. A new registration of the qualified voters of such hospital district shall be ordered and notice of such new registration shall be deemed to be sufficiently given by publication once in some newspaper published or circulating in such hospital district at least thirty days before the close of the registration books. This notice of registration may be considered one of three notices required of the election. Such published notice of registration shall state the days on which the books will be open for registration of the voters and the place or places at which they will be open on Saturdays. The books of such new registration shall close on the second Saturday before the election. The Saturday before the election shall be challenge day; and except as otherwise provided in this article, such election shall be held in accordance with the laws governing general elections. The form of the question, as stated on the ballot or ballots, shall be in substantially the words: "For the issuance of $..... Hospital Bonds and/or Notes, or a description of any other purpose named in this article for which bonds and/or notes may be issued, and the levying of a sufficient tax for the payment thereof." Such affirmative and negative form may be printed upon separate ballots, or both thereof may be printed upon one ballot, containing squares opposite the affirmative and the negative forms, in one of which squares the

voter may make a cross [X] mark. (1949, c. 766, s. 5.)

§ 131-126.34. Canvassing vote and determining results.—At the close of the polls, the election officers shall count the votes and make returns thereof to the board of county commissioners, which board shall, as soon as practicable after the election, judicially pass upon the returns and judicially determine and declare the results of such election, which determination shall be spread upon the minutes of said board. The returns shall be made in duplicate, one copy of which shall be delivered to the board of county commissioners as aforesaid and the other filed with the clerk of the superior court of the county in which the hospital district is situated. The board of county commissioners shall prepare a statement showing the number of votes cast for and against the bonds and/or notes, and declaring the result of the election, which statement shall be signed by the chairman of the board and attested by the clerk, who shall record it in the minutes of the board and file the original in his office and publish it once in a newspaper published or circulating in such hospital district. (1949, c. 766, s. 5.)

§ 131-126.35. Limitation of actions.—No right of action or defense founded upon the invalidity of such election or the invalidity of any proceedings or steps taken in the creation of such district or such unit shall be asserted, nor shall the validity of such election or the validity of the creation of such hospital district, or the right or duty to levy sufficient tax for the payment of the principal and interest of such bonds and/or notes, be open to question in any court upon any ground whatever, except in an action or proceeding commenced within thirty days after the publication of such statement of results as provided in the preceding section. (1949, c. 766, s. 5.)

§ 131-126.36. Issuance of bonds and levy of taxes.—If a majority of the votes cast shall be in favor of the issuance of such bonds and/or notes and the levy of such tax, then the board of county commissioners may provide by resolution, which resolution may be finally passed at the same meeting at which it is introduced, for the issuance of such bonds and/or notes, which bonds and/or notes shall be issued in the name of the county, but they shall be made payable exclusively out of taxes to be levied in such hospital district, except the board of county commissioners may pay from county funds any part of the principal and interest of said bonds and/or notes. They shall be issued in such form and denominations, and with such provisions as to the time, place and medium of payment of principal and interest as the said board of county commissioners may determine, subject to the limitations and restrictions of this article. They may be issued as one issue, or divided into two or more separate issues, and in either case may be issued at one time or in blocks from time to time. When bonds are to be issued, they shall be serial bonds and each issue thereof shall so mature that the aggregate principal amount of the issue shall be payable in annual installments or series, beginning not more than three years after the date of the bonds of such issue and ending not more than thirty years after such date. No such installment shall be more than two and one-half times as great in amount as the smallest prior installment of the same bond issue. The bonds and/or notes shall bear interest at a rate not exceeding six per cent (6%) per annum, payable semi-annually, and may have interest coupons attached, and may be made registerable as to principal or as to both principal and interest, under such terms and conditions as may be prescribed by said board. They shall be signed by the chairman of the board of county commissioners, and the seal of the county shall be affixed to or impressed upon each bond and/or note and attested by the register of deeds of the county or by the clerk of said board; and the interest coupons shall bear the printed, lithographed or facsimile signature of such chairman. The delivery of bonds and/or notes, signed as aforesaid by officers in office at the time of such signing, shall be valid, notwithstanding any changes in office occurring after such signing. (1949, c. 766, s. 5.)

§ 131-126.37. Collection and application of tax.—The board of county commissioners is hereby authorized and directed to levy annually a special tax, ad valorem, on all taxable property in the hospital district in which the election was held, sufficient to pay the principal and interest of the bonds and/or notes as such principal and interest become due. Such special tax shall be in addition to all other taxes authorized to be levied in such district or in such unit. The taxes provided for in this section shall be collected by the county officer collecting other taxes and be applied solely to the payment of principal and interest of such bonds and/or notes. (1949, c. 766, s. 5.)

§ 131-126.38. Tax levy for operation, equipment and maintenance.—Upon receipt of a petition signed by five hundred or more adult residents of a hospital district, or upon request set forth in the petition for a bond issue, as heretofore provided in this article, the board of county commissioners of the county in which such hospital district is located shall cause to be levied a tax for the purpose of financing the cost of operation, equipment and maintenance of any hospital facility authorized by this article, including any public or nonprofit hospital facility: Provided, that the levy of such tax is approved by a majority of the qualified voters of the hospital district who shall vote thereon in an election held for such purpose. The rate or amount of such taxes for which a levy may be made hereunder shall be determined by the board of county commissioners of such county; and a ballot shall be furnished to each qualified voter at said election, which ballot may contain the words "For Hospital Facility Maintenance Tax (Briefly stating any other pertinent information)," and "Against Hospital Facility Maintenance Tax (Briefly stating any other pertinent information)," with squares in front of each proposition, in one of which squares the voter may make a cross mark [X]; but any other form of ballot containing adequate information and properly stating the question to be voted upon shall be construed as being in compliance with this section. Such election may be held at any time fixed by the board of county commissioners of such county, and the question of levying a tax for the operation and maintenance of hospital facilities, as provided by this section, may be sub-

mitted at the same time the question of issuing bonds is submitted, as provided in this article, or the question of levying a tax for operation and maintenance purposes may be submitted in a separate election according to the discretion and judgment of the board of county commissioners of the county in which the hospital district is located. Such election for the approval of a levy of taxes for costs of operation, equipment and maintenance of any hospital facility, as authorized by this article, shall be held and conducted in the same manner as elections are held and conducted to determine the question of the issuance of bonds as provided in this article. (1949, c. 766, s. 5.)

§ 131-126.39. Article supplemental to other grants of authority.—The powers conferred by this article shall be regarded as supplemental and in addition to powers conferred by other laws and shall not supplant or repeal any existing powers for the issuance of bonds and/or notes, or any provisions of law for the payment of bonds and/or notes issued under such powers, or for the custody of moneys provided for such payment. (1949, c. 766, s. 5.)

§ 131-126.40. Approval of local government commission.—This article shall constitute full authority for the things herein authorized and no proceedings, publications, notices, consents or approvals shall be required for the doing of the things herein authorized, except such as are herein prescribed and required, and except that the provisions of the Local Government Act then in force as to the approval of the issuance of bonds and/or notes and endorsements of such approval upon such bonds and/or notes and as to the sale of bonds and/or notes and the disposition of the proceeds, shall be applicable to the bonds and/or notes, authorized by this article. The proceeds shall be paid out only upon order of the board of county commissioners. (1949, c. 766, s. 5.)

Art. 13D. Further Authority of Subdivisions of Government to Finance Hospital Facilities.

§ 131-126.41. Authority to pledge, encumber or appropriate certain funds to secure operating deficits of publicly owned or nonprofit hospitals.—The board of county commissioners of any county or the governing authority of any city or town is hereby authorized, in its discretion, to pledge, encumber or appropriate funds from any surplus funds, unappropriated funds, or funds derived from profits of alcoholic beverage control stores for the purpose of guaranteeing the operating deficit of any publicly owned or nonprofit hospital. The special approval of the general assembly is hereby given to the above enumerated appropriations and authorizations for such special purposes. (1949, c. 767, s. 1.)

§ 131-126.42. Issuance of bonds and notes for construction, operation and securing operating deficits.—The special approval of the general assembly is hereby given to the issuance by counties, cities and towns of bonds and notes for the special purpose of building, erecting and constructing any publicly owned or nonprofit hospital and for the purpose of financing the cost of operation, equipment and maintenance of any such hospital or for the purpose of securing or guaranteeing any operating deficit of any such hospital, and the special approval of the general assembly is hereby given to all counties, cities and towns to levy property taxes for the payment of said bonds and notes and interest thereon. (1949, c. 767, s. 2.)

§ 131-126.43. Tax levy for construction, operation and securing operating deficits.—The special approval of the general assembly is hereby given to the governing authority of any county, city or town for the levying of a tax on property in addition to other taxes for general purposes, not to exceed ten cents (10c) on the one hundred dollars ($100.00) value of property annually for the purpose of financing the cost of operation, equipment and maintenance of any publicly owned or nonprofit hospital or to guarantee or secure the operating deficit of any such hospital. (1949, c. 767, s. 3.)

§ 131-126.44. Article construed as supplementary to existing hospital facility laws.—The provisions of this article shall not be construed as repealing the provisions of any other statute or act authorizing the issuance of bonds and the levying of taxes for the construction, maintenance and operation of hospitals, health centers or other hospital facility as the words "hospital facility" are defined in G. S. § 131-126.18 and likewise providing for a vote of the qualified voters in an election for the approval of such bond issue or tax levy. This article shall be construed to be additional and supplementary to all statutes and provisions of law providing for such hospital facilities, their construction and operation by bond issues and tax levies approved by the vote of the qualified voters in an election and shall not be construed to repeal the provisions of such statutes and laws nor in any manner affect existing statutes provided for such purposes. (1949, c. 767, s. 4.)

Art. 14. Hospital for Spastic Children.

§ 131-127. Creation of hospital; powers.—An institution, to be known and designated as, "the North Carolina hospital for treatment of spastic children," is hereby created and such institution is authorized and empowerd to accept and use donations and appropriations and do all other things necessary and requisite to be done in furtherance of the purpose of its organization and existence as herein set forth. (1945, c. 504, s. 1.)

§ 131-128. Governor to appoint board of directors; terms of office; filling vacancies.—The governor shall appoint a board of directors consisting of nine (9) members for said hospital, three of whom shall be appointed for two years, three for four years, and three for six years, who shall hold their office until their successors have been appointed. At the end of the term of office of each of said directors, their successors shall each be named for a term of six years. The governor shall fill all vacancies occurring by reason of death, resignation, or otherwise. (1945, c. 504, s. 2.)

§ 131-129. Board authorized to acquire lands and erect buildings.—The board of directors, with the approval of the governor and the council of state, is authorized to secure by gift or purchase suitable real estate within the state at such place as the board may deem best for the purpose, and

to erect or improve buildings thereon, for carrying out the purposes of the institution; but no real estate shall be purchased or any commitments made for the erection or permanent improvements of any buildings involving the use of state funds unless and until an appropriation for permanent improvements of the institution is expressly authorized by the general assembly. (1945, c. 504 s. 3.)

§ 131-130. Operation pending establishment of permanent quarters.—In order to provide for the operation of the said institution prior to the time that permanent quarters can be established, the board of directors, with the approval of the governor and council of state, is authorized and empowered to enter into an agreement with any other state institution or agency for the temporary use of any state owned property which such other state institution or agency may be able and willing to divert for the time being from its original purpose; and any other state institution or agency, which may be in possession of real estate suitable for the purpose of the North Carolina hospital for treatment of spastic children upon such terms as may be mutually agreed upon. (1945, c. 504, s. 4.)

§ 131-131. Board to control and manage hospital.—The board of directors shall have the general superintendence, management, and control of the institution; of the grounds and buildings, officers, and employees thereof; of the patients therein and all matters relating to the government, discipline, contracts, and fiscal concerns thereof; and may make such rules and regulations as may seem to them necessary for carrying out the purposes of the institution. And the board shall have the right to keep, restrain, and control the patients of the institution until such time as the board may deem proper for their discharge under such proper and humane rules and regulations as the board may adopt. (1945, c. 504, s. 5.)

§ 131-132. Appointment and discharge of superintendent; qualifications and compensation.—The board of directors shall appoint a superintendent of the institution, who shall be a person of professional training and experience in the care and treatment of spastic ailments, and may fix the compensation of the superintendent, subject to the approval of the budget bureau, and may discharge the superintendent at any time for cause. (1945, c. 504, s. 6.)

§ 131-133. Aims of hospital.—The purpose and aim of the North Carolina hospital for treatment of spastic children is to treat, care for, train, and educate, as their condition will permit, all spastic children of training age in the state who are capable of being rehabilitated; to disseminate knowledge concerning the extent, nature, and prevention of spastic ailments, and to that end, subject to such rules and regulations as the board of directors may adopt, there shall be received into said hospital, spastic children under the age of twenty-one years when, in the judgment of the board of directors, it is deemed advisable. Application for the admission of a child must be made by the father if the mother and father are living together, and if not, by the one having custody, or by a duly appointed guardian or by the superintendent of any county home or by person having management of any orphanage, association, society, children's home, or other institution for the care of children to which the custody of such child has been committed, in which event the consent of the parents shall not be required. (1945, c. 504, s. 7.)

§ 131-134. Rules and regulations; payment for treatment.—The board of directors is hereby authorized and empowered to promulgate rules, regulations, and conditions of admission of patients to the hospital, but in so doing shall not exclude any patient otherwise qualified for admission because of inability to pay for examination and treatment, and all indigent patients otherwise qualified for admission shall be received without regard to their indigent condition when there is space and accommodation available for such patients. The board of directors shall require all patients who are able, including those having persons upon whom they are legally dependent who are able, to pay the reasonable cost of treatment and care and upon their refusal to do so, the said board of directors is authorized and empowered to institute action in the name of the hospital in the county in which it is located for the collection thereof: Provided, that if the amount is less than two hundred dollars ($200.00) the said action shall be instituted in the county where the defendent resides. (1945, c. 504, s. 8.)

§ 131-135. Discharge of patients.—Any patient entered in the hospital may be discharged therefrom or returned to his or her parents or guardian when, in the judgment of the directors, it will not be beneficial to such patient or to the best interest of the hospital to be longer retained therein. (1945, c. 504, s. 9.)

§ 131-136. Board to make further investigations.—The board of directors shall further investigate and study the need and requirements for establishing and equipping a hospital for the care and treatment of mentally normal cerebral palsy (spastic) patients and determine the annual per capita cost for the treatment of such patients, and cause to be prepared necessary plans and specifications for providing and equipping a hospital with a capacity of fifty (50) beds. Said board of directors shall present to the next session of the general assembly such plans and specifications together with its recommendations as to the establishment of such a hospital, including a site for its location. To meet the expense of preparing said plans and specifications and other incidental expenses of the board, there is hereby appropriated out of the contingency and emergency fund of the state such an amount as the governor and council of state may consider necessary. (1945, c. 504, s. 10.)

Chapter 134. Reformatories.

Art. 9. State Board of Correction and Training.

Art. 3. The Industrial Farm Colony for Women.

§ 134-36. Name and establishment.—A state institution for women to be known as Dobb's Farms, is hereby established. (1927, c. 219, s. 1; 1945, c. 847.)

Editor's Note.—The 1945 amendment changed the name of the Industrial Farm Colony for Women to Dobb's Farms.

Art. 7. Conditional Release and Final Discharge of Inmates of Certain Training and Industrial Schools.

§ 134-85. Conditional release.

Cited in In re Burnett, 225 N. C. 646, 36 S. E. (2d) 75.

Art. 9. State Board of Correction and Training.

§ 134-90. State board of correction and training created.—There is hereby created a state board of correction and training to be composed of nine members, all of whom shall be appointed by the governor of North Carolina. The commissioner of public welfare shall be an ex-officio member without voting power.

The original membership of the board shall consist of three classes, the first class to serve for a period of two years from the date of appointment, the second class to serve for a period of four years from the date of appointment, and the third class to serve for a period of six years from the date of appointment. At the expiration of the original respective terms of office, all subsequent appointments shall be for a term of six years, except such as are made to fill unexpired terms. Five members of the board shall constitute a quorum.

Members of the board shall serve for terms as prescribed in this section, and until their successors are appointed and qualified. The governor shall have the power to remove any member of the board whenever, in his opinion, such removal is in the best public interest, and the governor shall not be required to assign any reason for any such removal. (1947, c. 226.)

Editor's Note.—Session Laws 1947, c. 226, s. 1, rewrote this article which was codified from Session Laws 1943, c. 776, as amended by Session Laws 1945, c. 48, and formerly contained sections 134-90 to 134-100. See 25 N. C. Law Rev. 404.

Section 2 of the act rewriting this article provides: "This article is not applicable to reformatories or homes for fallen women authorized by article 4, chapter 134 of General Statutes. Nothing contained in this article shall be construed to affect any of the provisions of G. S. 134-49 through 134-66, the same being article 4 of chapter 134 of the General Statutes."

§ 134-91. Powers and duties of the state board of correction and training.—The following institutions, schools and agencies of this state; namely, the Stonewall Jackson Manual Training and Industrial School, the State Home and Industrial School for Girls, Dobbs Farms, the Eastern Carolina Industrial Training School for Boys, the Morrison Training School, and the State Training School for Negro Girls, together with all such other correctional state institutions, schools or agencies of a similar nature, established and maintained for the correction, discipline or training of delinquent minors, now existing or hereafter created, shall be under the management and administrative control of the state board of correction and training.

Wherever in General Statutes §§ 134-1 to 134-48, inclusive, or in General Statutes §§ 134-67 to 134-89, inclusive, or in any other laws of this state, the words "board of directors," "board of trustees" "board of managers," "directors," "trustees," "managers," or "board" are used with reference to the governing body or bodies of the institutions, schools or agencies enumerated in § 134-90, the same shall mean the state board of correction and training provided for in General Statutes § 134-90, and it shall be construed that the state board of correction and training shall succeed to, exercise and perform all the powers conferred and duties imposed heretofore upon the separate boards of directors, trustees or managers of the several institutions, schools or agencies herein mentioned, and said powers and duties shall be exercised and performed as to each of the institutions by the state board of correction and training herein provided for. The said board shall be responsible for the management of the said institutions, schools or agencies and the disbursement of appropriations made for the maintenance and permanent enlargement and repairs of the said institutions, schools or agencies subject to the provisions of the Executive Budget Act, and said board shall make report to the governor annually, and oftener if called for by him, of the condition of each of the schools, institutions or agencies under its management and control, and shall make biennial reports to the governor, to be transmitted by him to the general assembly, of all moneys re-

ceived and disbursed by each of said schools, institutions or agencies.

The state board of correction and training shall have full management and control of the institutions, schools and agencies named in this article, and shall have power to administer these institutions, schools and agencies in the manner deemed best for the interest of delinquent boys and girls of all races. Similar provisions shall be made for white and negro children in separate schools. Indian children shall be provided for in a manner comparable to that afforded children of the white and negro races. Individual students may be transferred from one institution, school or agency to another, but this authority to transfer individual students does not authorize the consolidation or abandonment of any institution, school or agency. The board of correction and training, subject to the approval of the governor and the advisory budget commission, is authorized to transfer the entire population at Dobbs Farm to the State Home and Industrial School for Girls and to utilize the present facilities at Dobbs Farm as a training school for negro girls.

The state board of correction and training is hereby vested with administrative powers over the schools, institutions and agencies set forth in this article, together with all lands, buildings, improvements, and other properties appertaining thereto, and the board is authorized and empowered to do all things necessary in connection therewith for the care, supervision and training of boys and girls of all races who may be received at any of such schools, institutions or agencies. (1947, c. 226.)

§ 134-92. Organization of the board.—The state board of correction and training is hereby authorized and given full power to meet and organize, and from their number select a chairman and vice chairman. The commissioner of correction hereinafter provided for in this article shall be executive secretary to the board. All officers of the board shall serve for a two-year period, which period shall be the same as the state's fiscal biennium. (1947, c. 226.)

§ 134-93. Meetings of the board.—The state board of correction and training shall convene at least four times a year and at places designated by the board. Insofar as practicable, the place of meetings shall rotate among the several schools and institutions. (1947, c. 226.)

§ 134-94. Executive committees. — The state board of correction and training shall select from its number an executive committee of three members. The powers and duties of the executive committee shall be prescribed by the board and all actions of this committee shall be reported to the full board at the next succeeding meeting.

In addition to the executive committee the board may set up such other committees as may be deemed necessary for the carrying out of the activities of the board. (1947, c. 226.)

§ 134-95. By-laws; rules and regulations.—The state board of correction and training shall make all necessary by-laws, rules and regulations for its own use and for the governing and administering of the schools, institutions and agencies under its control. (1947, c. 226.)

§ 134-96. Commissioner of correction. — The state board of correction and training is hereby authorized and empowered to employ a commissioner of correction who shall serve all schools, institutions and agencies covered by this article. The board shall prescribe the duties and salary of the commissioner of correction, subject to the approval of the director of the budget. The board may employ secretarial help and such other assistants as in its judgment are necessary to give effect to this article, subject, however, to the approval of the director of the budget.

The commissioner of correction shall be a person of demonstrated executive ability and shall have such special education, training, experience and natural ability in welfare, educational and correctional work as are calculated to qualify him for the discharge of his duties, such training shall include special study in the social sciences and adequate institutional and practical experiences; and he must be a person of good character. He shall devote his full time to the duties of his employment and shall hold no other office, except that he shall serve as secretary to the state board of correction and training.

The salary of the commissioner of correction and his assistants and the expenses incident to maintaining his office, his travel expenses, and the expenses of the board members shall be paid out of special appropriations set up for the state board of correction and training. The state board of public buildings and grounds shall provide suitable office space in the city of Raleigh for the commissioner and his staff. (1947, c. 226.)

§ 134-97. Compensation for members of the board.—The members of the state board of correction and training shall be paid the sum of seven dollars ($7.00) per day and actual expenses while engaged in the discharge of their official duties. (1947, c. 226.)

§ 134-98. Election of superintendents. — The state board of correction and training shall elect a superintendent for each of the schools, institutions and agencies, covered by this chapter. Each superintendent shall be equipped by professional social work training and experience to understand the needs and problems of adolescent boys and girls, to administer an institutional program and to direct professional staff members and other employees. The superintendents of the several institutions, schools and agencies shall be responsible, with the assistance of the commissioner of correction, for the employment of all personnel. The superintendents of the several schools and institutions shall likewise have the power to dismiss any employee for incompetence or failure to carry out the work assigned to him.

The superintendents shall make monthly reports to the commissioner of correction on the conduct and activities of the schools, institutions or agencies, and on the boys and girls under their care, and such reports on the financial and business management of the schools, institutions or agencies as may be required by the board of correction and training. (1947, c. 226.)

§ 134-99. Bonds for superintendents and budget officers.—All superintendents and budget officers shall before entering upon their duties make a good and sufficient bond payable to the state of

North Carolina in such form and amount as may be specified by the governor and approved by the state treasurer. (1947, c. 226.)

§ 134-100. Who may be committed. — The schools, institutions and agencies enumerated, and others that now exist or may be hereafter established, shall accept and train all delinquent children of all races and creeds under the age of eighteen as may be sent by the judges of the juvenile courts or by judges of other courts having jurisdiction, provided such persons are not mentally or physically incapable of being substantially benefited by the program of the institution, school or agency. (1947, c. 226.)

§ 134-101. Removal request by board.—If any boy or girl under the care of a state school, institution or agency shall offer violence to a member of the staff or another boy or girl or do or attempt to do injury to the buildings, equipment, or property of the school, or shall by gross or habitual misconduct exert a dangerous or pernicious influence over other boys and girls, the board of correction and training may request the court committing said boy or girl or any court of proper jurisdiction to relieve the school of the custody of the boy or girl. (1947, c. 226.)

§ 134-102. Transfer by order of governor.—The governor of the state may by order transfer any person under the age of eighteen years from any jail or prison in this state to one of the institutions, schools or agencies of correction. (1947, c. 226.)

§ 134-103. Institution to be in position to care for offender before commitment.—Before committing any person to the school, institution or agency, the court shall ascertain whether the school, institution or agency is in a position to care for such person and no person shall be sent to the school, institution or agency until the committing agency has received notice from the superintendent that such person can be received. It shall be at all times within the discretion of the state board of correction and training as to whether the board will receive any qualified person into the school, institution or agency. No commitment shall be made for any definite term but any person so committed may be released or discharged at any time after commitment, as hereinafter provided in this article. (1947, c. 226.)

§ 134-104. Delivery to institution.—It shall be the duty of the county or city authorities from which the person is sent to the school, institution or agency by any court to see that such person is safely and duly delivered to the school, institution or agency to which committed and to pay all expenses incident to his or her conveyance and delivery to the said school, institution or agency. If the offender be a girl, she must be accompanied by a woman approved by the county superintendent of public welfare. (1947, c. 226.)

§ 134-105. Return of boys and girls improperly committed.—Whenever it shall appear to the satisfaction of the superintendent of a state school, institution or agency and the state board of correction and training that any boy or girl committed to such school, institution or agency is not of a proper age to be so committed, or is not properly committed, or is mentally or physically incapable of being materially benefited by the services of such school, institution or agency, the superintendent, with the approval of the state board of correction and training, may return such boy or girl to the committing court to be dealt with in all respects as though he or she had not been so committed. (1947, c. 226.)

§ 134-106. Work to be conducted.—There shall be established and conducted on such lands as may be owned in connection with the schools, institutions or agencies such trades, crafts, arts, and sciences suitable to the students and such teachings shall be done with the idea of preparing the students for making a living for themselves after release. Schools shall be maintained of public school standards and operated by teachers holding standard certificates as accepted in state's system of public schools. A recreation program shall be maintained for the health and happiness of all students. The precepts of religion, ethics, morals, citizenship and industry shall be taught to all students. (1947, c. 226.)

§ 134-107. Conditional release; superintendent may grant conditional release; revocation of release.—The board of correction and training shall have power to grant conditional release to any person in any school, institution or agency under its jurisdiction and may delegate this power to the superintendents of the various schools, institutions and agencies, under rules and regulations adopted by the board of correction and training; such conditional release may be terminated at any time by written revocation by the superintendent, under rules and regulations adopted by the board of correction and training, which written revocation shall be sufficient authority for any officer of the school, institution or agency, or any peace officer to apprehend any person named in such written revocation in any county of the state and to return such person to the institution. (1947, c. 226.)

§ 134-108. Final discharge. — Final discharge may be granted by the superintendent under rules adopted by the state board of correction and training at any time after admission to the school; provided, however, that final discharge must be granted any person upon reaching his twenty-first birthday. (1947, c. 226.)

§ 134-109. Return of runaways.—If a boy or girl runs away from a state school, institution or agency, the superintendent may cause him or her to be apprehended and returned to such school, institution or agency. Any employee of the school, institution or agency, or any person designated by the superintendent, or any official of the welfare department, or any peace officer may apprehend and return to the school, institution or agency, without a warrant, a runaway boy or girl in any county of the state, and shall forthwith carry such runaway to the school, institution or agency. (1947, c. 226.)

§ 134-110. Aiding escapees; misdemeanor.—It shall be unlawful for any person to aid, harbor, conceal, or assist in any way any boy or girl who is attempting to escape or who has escaped from any school, institution or agency of correction and any person rendering such assistance shall be guilty of a misdemeanor. (1947, c. 226.)

§ 134-111. State board of health to supervise sanitary and health conditions.—The state board of health shall have general supervision over the sanitary and health conditions of the several schools, institutions and agencies and shall make periodic examinations of the same and report to the state board of correction and training the conditions found with respect to the sanitary and hygienic care of the students. (1947, c. 226.)

§ 134-112. Care of persons under federal jurisdiction.—The state board of correction and training is hereby empowered to make and enter into contractual relations with the proper official of the United States for admission to the state schools, institutions and agencies of such federal juvenile delinquents committed to the custody of such attorney general as provided in the Federal Juvenile Delinquency Act as would profit from the program and services of the schools, institutions or agencies. (1947, c. 226.)

§ 134-113. Term of contract. — Any contract made under the authority and provision of this article shall be for a period of not more than two years and shall be renewable from time to time for a period of not to exceed two years. (1947, c. 226.)

§ 134-114. Approval by state budget bureau.— Any contract entered into under the provisions of this article with the office of the United States attorney general, the bureau of prisons of the United States department of justice, or necessary federal agency by any of the contracting institutions for the care of any persons coming within the provisions of this article shall not be less than the current estimated cost per capita at the time of execution of the contract, and all such financial provisions of any contract, before the execution of said contract, shall have the approval of the state budget bureau. (1947, c. 226.)

Chapter 135. Retirement System for Teachers and State Employees.

Sec.

§ 135-1. Definitions.

(6) "Member" shall mean any teacher or state employee included in the membership of the system as provided in §§ 135-3 and 135-4: Provided, that no member shall be entitled to participate under the provisions of this chapter as to that part of the compensation in excess of five thousand dollars ($5,000.00) received by such members during any year and this shall apply to all creditable service.

(10) "Prior service" shall mean service rendered prior to the date of establishment of the retirement system for which credit is allowable under § 135-4; provided, persons now employed by the state highway and public works commission shall be entitled to credit for employment in road maintenance by the various counties and road districts prior to one thousand nine hundred and thirty-one.

(1945, c. 924; 1947, c. 458, s. 6.)

Editor's Note.—

The 1945 amendment rewrote subsection (6). The 1947 amendment omitted the words "and subsequent to one thousand nine hundred and twenty-one" formerly appearing at the end of subsection (10). As the rest of the section was not affected by the amendments it is not set out.

§ 135-3. Membership.—The membership of this retirement system shall be composed as follows:

(1) All persons who shall become teachers or state employees after the date as of which the retirement system is established. On and after July 1st, 1947, membership in the retirement system shall begin ninety days after the election, appointment or employment of a "teacher or employee" as the terms are defined in this chapter.

(2) All persons who are teachers or state employees on February 17, 1941, or who may become teachers or state employees on or before July first, one thousand nine hundred and forty-one, except those who shall notify the board of trustees, in writing, on or before January first, one thousand nine hundred and forty-two, that they do not choose to become members of this retirement system, shall become members of the retirement system.

(3) Should any member in any period of six consecutive years after becoming a member be absent from service more than five years, or should he withdraw his accumulated contributions, or should he become a beneficiary or die, he shall thereupon cease to be a member.

(4) Notwithstanding any provisions contained in this section, any employee of the state of North Carolina who was taken over and required to perform services for the federal government, on a loan basis, and by virtue of an executive order of the president of the United States effective on or after January first, one thousand nine hundred and forty-two, and who on the effective date of such executive order was a member of the retirement system and had not withdrawn all of his or her accumulated contributions, shall be deemed to be a member of the retirement system during such period of federal service or employment by virtue of such executive order of the president of the United States. Any such employee who within a period of twelve months after the cessation of such federal service or employment, is again employed by the state or any employer as said term is defined in this chapter, or within said period of twelve months engages in service or membership service, shall be permitted to resume active participation in the retirement system and to resume his or her contributions as provided by this chapter. If such member so elects, he or she may pay to the board of trustees for the benefit of the proper fund or account an amount equal to his or her accumulated contributions previously withdrawn with interest from date of withdrawal to time of payment and the accumulated contributions, with interest thereon, that such member would have made during such period of federal employment

to the same extent as if such member had been in service or engaged in the membership service for the state or an employer as defined in this chapter, which such payment of accumulated contributions shall be computed on the basis of the salary or earnable compensation received by such member on the effective date of such executive order.

(5) Any teacher or state employee whose membership is contingent on his own election and who elects not to become a member may thereafter apply for and be admitted to membership; but no such teacher or state employee shall receive prior service credit unless he elected to become a member prior to July 1, 1946.

(6) No person who becomes a "teacher or employee," as the terms are defined in this chapter, shall be or become a member of the retirement system who is elected, appointed or employed after he has attained the age of sixty years.

(7) Notwithstanding any other provision of this chapter, any member who separates from service prior to retirement after completing twenty or more years of creditable service and who leaves his total accumulated contributions in said system shall have the right to retire upon attaining the age of sixty years, notwithstanding the fact that said member does not have the status of a member in service at the time his application for retirement is filed; and such applicant for retirement shall be entitled to the benefits provided by subsection (2) of section 135-5 of this chapter. All such applications for retirement under this subsection must be filed within a period of twelve months from and after the sixtieth birthday of such applicant. (1941, c. 25, s. 3; 1945, c. 799; 1947, c. 414; c. 457, ss. 1, 2; c. 458, s. 5; c. 464, s. 2; 1949, c. 1056, s. 1.)

Editor's Note.—The 1945 amendment added subsection (4). The first 1947 amendment added subsection (5); the second amendment added subsection (6) and the second sentence of subsection (1); the third amendment added subsection (7); and the fourth amendment substituted "twelve months" for "six months" in the second sentence of subsection (4).

The 1949 amendment added at the end of subsection (5) the words "unless he elected to become a member prior to July 1, 1946."

§ 135-3.1. Membership of highway patrolmen.—Every person who is employed in the future as a state highway patrolman shall automatically become a member of the teachers' and state employees' retirement system unless such person shall, within fifteen days after his employment, furnish the executive secretary of the board of trustees, teachers' and state employees' retirement system, sufficient evidence that such person has become a member of the law enforcement officers' benefit and retirement fund, in which event such person shall not be entitled to membership in the teachers' and state employees' retirement system. (1943, c. 120, s. 6; 1947, c. 692.)

Editor's Note.—Session Laws 1947, c. 692, s. 1, allowed state highway patrolmen until August 1, 1947, in which to withdraw their membership in the teachers' and state employees' retirement system and become members of the law enforcement officers' benefit and retirement fund.

§ 135-3.2. Membership of co-operative agricultural extension service employees.—Under such rules and regulations as the board of trustees may establish and promulgate, co-operative agricultural extension service employees may, in the discretion of the governing authority of a county, become a member of the teachers' and state employees' retirement system to the extent of that part of their compensation derived from a county. (1949, c. 1056, s. 7.)

§ 135-4. Creditable service.—(1) Under such rules and regulations as the board of trustees shall adopt, each member who was a teacher or state employee at any time during the five years immediately preceding the establishment of the system and who became a member prior to July 1, 1946 shall file a detailed statement of all North Carolina service as a teacher or state employee rendered by him prior to the date of establishment for which he claims credit.

(6) Teachers and other state employees who entered the armed services of the United States on or after September sixteenth, one thousand nine hundred and forty, and prior to February seventeenth, one thousand nine hundred and forty-one and who returned to the service of the state within a period of two years after they have been honorably discharged from the armed services of the United States, shall be entitled to full credit for all prior service. Teachers and other state employees who entered the armed services of the United States on or after February 17th, 1941 and who returned to the service of the state prior to July 1st, 1950 after they have been honorably discharged from such armed services shall be entitled to full credit for all prior service, and, in addition, they shall receive membership service credit for the period of service in such armed services occurring after the date of establishment. Under such rules as the board of trustees shall adopt, the employer to which each such teacher or other state employee returned shall make contributions with respect to such member in the amounts that he would have paid during such service in such armed services on the basis of his earnable compensation when such service commenced. Such contributions shall be credited to the individual account of the member in the annuity savings fund, in such manner as the board of trustees shall determine, but any such contributions so credited and any regular interest thereon shall be available to the member only in the form of an annuity, or benefit in lieu thereof, upon his retirement on a service, disability or special retirement allowance; and in the event of cessation of membership or death prior thereto, any such contributions so credited and regular interest thereon shall not be payable to him or on his account, but shall be transferred from the annuity savings fund to the pension accumulation fund. If any payments were made by a member on account of such service as provided by paragraph (e) of subsection (1) of § 135-8, the board of trustees shall refund to or reimburse such member for such payments.

(7) Teachers and other state employees who served in the armed forces of the United States and who, after being honorably discharged, returned to the service of the state within a period of two years from date of discharge shall be credited with prior service for such period of service in the armed forces of the United States; and the salaries or compensations paid to such employees immediately before entering the armed forces shall be deemed to be the actual compensation rates of

such teachers and state employees during said period of service. (1941, c. 25, s. 4; 1943, cc. 200, 783; 1945, c. 797; 1947, c. 575; 1949, c. 1056, ss. 2, 4.)

Editor's Note.—
The 1945 amendment inserted in lines two and three of subsection (6) the words "on or." The 1947 amendment added subsection (7). The 1949 amendment rewrote subsection (1) and added the last four sentences of subsection (6). As the rest of the section was not affected by the amendments it is not set out.

§ 135-5. Benefits.

(2) Service Retirement Allowances.—Upon retirement from service a member shall receive a service retirement allowance which shall consist of:

(a) An annuity which shall be the actuarial equivalent of his accumulated contributions at the time of his retirement; and

(b) A pension equal to the annuity allowable at age of sixty years computed on the basis of contributions made prior to the attainment of age sixty; and, if the member contributed during the period from July 1st, 1941, to June 30th, 1947, an additional supplementary pension which shall be equal to one-fourth of the annuity allowable at age of sixty years, computed on the basis of contributions made during such period but prior to the attainment of age sixty, plus one-fourth of the annuity allowable at his retirement age computed on the basis of contributions made during such period; and

(c) If he has a prior service certificate in full force and effect, an additional pension which shall be equal to the annuity which would have been provided at his retirement age by the contributions which he would have made during such prior service had the system been in operation and had he contributed thereunder at the rate of five per centum of his compensation, plus the pension, which would have been provided at age sixty on account of such contributions.

(6) Return of Accumulated Contributions.—Should a member cease to be a teacher or state employee except by death or retirement under the provisions of this chapter, he shall be paid such part as he shall demand of the sum of the contributions standing to the credit of his individual account in the annuity savings fund, together with such interest thereon as the board shall allow, but not less than one-half of accumulated regular interest thereon. Upon receipt of proof satisfactory to the board of trustees of the death of a member in service there shall be paid to his legal representatives or to such person as he shall have nominated by written designation duly acknowledged and filed with the board of trustees, the amount of his accumulated contributions at the time of his death.

(8) Computation of Benefits Payable Prior or Subsequent to July 1, 1947.—Prior to July 1st, 1947, all benefits payable as of the effective date of this act shall be computed on the basis of the provisions of chapter 135 as they existed at the time of the retirement of such beneficiaries. On and after July 1st, 1947, all benefits payable to, or on account of, such beneficiaries shall be adjusted to take into account, under such rule as the board of trustees may adopt, the provisions of this act as if they had been in effect at the date of retirement, and no further contributions on account of such adjustment shall be required of such beneficiaries. The board of trustees may authorize such transfers of reserve between the funds of the retirement system as may be required by the provisions of this subsection.

(9) Restoration to service of certain former members.—If a former member who ceased to be a member prior to July 1, 1949, for any reason other than retirement, again becomes a member and prior to July 1, 1951, redeposits in the annuity savings fund by a single payment the amount, if any, he previously withdrew therefrom, he shall, anything in this chapter to the contrary, be entitled to any membership service credits he had when his membership ceased, and any prior service certificate which became void at the time his membership ceased shall be restored to full force and effect: Provided, that, for the purpose of computing the amount of any retirement allowance which may become payable to or on account of such member under the retirement system, any amount redeposited as provided herein shall be deemed to represent contributions made by the member after July 1, 1947. (1941, c. 25, s. 5; 1945, c. 218; 1947, c. 458, ss. 3, 4, 7, 8a; 1949, c. 1056, ss. 3, 5.)

Editor's Note.—The 1945 amendment made changes in subsection (6). The 1947 amendment rewrote paragraphs (b) and (c) of subsection (2). It also rewrote subsection (6) and added subsection (8). The 1949 amendment added the second sentence of subsection (6). It also added subsection (9). Only the subsections affected by the amendments are set out.

§ 135.6. Administration.

(2) Membership of Board; Terms.—The board shall consist of eight members, as follows:

(a) The state treasurer, ex-officio;

(b) The superintendent of public instruction, ex-officio;

(c) Six members to be appointed by the governor and confirmed by the senate of North Carolina. One of the appointive members shall be a member of the teaching profession of the state; one of the appointive members shall be an employee of the state highway and public works commission, who shall be appointed by the governor for a term of four years commencing April 1st, 1947 and quadrennially thereafter; one to be a general state employee, and three who are not members of the teaching profession or state employees; two to be appointed for a term of two years, two for a term of three years and one for a term of four years. At the expiration of these terms of office the appointment shall be for a term of four years.

(1947, c. 259.)

The 1947 amendment increased the membership of the board from seven to eight and the appointive members from five to six. It also inserted in the provision requiring one of the appointive members to be an employee of the state highway and public works commission. As only subsection (2) was affected by the amendment the rest of the section is not set out.

§ 135-8. Method of financing.

(1) Annuity Savings Fund.—

(a) Prior to the first day of July, 1947, each employer shall cause to be deducted from the salary of each member on each and every payroll of such employer for each and every payroll period four per centum of his earnable compensation; and the employer also shall deduct four per centum of any compensation received by any member for

teaching in public schools, or in any of the institutions, agencies or departments of the state from salaries other than the appropriations from the state of North Carolina. On and after such date the rate so deducted shall be five per centum. In determining the amount earnable by a member in a payroll period, the board of trustees may consider the rate of annual compensation payable to such member on the first day of the payroll period as continuing throughout such payroll period, and it may omit deduction from compensation for any period less than a full payroll period if a teacher or state employee was not a member on the first day of the payroll period.

(f) The contributions of a member, and such interest as may be allowed thereon, paid upon his death or withdrawn by him as provided in this chapter, shall be paid from the annuity savings fund, and any balance of the accumulated contributions of such a member shall be transferred to the pension accumulation fund.

(3) Pension Accumulation Fund.—

(c) Immediately succeeding the first valuation the actuary engaged by the board of trustees shall compute the rate per centum of the total annual compensation of all members which is equivalent to four per centum of the amount of the total pension liability on account of all members and beneficiaries which is not dischargeable by the aforesaid normal contribution made on account of such members during the remainder of their active service. The rate per centum originally so determined shall be known as the "accrued liability contribution" rate. Such rate shall be increased on the basis of subsequent valuations if benefits are increased over those included in the valuation on the basis of which the original accrued liability contribution rate was determined.

(1947, c. 458, ss. 1, 2, 8.)

The 1947 amendment rewrote paragraph (a) of subsection (1) and added paragraph (f) thereto. It also added the third sentence to paragraph (c) of subsection (3). As the rest of the section was not affected by the amendment only the paragraphs mentioned are set out.

§ 135-15: Repealed by Session Laws 1949, c. 1056, s. 9.

§ 135-16. Employees transferred to North Carolina state employment service by act of congress.—Notwithstanding any provision contained in this chapter, any employee of the United States Employment service who was transferred to and became employed by the state of North Carolina, or any of its agencies, on November 16th, 1946, by virtue of Public Law 549, 79th Congress, Chapter 672, 2nd Session, and who was employed by the war manpower commission or the United States employment service between January 1st, 1942, and November 15th, 1946, shall be deemed to have been engaged in membership service as defined by this chapter for any payroll period or periods between such dates: Provided, that any such employee or member on or before January 1st, 1948, pays to the board of trustees for the benefit of the proper fund or account an amount equal to the accumulated contributions, with interest thereon, that such employee or member would have made during such period if he had been a member of the retirement system with earnable compensation based on the salary received for such period and as limited by this chapter. Provided, further that funds are made available by the United States employment service, or other federal agency, to the employment security commission for the payment of and the employment security commission pays to the board of trustees for the benefit of the proper fund a sum equal to the employer's contributions that would have been paid for such period for members or employees who pay the accumulated contributions provided in this section.

The board of trustees is authorized to adopt and issue all necessary rules and regulations for the purpose of administering and enforcing the provisions of this section. (1947, c. 464, s. 1; c. 598, s. 1.)

Editor's Note.—By virtue of Session Laws 1947, c. 598, s. 1, "employment security commission" was substituted for "unemployment compensation commission."

§ 135-17. Facility of payment.—In the event of the death of a member or beneficiary not survived by a person designated to receive any return of accumulated contributions or balance thereof, or in the event that the board of trustees shall find that a beneficiary is unable to care for his affairs because of illness or accident, any benefit payments due may, unless claim shall have been made therefor by a duly appointed guardian, committee or other legal representative, be paid to the spouse, a child, a parent or other blood relative, or to any person deemed by the board of trustees to have incurred expense for such beneficiary or deceased member, and any such payments so made shall be a complete discharge of the liabilities of this retirement system therefor. (1949, c. 1056, s. 6.)

§ 135-18. Re-employment of retired teachers and employees.—The board of trustees of the teachers' and state employees' retirement system may establish and promulgate rules and regulations governing the re-employment of retired teachers and employees. (1949, c. 1056, s. 8.)

Chapter 136. Roads and Highways.

Art. 2. Powers and Duties of Commission.

Art. 4. Neighborhood Roads, Cartways, Church Roads, etc.

Art. 6A. Municipal Corporations Operating Toll Roads.

Art. 7. Miscellaneous Provisions.

Art. 1. Organization of State Highway and Public Works Commission.

§ 136-1. State highway and public works commission created.

The chairman shall devote his entire time and attention to the work of the commission, and shall receive as his compensation such sum as may be fixed in the discretion of the governor and advisory budget commission, payable monthly, and his actual traveling expenses when engaged in the discharge of his duties.

(1945, c. 895.)

Editor's Note.—

The 1945 amendment rewrote the fifth sentence beginning in line twenty-two. As the rest of the section was not affected by the amendment it is not set out.

For acts relating to parking meters in certain localities and exempting them from this chapter, see Session Laws 1947, c. 54 (city of Shelby); c. 66 (town of Laurinburg); c. 275 (city of Statesville); c. 735 (town of Mooresville); c. 1035 (county of Cabarrus).

Art. 2. Powers and Duties of Commission.

§ 136-18. Powers of commission.

(t) To prohibit the erection of any informational, regulatory, or warning signs within the right of way of any highway project built within the corporate limits of any municipality in the state where the funds for such construction are derived in whole or in part from federal appropriations expended by the state highway and public works commission, unless such signs have first been approved by the state highway and public works commission. (1921, c. 2, s. 10; 1923, c. 160, s. 1; 1923, c. 247; 1929, c. 138, s. 1; 1931, c. 145, ss. 21, 25; 1933, c. 172; 1933, c. 517, s. 1; 1935, c. 213, s. 1, c. 301; 1937, c. 297, s. 2; 1937, c. 407, s. 80; 1941, c. 47; 1941, c. 217, s. 6; 1943, c. 410; 1945, c. 842; C. S. 3846(j).)

Editor's Note.—

The 1945 amendment added subsection (t). As the rest of the section was not affected by the amendment it is not set out.

Injunction Will Not Lie against State Highway Commission.—Plaintiffs sued the state highway and public works commission to enjoin it from enforcing its ordinance restricting the placing of advertising signs along the state highways, alleging that the ordinance was in excess of the authority vested in the commission and was unconstitutional. The members of the commission were not made parties defendant. It was held that defendant's demurrer was properly sustained, since injunction will not lie against a state agency to prevent it from committing a wrong. Schloss v. State Highway, etc., Comm., 230 N. C. 489, 53 S. E. (2d) 517. See note to § 136-18.

Cited in Wood v. Carolina Tel., etc., Co., 228 N. C. 605, 46 S. E. (2d) 717, 3 A. L. R. (2d) 1.

§ 136-18.1. Use of Bermuda grass.

—The use of Bermuda grass shall be restricted to sections of the highway where the abutting property is not in cultivation, except where the state highway and public works commission has written consent of the abutting landowner. In long sections of woodland or waste land sufficiently distant from cultivated areas, Bermuda grass may be used. The commission and its employees shall use every reasonable effort to eliminate Bermuda grass heretofore planted on the shoulders of the highways through cultivated farm areas. (1945, c. 992.)

§ 136-19. Acquirement of land and deposits of materials; condemnation proceedings; federal parkways.

Whenever the commission and the owner or owners of the lands, materials, and timber required by the commission to carry on the work as herein provided for, are unable to agree as to the price thereof, the commission is hereby vested with the power to condemn the lands, materials, and timber, and in so doing the ways, means, methods, and procedure of chapter 40, entitled "Eminent Domain," shall be used by it as near as the same is suitable for the purposes of this section, and in all instances the general and special benefits shall be assessed as offsets against damages: Provided, that in all cases where the state highway and public works commission, upon the completion of the particular project, posts a notice at the courthouse door in each county wherein any part of the particular project is situate, and posts such notice in appropriate and suitable size at each end of the project for thirty (30) days to the effect that the project was completed as of a certain date named in the notice, any action for damages for rights of way or other causes shall be brought within six months from the date the project was completed as specified

in such notice, and in all cases where the state highway and public works commission does not post notice as above set forth, any action may be brought within twelve months from the date of the completion of the project.

(1949, c. 1115.)

Editor's Note.—The 1949 amendment rewrote the proviso at the end of the second paragraph. As the rest of the section was not changed by the amendment only this paragraph is set out.

Commission Not Subject to Suit Except as Provided by Law.—The state highway and public works commission is an agency of the state and as such is not subject to suit save in a manner expressly provided by statute. Schloss v. State Highway, etc., Comm., 230 N. C. 489, 53 S. E. (2d) 517. See note to § 136-18.

Right to Compensation Does Not Rest upon Statute.—The right to compensation for property taken under the power of eminent domain does not rest upon statute but has always obtained in this jurisdiction. Lewis v. North Carolina State Highway, etc., Comm., 228 N. C. 618, 46 S. E. (2d) 705.

Six Months' Limitation upon Action for Damages.—The requirement of this section that actions for damages for the taking of a right of way for highway purposes where the owner and the commission cannot agree upon the amount must be commenced within six months from the completion of the project, is a statute of limitation rather than a condition precedent to the right of action. Lewis v. North Carolina State Highway, etc., Comm., 228 N. C. 618, 46 S. E. (2d) 705.

Commission Held Not Estopped to Plead Statute of Limitation.—The fact that representatives of the state highway and public works commission assured the owners of the servient tenement that the commission would provide them a safe approach to the new highway, does not estop the commission from pleading the six months statute of limitations as a defense to their action for damages for the taking of a right of way for highway purposes, there being no evidence that the commission requested plaintiffs to delay the pursuit of their rights or that it made any agreement, express or implied, that it would not plead the statute. Lewis v. North Carolina State Highway, etc., Comm., 228 N. C. 618, 46 S. E. (2d) 705.

A cause of action for breach of contract cannot be joined in a special proceeding for condemnation, under this section and § 40-12. Dalton v. State Highway, etc., Comm., 223 N. C. 406, 407, 27 S. E. (2d) 1.

Elements of Damage.—

In accord with original. See Dalton v. State Highway, etc., Comm., 223 N. C. 406, 407, 27 S. E. (2d) 1.

Cited in Bailey v. State Highway, etc., Comm., 230 N. C. 116, 52 S. E. (2d) 276.

§ 136-19.1. Surplus material derived from grading to be made available to adjoining landowners.—It shall be the duty of the state highway and public works commission or any contractor working for said commission to make available to the adjoining landowner any gravel, dirt or material which is available from grading a road or highway through such adjoining lands which is not required or desired by the state highway and public works commission for use upon any part of the highway, and said surplus material shall not be sold or disposed of by the state highway and public works commission or any contractor working for them until the adjoining landowner has been given the right to accept and use the same when deposited on any convenient place at or near his land by the contractor or the commission. (1949, c. 1076.)

§ 136-29. Settlement of controversies between commission and awardees of contracts.

Upon receipt of said appeal the chairman of the state highway and public works commission shall promptly appoint some competent person, and the claimant shall likewise select a competent person, and these two shall elect a third such person, the three of whom shall constitute a board of review, and shall promptly set a time and place for the hearing.

(1947, c. 530.)

Editor's Note.—

The 1947 amendment rewrote the third sentence which formerly provided for the appointment of a "committee" of three members of the commission, and substituted therefor the present "board of review." As the rest of the section was not changed it is not set out.

§ 136-33.1. Signs for protection of cattle.—Upon written request of any owner of more than five head of cattle, the state highway and public works commission shall erect appropriate and adequate signs on any road or highway under the control of the state highway and public works commission, such signs to be so worded, designed and located as to give adequate warning of the presence and crossing of cattle. Such signs shall be located at points agreed upon by the owner and the state highway and public works commission at points selected to give reasonable warning of places customarily or frequently used by the cattle of said owner to cross said road or highway, and no one owner shall be entitled to demand the placing of signs at more than one point on a single or abutting tracts of land. (1949, c. 812.)

§ 136-38. Use of funds recommended by local governing body; primary use; balance of funds.—Each year before the first day of July the governing body of each city and town shall recommend for the approval of the state highway and public works commission the use of such funds as are allocated to such city or town: Provided, that all of such funds so allocated to cities and towns shall be used first for the maintenance, repair, improvement, construction, reconstruction or widening of the streets within said cities and towns which form a part of the state highway system until such streets shall be in a condition satisfactory to the state highway and public works commission and to the governing body of such city or town, after which if there is any balance of funds remaining in the allotment to any city or town, such balance shall be used for the maintenance, repair, improvement, construction, reconstruction, or widening of streets which form important connecting links to the state highway system or the county highway system or farm to market roads. Should any balance then remain in the allotment to any city or town, such balance shall be used for the maintenance, repair, improvement, construction, reconstruction or widening of any street or streets as may be designated by the governing body of such municipality. Should any balance remain in the allotment to any city or town at the end of a fiscal year, such balance shall accrue to the credit of such city or town to be added to its allotment for the ensuing fiscal year. (1941, c. 217, s. 3; 1947, c. 290.)

Editor's Note.—The 1947 amendment inserted the next to the last sentence.

Art. 3. General Provisions.

Part II. County Public Roads Incorporated into State Highway System.

§ 136-53. Map of county road systems posted; objections.

Cited in Speight v. Anderson, 226 N. C. 492, 39 S. E. (2d) 371.

Art. 4. Neighborhood Roads, Cartways, Church Roads, etc.

§ 136-67. Neighborhood public roads.—All those portions of the public road system of the state which have not been taken over and placed under maintenance or which have been abandoned by the state highway and public works commission, but which remain open and in general use as a necessary means of ingress to and egress from the dwelling house of one or more families, and all those roads that have been laid out, constructed, or reconstructed with unemployment relief funds under the supervision of the department of public welfare, and all other roads or streets or portions of roads or streets whatsoever outside of the boundaries of any incorporated city or town in the state which serve a public use and as a means of ingress or egress for one or more families, regardless of whether the same have ever been a portion of any state or county road system, are hereby declared to be neighborhood public roads and they shall be subject to all of the provisions of §§ 136-68, 136-69 and 136-70 with respect to the alteration, extension, or discontinuance thereof, and any interested party is authorized to institute such proceeding, and in lieu of personal service with respect to this class of roads, notice by publication once a week in any newspaper published in said county, or in the event there is no such newspaper, by posting at the courthouse door and three other public places, shall be deemed sufficient: Provided, that this definition of neighborhood public roads shall not be construed to embrace any street, road or driveway that serves an essentially private use, and all those portions and segments of old roads, formerly a part of the public road system, which have not been taken over and placed under maintenance and which have been abandoned by the state highway and public works commission and which do not serve as a necessary means of ingress to and egress from an occupied dwelling house are hereby specifically excluded from the definition of neighborhood public roads, and the owner of the land, burdened with such portions and segments of such old road, is hereby invested with the easement of right of way for such old roads heretofore existing.

Upon request of the board of county commissioners of any county, the state highway and public works commission is permitted, but is not required, to place such neighborhood public roads as above defined in a passable condition without incorporating the same into the state or county system, and without becoming obligated in any manner for the permanent maintenance thereof.

This section shall not authorize the reopening on abandoned roads of any railroad grade crossing that has been closed by order of the state highway and public works commission in connection with the building of an overhead bridge or underpass to take the place of such grade crossing. (1929, c. 257, s. 1; 1933, c. 302; 1941, c. 183; 1949, c. 1215.)

Editor's Note.—The 1949 amendment rewrote this section.

Purpose of Section.—The purpose of this section, defining neighborhood public roads, was to bring the designated roads within the procedure prescribed in the original act, chap. 448, P. L. 1931 (now a part of § 136-53). Speight v. Anderson, 226 N. C. 492, 39 S. E. (2d) 371, 373.

Section Applies Only to Established Easements and Roads.—This section refers to traveled ways which were at the time of the adoption of the 1941 amendment established easements or roads or streets in a legal sense, and it cannot be construed to include ways of ingress and egress existing by consent of the landowner as a courtesy to a neighbor, nor to those adversely used for a time insufficient to create an easement. Speight v. Anderson, 226 N. C. 492, 39 S. E. (2d) 371, 373.

Road Maintained for Convenience of Landowner's Tenants.—Where all the evidence tended to show that road was laid out and maintained primarily as a convenience for those who resided on defendants' tracts, no continuous use for a public purpose was disclosed within meaning of this section. Speight v. Anderson, 226 N. C. 492, 39 S. E. (2d) 371, 374.

§ 136-68. Special proceeding for establishment, alteration or discontinuance of cartways, etc.; petition; appeal.

Cross Reference.—See note to § 136-69.

Municipality Has Exclusive Control of Streets and Ways.—The law relating to cartways was not intended to withdraw from cities and towns any part of their exclusive control over their streets and other public ways, and confers no jurisdiction on the clerk of the Superior Court to establish an alley within an incorporated town. Parsons v. Wright, 223 N. C. 520, 27 S. E. (2d) 534.

This Section and § 136-69 to Be Strictly Construed.—This and the following section, relating to the establishment of cartways for ingress and egress to a highway over intervening lands, are in derogation of common law and must be strictly construed. Brown v. Glass, 229 N. C. 657, 50 S. E. (2d) 912.

An action to obtain a judicial declaration of plaintiff's right to an easement appurtenant and by necessity over the lands of defendants is authorized by Chap. 1, Art. 26, and the superior court has jurisdiction, it not being a special proceeding to establish a cartway, which must be instituted before the clerk. Carver v. Leatherwood, 230 N. C. 96, 52 S. E. (2d) 1.

Applied in Garris v. Byrd, 229 N. C. 343, 49 S. E. (2d) 625.

§ 136-69. Cartways, tramways, etc., laid out; procedure.

Cross Reference.—See notes to § 136-68.

Petitioner's Land Must Be Used for One of Purposes Enumerated.—This section enumerates the purposes for which the petitioner's land must be used in order to confer upon the owner the right of a "way of necessity" over another's land, and the listing of them excludes other uses not named, the presence of one of those named becoming a condition precedent to the exercises of the right. It will be observed that all of them respect substantial traffic or transportation of products taken from the land. Brown v. Glass, 229 N. C. 657, 50 S. E. (2d) 912.

Petitioners are not entitled to the establishment of a cartway over the intervening lands of another for the purpose of egress to the highway for a home they propose to construct on their adjoining land, since such use does not come within those enumerated in this section. Id.

And Petitioner Must Have No Other Adequate Means of Transportation.—Petitioner is entitled to the establishment of a cartway across the lands of another only if petitioner's land is not adjacent to a public road and has no other adequate and proper means of ingress and egress to the highway, and he is not entitled to the relief if he has such means available to him at the time. Garris v. Byrd, 229 N. C. 343, 49 S. E. (2d) 625.

Effect of Permissive Way.—If a permissive way is in all respects reasonable and adequate as a proper means of ingress and egress, the petition for a cartway should be denied. Conversely, if the permissive nature of the way renders it insufficient to meet the requirement of "other adequate means of transportation" within the meaning of the statute, the relief should be granted. Where the court below found that the permissive way available to petitioner was "in all respects reasonable and adequate" and then concluded that the petitioner was entitled to a cartway, the supreme court deemed it devisable to vacate the judgment entered and remand the cause for a rehearing. Garris v. Byrd, 229 N. C. 343, 49 S. E. (2d) 625.

The laying off of a cartway and the adjudication of damages are matters for the jury of view, subject to review by the court. Garris v. Byrd, 229 N. C. 343, 49 S. E. (2d) 625.

Appeal Lies from Order Appointing Jury.—In a proceed-

ing to establish a cartway or way of necessity from lands of petitioners to a state highway, under this and the preceding section, an order of the clerk adjudging that petitioners are entitled to the relief and appointing a jury of view to "lay off" the cartway is a final determination of the right to the easement, leaving only the mechanics of execution to the jury of view, and therefore an appeal to the superior court by respondents whose lands are affected is not premature, and judgment of the superior court dismissing the appeal and remanding the cause to the clerk, is erroneous. Triplett v. Lail, 227 N. C. 274, 41 S. E. (2d) 755.

§ 136-71. Church roads and easements of public utility lines laid out on petition; procedure.—Necessary roads or easements and right of ways for electric light lines, power lines, water lines, sewage lines, and telephone lines leading to any church or other place of public worship may be established in the same manner as set forth in the preceding sections of this article upon petition of the duly constituted officials of such church. (Rev., ss. 2687, 2689; Code, ss. 2062, 2064; 1872-3, c. 189, ss. 1-3, 5; 1931, c. 448; 1949, c. 382; C. S. 3838.)

Editor's Note.—The 1949 amendment inserted the provision as to easements and rights of way for electric light and other lines.

Art. 6. Ferries and Toll Bridges.

§ 136-89. Safeguarding transportation of life; guard chains or gates.

Editor's Note.—To the historical reference appearing in original should be added, "C. S. 3825(b), 3825(c)."

Art. 6A. Municipal Corporations Operating Toll Roads.

§ 136-89.1. Who may file petition with municipal board of control for organization of corporation.—Any number of persons not less than ten (10) are hereby authorized and empowered to file a petition with the municipal board of control created by G. S. § 160-195, for the organization and creation of a municipal corporation for the purpose of acquiring rights of way, owning and operating a toll road or highway in the state. (1949, c. 1024, s. 1.)

§ 136-89.2. Presentation of petition to secretary of board of control; contents of petition; order for and notice of hearing.—The petition shall be presented to the secretary of the municipal board of control and shall set forth the name by which the municipal corporation is to be known and shall describe in a general way the location of the proposed highway of toll road which is to be constructed or acquired, and by giving the names of the owners of the lands over which the said toll road or highway is to be constructed. The said petition shall describe in general terms the nature of the highway to be constructed and the width of the right of way which is desired to be acquired, which shall not exceed a width of one hundred (100) feet.

The secretary of said board shall thereupon make an order prescribing the time and place for the hearing of said petition before the municipal board of control. Notice of hearing shall be published once a week for four weeks in a newspaper published in or having a circulation in the county or counties where such toll road or highway is to be constructed, giving notice of the proposal to organize a municipal corporation for such purpose. Such notice is to be signed by the secretary of said board. (1949, c. 1024, s. 2.)

§ 136-89.3. Procedure on hearing; order creating municipal corporation; recordation of papers relating to organization; fees.—Any person in any manner interested in the laying out and construction of the said toll road or highway may appear at the hearing of such petition, and the matter shall be tried as an issue of fact by the municipal board of control, and no formal answer to the petition need be filed. The board may adjourn the hearing from time to time in its discretion. The municipal board of control shall determine whether or not the laying out, construction and operation of the toll road is in the public interest and whether all the requirements of this article have been substantially complied with and, if the municipal board of control shall so find, it shall enter an order creating a municipal corporation and fixing the name of the same, giving it the name proposed in the petition unless, for good cause, it finds that some other name should be provided.

All papers in reference to the organization of such municipal corporation shall be filed and recorded in the office of the secretary of state, and certified copies thereof shall be filed and recorded in the office of the clerk of the superior court of the county in which such municipal corporation shall operate. The fees shall be the same as now provided for organization of a private non-stock corporation and shall be paid out of the funds of such municipality.

Upon the approval of the municipal board of control and the recording of the papers, as above provided, the organization shall become a municipal corporation with such powers and functions as are prescribed in this article. (1949, c. 1024, s. 3.)

§ 136-89.4. Election of board of commissioners; term of office; vacancy appointments.—Within ninety (90) days after the organization of such municipal corporation, the petitioners for the same shall meet at the courthouse of the county in which the said toll road or highway or some part thereof is located and elect a board of not less than three (3) nor more than seven (7) commissioners which shall act as the governing board of said municipal corporation. Notice of the time and place of such meeting may be given by any three (3) of the petitioners, and such board of commissioners, when elected, shall serve for a term of six (6) years from the date of their election or until their successors are duly elected and qualified. The successors to such board of commissioners shall be elected by the commissioners before their term of office expires, and any vacancy in the membership thereof shall be filled by the remaining members of the said commission. (1949, c. 1024, s. 4.)

§ 136-89.5. President and secretary of board; seal.—The board of commissioners of said municipal corporation shall elect a president and secretary thereof and adopt a common seal, said officers to serve for a term of six years or until their successors are duly elected and qualified. Any vacancies occurring in such offices shall be filled by the appointment of the board of com-

missioners for the unexpired term of the one creating such vacancy. (1949, c. 1024, s. 5.)

§ 136-89.6. Authority of corporation to construct and operate toll road.—The said municipal corporation, when organized, is hereby authorized and empowered to lay out, open up, own and construct and operate a toll road over the route designated in the petition and to make such reasonable charges for the use of said highway as shall be approved by the North Carolina utilities commission. (1949, c. 1024, s. 6.)

§ 136-89.7. Power of eminent domain.—In the event the said municipal corporation is unable to agree with the owner of the land across whose land a toll road or highway is to be constructed as to the acquisition of the right of way across such land for the use and operation of the said toll road, the said municipal corporation shall have the right to acquire such easement and right of way by eminent domain upon compliance with the provisions of the Public Works Eminent Domain Law, set forth in article 3 of chapter 40, of the General Statutes, provided, that the said right of way shall not exceed one hundred (100) feet in width, or such right of way may be condemned in accordance with the provisions of article 2 of chapter 40 of the General Statutes of North Carolina. (1949, c. 1024, s. 7.)

§ 136-89.8. Operation of corporation for public benefit.—Said corporation, when created, shall be operated entirely for the benefit of the public, and no person shall receive any profits whatever from the operation thereof, except that the officers and employees of said corporation shall be paid by the governing board thereof reasonable compensation for services rendered. (1949, c. 1024, s. 8.)

§ 136-89.9. Issuance of revenue bonds.—In order to defray the costs of the acquisition of right of way and the construction of the said toll road or highway and structures which are placed thereon, the said municipal corporation is hereby authorized and empowered to issue revenue bonds, in accordance with the provisions of Revenue Bonds Act of 1938, as set forth in article 34 of chapter 160 of the General Statutes, and G. S. § 160-423 shall not be applicable as to any bonds issued by such municipality, and the same may be issued at any time thereafter as may be determined by the governing board thereof. (1949, c. 1024, s. 9.)

§ 136-89.10. Bonds, notes and property exempt from taxation.—All of said bonds and notes and coupons shall be exempt from all state, county and municipal taxation or assessment, direct or indirect, general or special, whether imposed for the purpose of general revenue or otherwise, and the interest on said bonds and notes shall not be subject to taxation as for income, nor shall said bonds or notes or coupons be subject to taxation when constituting a part of the surplus of any bank, trust company or other corporation. All the property of the said corporation shall be exempt from all taxation. (1949, c. 1024, s. 10.)

§ 136-89.11. Acquisition of toll road or highway by state highway and public works commission.—In the event the state highway and public works commission shall at any time hereafter determine to acquire any toll road or highway which may be constructed by a municipal corporation organized under the provisions of this article, for the purpose of operating the same as a part of the state highway system, the state highway and public works commission shall have a right to acquire the same and to enter into an agreement with the municipal corporation created under the provisions of this article for the acquisition of such road or highway, and all rights of such municipal corporation therein, upon the condition that the state highway and public works commission shall pay or assume all of the outstanding obligations of such municipal corporation, including any outstanding bonds, incurred or issued in the acquisition of rights of way and construction of such improvements and, upon such contract being entered into, all of the right, title and interest of such municipal corporation created hereunder to such toll road or highway shall cease and determine and the same shall become a part of the state highway system, and such road or highway may be operated as a toll road or otherwise, as the state highway and public works commission may determine. (1949, c. 1024, s. 11.)

Art. 7. Miscellaneous Provisions.

§ 136-96. Road or street not used within 20 years after dedication deemed abandoned; declaration of withdrawal recorded; defunct corporations.

Editor's Note.—

To the historical reference appearing in original should be added, "C. S. 3846(ss), 3846(tt)."

Withdrawal in Conformity with Section Terminates Easement.—

Where land impliedly dedicated has not been actually opened or used for twenty years, and no person has asserted public or private easement thereon within the period fixed by this section or at any other time, and the land is not necessary for ingress, egress or regress to lots sold, effect is given by this section to the filing of a declaration of withdrawal of the land from dedication on the part of those holding under the original owner, and the dedication of the land is conclusively presumed to have been abandoned, and no claim of easement public or private may thereafter be enforced. Foster v. Atwater, 226 N. C. 472, 38 S. E. (2d) 316, 318.

Section Not Applicable Where Road Is Way of Necessity.—Where the jury found that continued use of the street was necessary to afford convenient ingress, egress and regress to the lot owned by plaintiffs the provisions of this section that a street not used within 20 years after dedication shall be deemed abandoned were not applicable. Evans v. Horne, 226 N. C. 581, 39 S. E. (2d) 612, 614, following Home Real Estate Loan, etc., Co. v. Carolina Beach, 216 N. C. 778, 7 S. E. (2d) 13; and distinguishing Sheets v. Walsh, 217 N. C. 32, 6 S. E. (2d) 817.

Burden of Proof and Admissibility of Evidence.—In an action for damages for trespass and to enjoin further trespass upon an easement claimed by plaintiffs by dedication, the burden is on plaintiffs to establish the property right asserted, and defendants are entitled to introduce the record of withdrawal of dedication executed pursuant to this section as a release or extinguishment by estoppel of record from sources to which plaintiffs were a privy, notwithstanding the absence of allegation in their answer of such withdrawal from dedication. Pritchard v. Fields, 228 N. C. 441, 45 S. E. (2d) 575.

§ 136-102. Billboard obstructing view at entrance to school, church or public institution on public highway.—1. It shall be unlawful for any person, firm, or corporation to construct or maintain outside the limits of any city or town in this state any billboard larger than six square feet at or nearer than two hundred feet to

the point where any walk or drive from any school, church, or public institution located along any highway enters such highway except under the following conditions:

(a) Such billboard is attached to the side of a building or buildings which are or may be erected within two hundred feet of any such walk or drive and the attachment thereto causes no additional obstruction of view.

(b) A building or other structure is located so as to obstruct the view between such walk or drive and such billboard.

(c) Such billboard is located on the opposite side of the highway from the entrance to said walk or drive.

2. Any person, firm, or corporation convicted of violating the provisions of this section shall be guilty of a misdemeanor and punished by a fine of ten dollars ($10.00), and each day that such violation continues shall be considered a separate offense. (1947, c. 304, ss. 1, 2.)

Art. 8. Citation to Highway Bond Acts.

VIII. The Secondary Road Bond Act of 1949. Session Laws 1949, cc. 1250, 1255.

Chapter 138. Salaries and Fees.

Sec.

138-4. Governor to fix salaries of administrative officers.

§ 138-4. Governor to fix salaries of administrative officers.—The salaries of administrative officers whose salaries are now fixed by statute shall be fixed by the governor, subject to the approval of the advisory budget commission, such salaries to be payable in equal monthly installments. (1947, c. 898.)

Chapter 139. Soil Conservation Districts.

Sec.

139-6. Election and duties of county supervisors; county chairman to be ex officio district supervisor.

139-14. Dividing large districts.

139-15. "County committeeman" construed to mean "county supervisor"; powers and duties.

§ 139-2. Legislative determinations, and declaration of policy.

C. The Appropriate Corrective Methods.—To conserve soil resources and control and prevent soil erosion, it is necessary that land-use practices contributing to soil wastage and soil erosion be discouraged and discontinued, and appropriate soil-conserving land-use practices be adopted and carried out. Among the procedures necessary for widespread adoption, are the carrying on of engineering operations such as the construction of terraces, terrace outlets, check-dams, dikes, ponds, ditches, and the like; the utilization of strip cropping, lister furrowing, contour cultivating, and contour furrowing; farm drainage; land irrigation; seeding and planting of waste, sloping, abandoned, or eroded lands with water-conserving and erosion-preventing plants, trees, and grasses; forestation and reforestation; rotation of crops; soil stabilization with trees, grasses, legumes, and other thick-growing, soil-holding crops; the addition of soil amendments; manurial materials, and fertilizers for the correction of soil deficiencies, and/or to promote increased growth of soil-protecting crops; retardation of run-off by increasing the absorption of rainfall; and retirement from cultivation of steep, highly erosive areas and areas now badly gullied or otherwise eroded.

(1947, c. 131, s. 1.)

Editor's Note.—The 1947 amendment inserted the words "farm drainage" in line thirteen of subsection C. As the rest of the section was not affected by the amendment it is not set out.

§ 139-3. Definitions.

(12) "Due notice" means notice given by posting the same at the courthouse door and at three other public places in the county, including those where it may be customary to post notices concerning county or municipal affairs generally, not less than ten days before the date of the event of which notice is being given. At any hearing held pursuant to such a notice at the time and place designated in such a notice, adjournment may be made from time to time without the necessity of renewing such notice for such adjourned dates. (1937, c. 393, s. 3; 1947, c. 131, s. 2.)

Editor's Note.—The 1947 amendment rewrote subsection (12). As the rest of the section was not changed it is not set out.

§ 139-4. State soil conservation committee.—A. There is hereby established to serve as an agency of the state and to perform the functions conferred upon it in this chapter, the state soil conservation committee which shall be composed of the following members. The following shall serve, ex-officio, as members of the committee: the director of the state agricultural extension service, the director of the state agricultural experiment station, and the state forester. Three members shall consist each year of the president, first vice-president and the immediate past president of the state association of soil conservation district supervisors. The committee shall invite the secretary of the United States department of agriculture to appoint some resident of North Carolina to serve as a member of the committee. The committee, in cooperation with the North Carolina State College of Agriculture and Engineering in the state, shall develop a program for soil conservation and for other purposes as provided for in this chapter, and shall keep a record of its official actions, shall adopt a seal, which seal shall be judicially noticed, and may perform such acts, hold such public hearings, and promulgate such rules and regulations as

may be necessary for the execution of its functions under this chapter.

C. The committee shall designate its chairman, and may, from time to time, change such designation. A member of the committee shall hold office so long as he shall retain the office by virtue of which he shall be serving on the committee. A majority of the committee shall constitute a quorum, and the concurrence of a majority of the committee in any matter within their duties shall be required for its determination. Every member of the state committee who does not receive a salary from an agency of the state or federal government, shall receive a per diem of five dollars ($5.00) while engaged in the discharge of the duties of the committee, and all members of the state committee shall be entitled to their necessary expenses, including traveling expenses, necessarily incurred in the discharge of their duties as members of the committee. The committee shall provide for the execution of surety bonds for all employees and officers who shall be entrusted with funds or property, shall provide for the keeping of a full and accurate record of all proceedings and and of all resolutions, regulations, and orders issued or adopted; and shall provide for an annual audit of the accounts of receipts and disbursements.

(1947, c. 131, s. 3.)

Editor's Note.—The 1947 amendment rewrote subsection A and the fourth sentence of subsection C. As the other subsections were not changed they are not set out.

§ 139-5. Creation of soil conservation districts. F. If the committee shall determine that the operation of the proposed district within the defined boundaries is administratively practicable and feasible, it shall appoint two temporary supervisors to act as the governing body of the district, who shall serve until supervisors are elected or appointed and qualify as provided in §§ 139-6 and 139-7. Such districts shall be a governmental subdivision of this state and a public body corporate and politic, upon the taking of the following proceedings:

The two appointed temporary supervisors shall present to the secretary of state an application signed by them which shall set forth (and such application need contain no detail other than the mere recitals): (1) that a petition for the creation of the district was filed with the state soil conservation committee pursuant to the provisions of this chapter and that the proceedings specified in this chapter were taken pursuant to such petition; that the application is being filed in order to complete the organization of the district as a governmental subdivision and public body, corporate and politic under this chapter; and that the committee has appointed them as supervisors; (2) the name and official residence of each of the temporary supervisors, together with a certified copy of the appointment evidencing their right to office; (3) the name which is proposed for the district; and (4) the location of the principal office of the supervisors of the district. The application shall be subscribed and sworn to by each of the said temporary supervisors before an officer authorized by the laws of this state to take and certify oaths, who shall certify upon the application that he personally knows the temporary supervisors and knows them to be the officers as affirmed in the application, and that each has subscribed thereto in the officer's presence. The application shall be accompanied by a statement by the state soil conservation committee, which shall certify (and such statement need contain no detail other than the mere recitals) that a petition was filed, notice issued, and hearing held as aforesaid, that the committee did duly determine that there is need, in the interest of the public health, safety and welfare, for a soil conservation district to function in the proposed territory and did define the boundaries thereof; that notice was given and a referendum held on the question of the creation of such district, and that the result of such referendum showed a majority of the votes cast in such referendum to be in favor of the creation of the district; that thereafter the committee did duly determine that the operation of the proposed district is administratively practicable and feasible. The said statement shall set forth the boundaries of the district as they have been defined by the committee.

(1947, c. 131, s. 4.)

Editor's Note.—The 1947 amendment rewrote the first two paragraphs of subsection F. As the rest of the section was not changed only these paragraphs are set out.

§ 139-6. Election and duties of county supervisors; county chairman to be ex officio district supervisor.—After issuance by the secretary of state of the certificate of organization of the soil conservation district, nominating petitions may be filed with the state soil conservation committee not less than ten nor more than sixty days preceding the first day of election week as provided in this section, to nominate candidates for a soil conservation committee in each county of the district, to be composed of three members. Any qualified voter may sign as many nominating petitions as there are vacancies on the county committee to be filled, but no nominating petition shall be accepted by the committee unless it shall be subscribed by twenty-five or more qualified voters of such county.

An election to elect a member or members of a county committee shall be held annually during the week of December in which the first Tuesday after the first Monday falls, and the polls shall be open each weekday of that week from six-thirty o'clock a. m. to six-thirty o'clock p. m., Eastern Standard Time.

At the first election held pursuant to this chapter, as amended, the candidate receiving the largest vote shall be elected for a term of three years, the candidate receiving the next largest number of votes shall be elected for a term of two years and the candidate receiving the third largest number of votes shall be elected for a term of one year. The names of all nominees on behalf of whom such petitions have been signed within the time herein designated, shall appear, arranged in the alphabetical order of the surnames, upon ballots, with a square before each name and a direction to insert an X mark in the squares before any three names to indicate the voter's preference in said first election. All qualified voters residing within the county shall be eligible to vote in such election. The three candidates who shall receive the largest number of the votes cast in such election shall be elected members of the soil conservation committee for the county. Their successors shall be elected for a term of three years. All members of the

county committee elected pursuant to this chapter shall take office on the first Monday in January following their election.

The state committee shall pay all of the expenses of such election, shall supervise the conduct thereof, shall prescribe regulations governing the conduct of such an election and the determination of the eligibility of voters therein, and shall publish the results thereof.

A county committee shall select from its members a chairman, a vice-chairman, and a secretary. The chairman will be ex-officio a member of the soil conservation district board of supervisors; the vice-chairman will be first alternate district supervisor; and the secretary will be second alternate district supervisor.

It shall be the duty of members of a county soil conservation committee (1) to be responsible for the securing of nominating petitions for the election of the county committee, providing for elections, reporting the results thereof to the district supervisors, who, in turn, shall report the results to the state committee, all to be done under the supervision of the state committee; (2) to work in close harmony with the district supervisors of their district in the performance by the district supervisors of their duties set out in paragraphs (1), (2), and (6) of G. S. § 139-8; (3) to further develop annual county goals and plans for reaching these goals for soil conservation work in their county; and (4) to request agencies whose duties are such as to render assistance in soil and water conservation to set forth in writing or memorandum what assistance they may have available in the county and report such to the district supervisors. (1937, c. 393, s. 6; 1947, c. 131, s. 5; 1949, c. 268, s. 1.)

Editor's Note.—The 1947 amendment rewrote this section. The 1949 amendment rewrote the caption of this section.

§ 139-7. Appointment, qualifications and tenure of supervisors.—The governing body of any district shall consist of the chairman of the county committees of the counties within the district, together with such additional supervisor or supervisors as may be appointed by the state committee pursuant to this paragraph, except that when a district is composed of only one county, the members of the county committee shall be members of the board of supervisors of the district which such county comprises. When a district is comprised of less than four counties, the state committee shall appoint two residents of the district to serve as district supervisors along with the elected supervisors. When a district is comprised of four or more counties, the state committee may, but is not required to, appoint one resident of the district to serve as a district supervisor along with the elected supervisors. Such appointive supervisors shall qualify and assume their duties at the same time as the elected supervisors and shall serve for a term of three years. When a vacancy arises with respect to an appointive supervisor, the state committee shall fill such vacancy for the unexpired term by appointment of a resident of the district in which the vacancy occurs. Every supervisor shall hold office until his successor has been elected or appointed and qualifies. When a vacancy arises on a county committee, the vacancy shall be filled by appointment by the state committee, of a resident of the county, to serve the remainder of the unexpired term.

The supervisors shall designate a chairman and and may, from time to time, change such designation. A simple majority of the board shall constitute a quorum for the purpose of transacting the business of the board, and approval by a majority of those present shall be adequate for a determination of any matter before the board, provided at least a quorum is present. Supervisors of soil conservation districts shall receive a per diem of five dollars ($5.00) and necessary expenses for attendance upon meetings of district supervisors, provided that when a per diem and expense allowance is claimed for attendance upon any district supervisor's meetings outside the district for which such supervisor serves, the same may not be paid unless written approval is obtained from the state committee prior to any such meeting.

The supervisors may employ a secretary, technical experts, whose qualifications shall be approved by the state committee, and such other employees as they may require, and shall determine their qualifications, duties and compensation. The supervisors may call upon the attorney general of the state for such legal services as they may require. The supervisors may delegate to their chairman, to one or more supervisors, or to one or more agents, or employees such powers and duties as they may deem proper. The supervisors shall furnish to the state soil conservation committee, upon request, copies of such ordinances, rules, regulations, orders, contracts, forms, and other documents as they shall adopt or employ, and such other information concerning their activities as it may require in the performance of its duties under this chapter.

The supervisors shall provide for the execution of surety bonds for all employees and officers who shall be entrusted with funds or property; shall provide for the keeping of a full and accurate record of all proceedings and of all resolutions, regulations, and orders issued or adopted; and shall provide for an annual audit of the accounts of receipts and disbursements. Any supervisor may be removed by the state soil conservation committee upon notice and hearing, for neglect of duty, incompetence or malfeasance in office, but for no other reason.

The supervisors may invite the legislative body of any municipality or county located near the territory comprised within the district to designate a representative to advise and consult with the supervisors of the district on all questions of program and policy which may affect the property, water supply, or other interests of such municipality or county.

All district supervisors whose terms of office expire prior to the first Monday in January, 1948, shall hold over and remain in office until supervisors are elected or appointed and qualify as provided in this chapter, as amended. The terms of office of all district supervisors, who have heretofore been elected or appointed for terms extending beyond the first Monday in January, 1948, are hereby terminated on the first Monday in January, 1948. (1937, c. 393, s. 7; 1943, c. 481; 1947, c. 131, ss. 6, 7.)

Editor's Note.—The 1947 amendment rewrote the first two paragraphs and added the last paragraph.

§ 139-14. Dividing large districts.—Whenever the state committee shall receive a petition from any board of district supervisors signed by all supervisors of such district, the state committee shall have the authority to divide such district into two or more districts. The governing bodies of the resulting districts shall be composed of supervisors in the same manner and in the same number as is provided in §§ 139-6 and 139-7. Upon the creating of new districts through dividing an existing district under the provisions of this section, the state committee shall appoint all district supervisors necessary to give such district its full quota of supervisors who shall serve until regular supervisors are elected or appointed, as the case may be, at the time of the next regular election of supervisors. The state committee shall assign a name to each district resulting from the division of the district under the provisions of this section and do all other things necessary to complete the organization of such new districts and place them on an operating basis. (1947, c. 131, s. 8.)

§ 139-15. "County committeeman" construed to mean "county supervisor"; powers and duties.—Wherever the words "county committeeman" or "county committeemen" appear in this chapter, the same shall be construed to mean "county supervisor" or "county supervisors"; and each such county committeeman or county supervisor shall receive the same compensation and have and exercise the same rights, powers, duties, responsibilities and voting privileges granted to or imposed upon district supervisors in respect to soil conservation activities under the provisions of this chapter. (1949, c. 268, s. 2.)

Chapter 140. State Art and Symphony Societies.

Art. 1A. Acquisition and Preservation of Works of Art.

Sec.

Art. 2. State Symphony Society.

Art. 1A. Acquisition and Preservation of Works of Art.

§ 140-5.1. Purpose of article.—The North Carolina state art society is authorized and empowered to inspect, appraise, obtain attributions and evaluations, to purchase, acquire, transport, exhibit, loan and store, and to receive on consignment or as loans, statuary, paintings and other works of art of any and every kind and description which are worthy of acquisition and preservation, and to do all other things incidental to and necessary to effectuate the purposes of this article. (1947, c. 1097, s. 1.)

§ 140-5.2. Preservation of works of art.—The North Carolina state art society shall be responsible for the care, custody, storage and preservation of all works of art acquired by it, or received by consignment or loan. (1947, c. 1097, s. 1.)

§ 140-5.3. Right to receive gifts.—In order to carry out the purposes of this article, the North Carolina state art society is authorized to acquire by gift or will, absolutely or in trust, from individuals, corporations, the federal government or from any other source, works of art or money or other property, which might be retained, sold or otherwise used to promote the purposes of the North Carolina state art society; provided that works of art acquired by the society under the provision of this section may not be pledged, mortgaged or sold; and provided, further, that any gifts, donations, devisees, bequests, or legacies of property, other than works of art, money and bonds may be disposed of only with the approval of the governor and council of state. The proceeds of the sale of any property acquired under the provisions of this section shall be deposited in the state treasury to the account of the state art society special fund. (1947, c. 1097, s. 1.)

§ 140-5.4. Special fund.—Gifts of money to the North Carolina state art society, when made for the purposes of this article, shall be paid into the state treasury and maintained as a fund to be designated; State art society special fund. All gifts made to the North Carolina state art society shall be exempt from every form of taxation including, but not by way of limitation, ad valorem, intangible, gift, inheritance and income taxation. (1947, c. 1097, s. 1.)

§ 140-5.5. Appropriation contingent on gifts.—There is hereby appropriated out of any unappropriated general fund surplus that may exist at June 30, 1947, the sum of one million dollars ($1,000,000.00) which appropriation shall not be made available for expenditure until funds are available to meet all appropriations made for the biennium 1947-49 and until the sum of one million dollars ($1,000,000.00) shall have been secured through gifts and paid into the state treasury to the credit of the special fund "state art society special fund." The appropriations contained herein and the receipts collected under the provisions of this article shall be subject to the provisions of the Executive Budget Act. (1947, c. 1097, s. 1.)

§ 140-5.6. Expenditure of funds.—After the conditions set forth in § 140-5.5 shall have been complied with, the sum of one million dollars ($1,000,000.00) appropriated in § 140-5.5 and the sum of one million dollars ($1,000,000.00) in gifts paid into the state treasury for the state art society special fund, referred to in § 140-5.5, may be expended for the purposes set out in §§ 140-5.1, and 140-5.2 and for all necessary expenses incidental thereto, including actual necessary expenses and subsistence as may be incurred in travel for the purpose of inspecting prospective gifts and purchases, such expenditures to be made only by a commission of five members to be appointed by the governor from the membership of

the North Carolina state art society, which commission shall be known as the "state art commission." The state treasurer shall, with the approval of the governor and council of state, invest any unexpended moneys in the state art society special fund in securities authorized to be purchased for the sinking funds of the state of North Carolina.

Two of the members of said commission shall be appointed for a term of one year, three members shall be appointed for a term of two years, and thereafter the term for all members of the commission shall be two years. Any vacancy arising on the commission shall be filled by appointment by the governor for the unexpired portion of the term. (1947, c. 1097, s. 1.)

§ 140-5.7. Expenses of commission.—The members of the commission described in § 140-5.6 shall serve without compensation, but in attending meetings of the commission the members shall be paid such actual necessary expenses as may be incurred in travel and subsistence while attending such meetings not in excess of that allowed by the biennial appropriation act. (1947, c. 1097, s. 1.)

§ 140-5.8. Location of art museum. — In the event of the erection of a state art museum under the provisions of this article, the same shall be erected in the city of Raleigh. (1947, c. 1097, s. 1½.)

Art. 2. State Symphony Society.

§ 140-6. Trustees for North Carolina Symphony Society.—The governing body of the North Carolina Symphony Society, Incorporated, shall be a board of trustees consisting of not less than sixteen members, of which the governor of the state and the superintendent of public instruction shall be ex officio members, and four other members shall be named by the governor. The remaining number of trustees shall be chosen by the members of the North Carolina Symphony Society, Incorporated, in such manner and at such times as that body shall determine. Of the four members first named by the governor, two shall be appointed for terms of two years each and two for terms of four years each, and subsequent appointments shall be made for terms of four years each. (1943, c. 755, ss. 1, 2; 1947, c. 1049, ss. 1-3.)

Editor's Note.—The 1947 amendment substituted "trustees" for "directors." Prior to the amendment the membership of the board was limited to sixteen.

§ 140-7. Adoption of by-laws; amendments.—The said board of trustees, when organized under the terms of this article, shall have authority to adopt by-laws for the society and said by-laws shall thereafter be subject to change only by a three-fifths vote of a quorum of said board of trustees. (1943, c. 755, s. 3; 1947, c. 1049, s. 2.)

Editor's Note.—The 1947 amendment substituted "trustees" for "directors."

Chapter 141. State Boundaries.

§ 141-6. Eastern boundary of state; jurisdiction over territory within littoral waters and lands under same.—1. The constitution of the state of North Carolina, adopted in 1868, having provided in article I, § 31, that the "'limits and boundaries of the state shall be and remain as they now are," and the eastern limit and boundary of the state of North Carolina on the Atlantic seaboard having always been, since the Treaty of Peace with Great Britain in 1783 and the Declaration of Independence of July 4th, 1776, one marine league eastward from the Atlantic seashore, measured from the extreme low water mark, the eastern boundary of the state of North Carolina is hereby declared to be fixed as it has always been at one marine league eastward from the seashore of the Atlantic Ocean bordering the state of North Carolina, measured from the extreme low water mark of the Atlantic Ocean seashore aforesaid.

2. The state of North Carolina shall continue as it always has to exercise jurisdiction over the territory within the littoral waters and ownership of the lands under the same within the boundaries of the state, subject only to the jurisdiction of the federal government over navigation within such territorial waters.

3. The governor and the attorney general are hereby directed to take all such action as may be found appropriate to defend the jurisdiction of the state over its littoral waters and the ownership of the lands beneath the same. (1947, c. 1031, ss. 1-3.)

Chapter 142. State Debt.

Art. 7. General Fund Bond Sinking Fund.

Sec.
142-50. Title of article.
142-51. Creation of fund.
142-52. Amount placed in fund.
142-53. Merger of general fund bond sinking funds previously created.
142-54. Provisions of Sinking Fund Commission Act applicable.

Art. 4. Sinking Fund Commission.

§ 142-37. Registration of securities; custody thereof.—Where practicable, securities purchased for sinking funds shall be registered as to the principal thereof in the name of "The state of North Carolina for the sinking fund for" (here briefly identify the sinking fund) and may be released from such registration by the signature of the state treasurer, but the treasurer shall not make such release unless and until the securities to be so released shall have been sold by the commission or until the commission shall have ordered such release. The treasurer may in his discretion keep all securities purchased for sinking funds in the vault in the revenue building or rent safety deposit boxes in responsible banks. (1925, c. 62, s. 8; 1947, c. 152.)

Editor's Note.—The 1947 amendment rewrote the second sentence.

Art. 5. Sinking Funds for Highway Bonds.

§ 142-44. Highway bonds; annual payments.

Editor's Note.—
As to transfer of sinking fund created by this section to general fund bond sinking funds, see § 142-53. As to repeal of this article in so far as it conflicts with article 7 of this chapter, see note under § 142-50.

Art. 6. Citations to Bond and Note Acts.

46. State Ports Bond Act of 1949. 1949, c. 820.
47. School plant construction and repair bonds. 1949, cc. 1020, 1249 (s. 22½), 1295.

Art. 7. General Fund Bond Sinking Fund.

§ 142-50. Title of article.—This article shall be known as "the state general fund bond sinking fund act of one thousand nine hundred forty-five." (1945, c. 3, s. 1.)

Laws Repealed.—Section 2 of the act inserting this article provides: "All laws and clauses of laws in conflict with this act, and in particular chapter six of the Session Laws of one thousand nine hundred and forty-three, the State Post-War Reserve Fund Act, in so far as it conflicts with the appropriations herein made, and chapter one hundred and eighty-eight of one thousand nine hundred and twenty-three, chapter one hundred and ninety-two of one thousand nine hundred and twenty-five, chapters one hundred and forty-seven, one hundred and fifty-two and two hundred and nineteen of one thousand nine hundred and twenty-seven, in so far as contributions are required to be made to these sinking funds for the redemption of general fund bonds covered by these acts, which bonds are provided for under the general fund bond sinking fund established by this act, are hereby repealed."

§ 142-51. Creation of fund.—There is hereby created a state general fund bond sinking fund for the purpose of retiring all outstanding general fund bonds and interest as they mature from time to time. (1945, c. 3, s. 1.)

§ 142-52. Amount placed in funds.—There is appropriated from the general fund of the state the sum of fifty-one million, five hundred eighty-five thousand and seventy-nine dollars ($51,585,079.00), which funds shall be taken from the general fund surplus, as may now exist or as may accrue by June thirtieth, one thousand nine hundred and forty-five, as far as possible and any additional amount necessary to provide the sum of fifty-one million, five hundred eighty-five thousand, and seventy-nine dollars ($51,585,079.00) shall be taken from the state post-war reserve fund established under §§ 143-191 to 143-194, and the amount necessary for this purpose is hereby appropriated from the state post-war reserve fund, which sum so appropriated shall be transferred to "the state general fund bond sinking fund" and shall be used exclusively for the purpose of retiring the principal and interest on outstanding general fund bonds authorized by and issued under the authority of the following acts of the legislature, to-wit:

Title of Issue	Chapter	Year
State Hospital	510	1909
Refunding	399	1909
Administration	66	1911
School for feeble minded	87	1911
Refunding	73	1911
Improvement	102	1913
Funding	107	1921
Educational and charitable	165	1921
Educational and charitable	162	1923
Educational and charitable	192	1925
Educational and charitable	147	1927
Great Smoky mountains park (Serial)	48	1927
Farm colony for women	219	1927
The state prison farm	152	1927
General fund bonds (Debit balance)	330	1933
Educational and charitable	296	1937
State office building	365	1937
Permanent improvement	1	1938
Permanent improvement and school book	67	1939
Permanent improvement	240	1941
Permanent improvement	81	1941
Permanent improvement	86	1941
World War veterans loan	97	1927
World War veterans loan	298	1929

(1945, c. 3, s. 1; 1949, c. 655.)

Editor's Note.—The 1949 amendment added the last two lines.

§ 142-53. Merger of general fund bond sinking funds previously created.—The general fund bond sinking funds heretofore created under authority of chapter one hundred and eighty-eight of the public laws of one thousand nine hundred and twenty-three, chapter one hundred and ninety-two of the public laws of one thousand nine hundred and twenty-five, chapter one hundred and forty-seven of public laws of one thousand nine hundred and twenty-seven, chapter one hundred and fifty-two of the public laws of one thousand nine hundred and twenty-seven, and chapter two hundred and nineteen of the public laws of one thousand nine hundred and twenty-seven for the purpose of retiring certain long term general fund bonds are hereby combined with, transferred to and made a part of "the state general fund bond sinking fund of one thousand nine hundred and forty-five," and together with the sum of fifty-one million, five hundred eighty-five thousand, and seventy-nine dollars ($51,585,079.00) appropriated by this law shall be used to retire the general fund bonds and interest as they may mature from time to time. (1945, c. 3, s. 1.)

Editor's Note.—Acts 1923, ch. 188, referred to in this section, was codified as §§ 142-44 to 142-46.

§ 142-54. Provisions of sinking fund commission act applicable.—The moneys paid into "the state general fund bond sinking fund of one thousand nine hundred and forty-five" herein provided for, shall in all respects, be subject to the requirements, limitations and provisions of chapter sixty-two of the public laws of one thousand nine hundred and twenty-five, and as amended, and known as "the sinking fund commission act." (1945, c. 3, s. 1.)

Editor's Note.—The act referred to in this section was codified as §§ 142-30 to 142-45.

Chapter 143. State Departments, Institutions, and Commissions.

Art. 1. Executive Budget Act.

§ 143-34.1. Payrolls submitted to the assistant to the director of the budget; approval of payment of vouchers.—All payrolls of all departments, institutions, and agencies of the state government shall, prior to the issuance of vouchers in payment therefor, be submitted to the assistant to the director of the budget, who shall check the same against the appropriations to such departments, institutions and agencies for such purposes, and if found to be within said appropriations, he shall approve the same and return one to the department, institution or agency submitting same and transmit one copy to the state auditor, and no voucher in payment of said payroll or any item thereon shall be honored or paid except and to the extent that the same has been approved by the assistant to the director of the budget. (1949, c. 718, s. 5.)

Art. 2. State Personnel Department.

§ 143-35. State personnel department established.—(1) Department distinct from budget bureau and under supervision of director.—There is hereby created and established a state personnel department (hereinafter referred to as "department") for the state of North Carolina. The department shall be separate and distinct from the budget bureau and shall be under the administration and supervision of a director appointed by the state personnel council. The salary of the director shall be fixed by the personnel council and shall not exceed that of the highest paid appointive head of any other state department, bureau, agency or commission. The director shall serve at the pleasure of the personnel council.

(2) State personnel council.—There is hereby created and established a state personnel council (hereinafter referred to as "council") for the purpose of advising and assisting the state personnel director in preparing, formulating and promulgating rules and regulations, determining and fixing job classifications and descriptions, job specifications and minimum employment standards, standards of salaries and wages, and any and all other matters pertaining to employment under this article. The state personnel council shall consist of seven members to be appointed by the governor of North Carolina on or before July 1, 1949. The council shall have the power to designate the member of said council who shall act as the chairman thereof. At least two members of the council shall be individuals of recognized standing in the field of personnel administration and who are not employees of the state, who are subject to the provisions of this article; at least two members of the council shall be individuals actively engaged in the management of a private business or industry; not more than two members of the council shall be individuals chosen from the employees of the state subject to the provisions of this article. The council shall meet at least one time in each calendar quarter of the year, or upon call of the governor, or of the director, or a member of the council, or

at the request of the head of any department or agency when necessary to consider any appeal provided for hereunder. Five members of the council shall constitute a quorum. Notice of meetings shall be given members of the council by the director who shall act as secretary to the council. The members of the council shall each receive seven dollars ($7.00) per day including necessary time spent in traveling to and from their place of residence within the state to the place of meeting while engaged in the discharge of the duties imposed hereunder, and his necessary subsistence and traveling expenses. Members of the council who are the employees of the state, as provided hereunder, shall not receive any per diem for their services but such members shall receive traveling expenses and subsistence, while engaged in the discharge of their duties hereunder, at the same rate and in the same amount as provided for state employees without any deduction for loss of time from their employment. Two of the council members shall be appointed by the governor to serve for a term of two years. Two members shall be appointed to serve for a term of three years. Three members shall be appointed to serve for a term of four years and upon the expiration of the respective terms, the successors of said members shall be appointed for a term of four years each thereafter: Provided, however, that no two members appointed from the same occupational groups named in this article shall serve terms expiring on the same date. Any member appointed to fill a vacancy occurring in any of the appointments made by the governor prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term. A member of the state personnel council shall not be considered a public officer, or as holding office within the meaning of article 14, section 7, of the constitution of this state, but such member shall be a commissioner for a special purpose. The governor may, at any time after notice and hearing, remove any council member for gross insufficiency, neglect of duty, malfeasance, misfeasance, or nonfeasance in office.

(3) Personnel officers representing state departments, agencies and commissions.—For the purpose of aiding and assisting in the operation and administration of this article, each state department, agency or commission shall appoint, or shall designate from among its present employees, a personnel officer to represent the department, agency or commission and the head of same in carrying out the provisions of this article within such department, agency or commission. All personnel officers designated hereunder shall serve in an advisory and consulting capacity to the state personnel director and the council in both intra-department and inter-department personnel policies and practices.

(4) Merit system council; responsibility of state personnel director; supervisor of merit examinations.—The merit system council created under the provisions of chapter 126 of the General Statutes, and all powers and duties heretofore exercised by the merit system council, shall continue in effect as provided in chapter 126 of the General Statutes: Provided, however, that the state personnel director shall be charged with the responsibility of carrying out the regulations and policies maintained and provided by the merit system council and the administration of same as applicable to individuals, employees and agencies of the state now subject to chapter 126 of the General Statutes, as amended, or as the same from time to time may be amended, but excluding and excepting from the application of this article all employees of the county welfare departments and the county, city, county-city and district health departments, and that nothing herein contained shall be construed so as to alter, abridge or deprive the merit system council of the authority vested in it by virtue of § 126-14 of the General Statutes. The state personnel director shall select and appoint, with the advice and approval of the merit system council, and in accordance with the merit system regulations, a person designated as supervisor of merit examinations, who shall not be a member of the merit system council and who shall be charged with the performance of the duties and functions of supervisor of merit examinations as provided by chapter 126 of the General Statutes. (1949, c. 718, s. 1; c. 1174.)

Editor's Note.—Session Laws 1949, c. 718, rewrote this article, inserted § 143-34.1 and amended §§ 126-2, 126-3 and 126-16. Section 6 of the said chapter provides: "Nothing herein shall be construed as authorizing the fixing of classifications and descriptions, job specifications and employment standards, standards of salaries or wages, or necessary number of positions, or otherwise which cause the total funds required by any department, agency, bureau, or commission to exceed the funds appropriated for salaries and wages in that agency for either year of the biennium."

Session Laws 1949, c. 1174, changed the compensation of a member of the council from ten to seven dollars a day.

§ 143-36. Duties and powers of director and council; surveys, classifications, etc.; report of director.—The state personnel director, with the head of each department, agency, bureau or commission of the state government, shall, as soon as practicable after the ratification of this article, undertake a new survey and investigation of the needs for personal service in all state departments, agencies, bureaus or commissions subject to this article for the purpose of establishing job specifications and minimum employment standards, job descriptions, job classifications, and salary schedules, and shall eliminate any existing inequalities between salaries and/or classifications of employees of substantially equal qualifications rendering substantially similar service. The state personnel director, with the head of each department, agency, bureau or commission, shall, after making such survey and investigation and upon the information so assembled, and with the approval of the council, fix, determine and classify the necessary number of positions and employees in all state departments, bureaus, agencies and commissions, the type and nature of work to be performed in such positions and by employees, and shall fix, establish and classify a standard of salaries and wages with a minimum salary rate and a maximum salary rate and such intermediate salary rate or rates as may be deemed necessary and equitable to be paid for all such services and positions and to all employees of the state subject to the provisions of this article. When the personnel survey and investigation is completed with respect to a particular department, bureau, agency or commission, the state personnel

director shall file a report with the governor and with the head of such department, bureau, agency or commission, setting out the number of allowable positions, the classification of the positions, and the duties to be performed and/or positions to be filled, and the salaries and wages to be paid to each of the employees in said department, bureau, agency or commission, and the scale of increments to be granted at least once each year to each employee whose services have met the standard of efficiency as established by the state personnel director and approved by the council and governor: Provided, however, in establishing the standards of efficiency for the purpose of annual increments, the regulations shall provide that all employees whose services merit retention in service shall, as hereinafter set forth, be granted annual increments up to but not exceeding the intermediate salary step nearest to the middle of the salary range established for the respective classification and/or position, and those employees whose services meet higher standards, as formulated and fixed by the state personnel director and council, shall, as hereinafter set forth, be given annual increments up to but not exceeding the maximum of the salary range for the respective classification and/or position. (1949, c. 718, s. 1.)

§ 143-37. Contents of report to become fixed standard; effective date.—When said report with respect to any such department, bureau, agency or commission has been completed and filed with and approved by the governor, and also filed with the head of such department, bureau, agency or commission, the findings in said report shall then become the fixed standard for the number of allowable positions and employees, the classification of positions and the duties to be performed, and/or the positions to be filled, the salaries and/or wages to be paid, and the increments to be granted to all employees in the department, bureau, agency or commission, to which said report relates, and it shall thereupon be the duty of the head of such department, bureau, agency or commission, on the first day of the next month, beginning not less than thirty days subsequent to the date of the reception of said report by him, to put the same into effect, and thereupon with respect to such department, bureau, agency or commission, the classification of positions, the number of employees, the duties to be performed and/or the positions to be filled, the salaries and wages to be paid, and the increments to be granted, all as specified in said report, shall become the only allowable standard for and with respect to such department, bureau, agency or commission. (1949, c. 718, s. 1.)

§ 143-38. Further surveys; reconsideration and change of report.—It shall be the duty of the state personnel director upon request of the head of any state department, bureau, agency or commission, and also from time to time without such request, to make additional surveys in regard to, and to keep informed of, the needs for personal services in the several state departments, bureaus, agencies and commissions, and to reconsider the report hereinbefore provided for, and with the approval of the council and the governor, to make changes therein in accordance with such findings; and upon report by him to the head of any department, bureau, agency or commission, and to the governor, setting out such findings and changes, it shall be the duty of the head of such department, bureau, agency or commission, to put such findings and changes into effect on the first day of the next month, beginning not less than thirty days after the date of receipt by him of such report: Provided, however, the state personnel director shall have the authority to make necessary individual adjustments within the framework of the approved salary and classification plan. (1949, c. 718, s. 1.)

§ 143-39. Payment of increments considered state personnel policy; increments to be considered in request for appropriations.—All salary ranges for state employees not exempted from this article shall contain a fixed and uniform scale of increments between the minimum and maximum salary rate as fixed and determined according to the provisions of § 143-36 of this article. It shall be considered a part of the personnel policy of this state that these increments or increases in pay shall be granted in accordance with standards and regulations fixed, determined and established by the state personnel director and the council as authorized and provided under the provisions of § 143-36 of this article. The head of each department, bureau, agency or commission, when making his request for the ensuing biennium shall take into account the annual and other increments based on efficiency standards as established, or as may be established, under the provisions of this article, for the employees of his department, bureau, agency or commission, and such head shall anticipate the amounts which shall be required during the biennium for the purpose of paying such increments, and shall include such amounts in his appropriations request, but in no case shall the amount estimated for increments based on efficiency standards exceed two-thirds the sum which would be required to grant efficiency increments to all the personnel of the agency then receiving, or who would receive during the first year of the biennium, the intermediate salary nearest the middle of the salary range established for the respective classification and/or position; provided, however, with the consent of the personnel council, state departments, bureaus, agencies or commissions with twenty-five (25) or less employees may exceed the two-thirds restrictions herein set up. (1949, c. 718, s. 1.)

§ 143-40. Director and council to fix holidays, vacations, hours, sick leave and other matters pertaining to state employment.—The state personnel director, upon the advice and approval of the council, shall fix, determine and establish the hours of labor in each state department, bureau, agency or commission, and is authorized and empowered to make all necessary rules and regulations with respect to holidays, vacations, sick leave or any other type of leave, and any and all other matters having direct relationship to services to be performed and the salaries and wages to be paid therefor, all of which shall be subject to the approval of the governor: Provided, however, that the amount of annual leave granted as a matter of right to each regular state employee

shall not be less than one and one-fourth days per calendar month cumulative to at least thirty days, and that sick leave granted to each state employee shall not be less than ten days for each calendar year, accumulative from year to year. (1949, c. 718, s. 1.)

§ 143-41. Director to determine qualifications of applicants for positions.—The state personnel director, with the advice and approval of the council and governor, shall adopt rules and regulations to the end that applicants for positions in the various state departments, bureaus, agencies, and commissions covered by this article may file applications for state employment with the director, and it shall be the duty of the director to examine into the qualifications of each applicant within a reasonable period of time after the application is filed, and the director shall notify each applicant of the results of such examination in writing and shall certify and shall keep a list of persons so qualified. Said list shall be open to the inspection of the heads of the various departments, bureaus, agencies and commissions of the state, and such heads may from time to time fill positions from such lists. When any position covered by this article has remained unfilled for a period of ten days, it shall be the duty of the department, bureau, agency or commission in which the unfilled position exists to notify the director of the fact, and the director shall list the unfilled position, so long as it shall remain unfilled, on the list which he shall keep posted in his office where it shall be available on demand to any person seeking employment in various state agencies, departments, bureaus or commissions. The list of certified applicants and list of unfilled positions shall be presented to the council for its information at each regular meeting of the council. (1949, c. 718, s. 1.)

§ 143-42. Appeal provided in case of disagreement.—In the event there shall be a disagreement between the state personnel director and the head of any other department, bureau, agency or commission of the state or between the state personnel director and any employee subject to this article because of any ruling of the director upon any question involving such other department, bureau, agency or commission, or any of its positions, employees, or other matter within the scope and purview of this article, then the matters in dispute shall be heard by the council. Any employee or agency head may appeal from the decision of the council and the matter shall be heard by the governor and the decision or action of the governor thereon shall be final. (1949, c. 718, s. 1.)

§ 143-43. Offices of state personnel department; department to employ clerical and necessary assistants.—The board of public buildings and grounds shall provide the state personnel department with adequate offices in the city of Raleigh, North Carolina. The state personnel director shall be charged with the supervision and administration of all activities subject to the jurisdiction and control of the state personnel department and, subject to the approval of the council and governor, said director is hereby authorized to employ clerical and such other assistants as may be deemed necessary and adequate in order to carry out the purpose and intent of this article. For the purpose of establishing and fixing proper and adequate standards, classifications, job descriptions, specifications and salaries for technical, professional and skilled employees and for any other purposes pertinent to this article, the director may, in cooperation with the head of any other state department, bureau, agency or commission, make use of the data, studies and services of any such department, bureau, agency or commission or the technical, professional or special knowledge or services of any employees of such department, bureau, agency or commission. (1949, c. 718, s. 1.)

§ 143-44. Director to determine the qualifications of state employees selected by heads of departments; persons employed on effective date deemed qualified.—All persons employed in any department, bureau, agency or commission of the state government on the effective date of this article shall be deemed qualified for the positions they hold or occupy, provided no person who has held any position for a period of less than six months on the effective date of this article shall be deemed qualified until he shall have completed six months of satisfactory service in such position or shall before that time have been examined and found qualified by the director in accordance with the rules and regulations of the council.

The selection and appointment of all personnel of all of the departments, bureaus, agencies or commissions of the state, shall, as heretofore, be exercised by the head of the department, bureau, agency or commission as to which the employment is to be performed, but, from and after the effective date of this article, such employment shall be subject to the approval of the state personnel director, as to whether such employees so selected meet the standards of qualifications established under this article, and, if such person so selected is found duly qualified according to such standards, the personnel director shall approve the employment if otherwise authorized and permissible under this article. Any employee of the state or any person seeking employment who has been found by the director not to be qualified for the position applied for may appeal the decision of the director to the council at its next regular meeting after he has received notice of disqualification. (1949, c. 718, s. 1.)

§ 143-45. Director to certify copies of reports to state auditor and budget bureau.—The state personnel director shall transmit to the state auditor and the budget bureau copies of his report or reports, or any changes in same, with respect to the various departments, bureaus, agencies and commissions, and the salaries and wages, including increments, for such positions and employees in the several departments, bureaus, agencies and commissions and the same shall be paid out of the appropriations for such purposes and in accordance with the schedule set out in said report or reports or any duly established changes made therein: Provided, however, that when the director of personnel shall have approved any employment or salary increase in any department, bureau or agency of the state government, the certification for payment by the assistant to the

director of the budget, as required by § 143-34.1, shall not be construed as conferring upon or vesting in the assistant to the director of the budget any authority or control over the employment of personnel, salaries, wages, hours of labor, vacations, sick leave, classifications, standards, regulations and reports, matters, things, administration and functions committed and vested in this article to the jurisdiction and control of the state personnel director and council as set forth in this article. (1949, c. 718, s. 1.)

§ 143-46. Exemptions; persons and employees not subject to this article.—The provisions of this article shall not apply to certain persons and employees as follows: Persons employed solely on an hourly basis; public school superintendents; principals and teachers and other public school employees; instructional and research staff of the educational institutions of the state; professional staff of hospitals, asylums, reformatories and correctional institutions of the state; members of boards, bureaus, agencies, commissions, councils and advisory councils, compensated on a per diem basis; constitutional officers of the state and except as to salaries, their chief administrative assistant; officials and employees whose salaries are fixed by the governor, or by the governor and council of state, or by the governor subject to the approval of the council of state, or advisory budget commission, by authority of a specific statute explicitly pertaining to such officials and/or employees; officials and/or employees whose salaries are fixed by the governor subject to the approval of a definitely named officer, agent, bureau, agency or commission of the state by authority of a specific statute explicitly pertaining to such officials and/or employees; officials and/or employees whose salaries are fixed by statute or by virtue of a specific statutory method other than by the method provided by this article explicitly pertaining to such officials and/or employees. In all cases of doubt or where any question arises as to whether or not any person, official or employee is subject to the provisions of this article, the doubt, controversy or question shall be investigated and decided by the state personnel director with the approval of the council and such decision shall be final. Where the approval of any appointment, employment and/or salary is required by statute to be made by the budget bureau or assistant to the director of the budget (by whatever title or name), all such authority and power of approval, in whatever manner or form exercised, is hereby transferred to and vested in the state personnel director, and all such statutes shall be deemed to be amended to such extent. (1949, c. 718, s. 1.)

§ 143-47. Classifications and salaries established prior to effective date of article to remain in force until changed.—All classifications, grades, salaries, wages, hours of work, vacation, sick leave, positions and standards heretofore established by the division of personnel under the budget bureau prior to the effective date of this article shall remain in force and effect until the same are amended, altered, voided or replaced by the state personnel director and the council acting under the authority of this article. (1949, c. 718, s. 1.)

Editor's Note.—This article as rewritten by Session Laws 1949, c. 718, became effective April 1, 1949.

Art. 3. Division of Purchase and Contract.

§ 143-49. Powers and duties of director.

Cross Reference.—As to settlement of affairs of inoperative boards and agencies, see §§ 143-267 to 143-272.

§ 143-59. Rules and regulations covering certain purposes.

(f) Notwithstanding any of the provisions of this article, the director of purchase and contract, with the approval of the advisory budget commission, may follow whatever procedure is deemed necessary to enable the state, its institutions and agencies, to take advantage of the sale of any war surplus material sold by the federal government or its disposal agencies. (1931, c. 261, s. 11; 1945, c. 145.)

Editor's Note.—The 1945 amendment added the above subsection. As the original section was not otherwise changed by the amendment it is not set out.

Art. 4. World War Veterans Loan Administration.

Title I. "World War Veterans Loan Act of 1925."

§ 143-65. Name of title.

Editor's Note.—The War Veterans Loan Administration is now in process of liquidation. See § 165-11.

Art. 7. Inmates of State Institutions to Pay Costs.

§ 143-117. Institutions included.—All persons admitted to the State Hospital at Raleigh, State Hospital at Morganton, State Hospital at Goldsboro, Casswell Training School at Kinston, Stonewall Jackson Training School for Boys at Concord, the State Home and Industrial School for Girls at Samarcand, the East Carolina Training School at Rocky Mount, the Morrison Training School for Negro Boys in Richmond County, the School for the Deaf at Morganton, and the North Carolina Sanatorium for the Treatment of Tuberculosis at Sanatorium, be and they are hereby required to pay the actual cost of their care, treatment, training and maintenance at such institutions. (1925, c. 120, s. 1; 1949, c. 1070.)

Editor's Note.—The 1949 amendment struck out "the School for the Blind and Deaf at Raleigh" from the list of institutions named in this section.

Art. 8. Public Building Contracts.

§ 143-128. Separate specifications for building contracts; responsible contractors.—Every officer, board, department, commission or commissions charged with the duty of preparing specifications or awarding or entering into contract for the erection, construction or altering of buildings for the State, when the entire cost of such work shall exceed fifteen thousand dollars ($15,000.00), must have prepared separate specifications for each of the following branches of work to be performed: 1. Heating and ventilating and accessories. 2. Plumbing and gas fitting and accessories. 3. Electrical installations. 4. Air conditioning, for the purpose of comfort cooling by the lowering of temperature, and accessories. All such specifications must be so drawn as to permit separate and independent bidding upon each of the classes of work enumerated in the above subdivisions. All contracts hereafter awarded by the state or a department, board, commissioner, or officer thereof, for the erection, construction or alteration of buildings, or any part thereof, shall award the re-

spective work specified in the above subdivisions separately to responsible and reliable persons, firms or corporations regularly engaged in their respective line of work. When the estimated cost of work to be performed in any single subdivision is less than one thousand dollars ($1,000.00), the same may be included in one of the several other contracts, irrespective of total project cost.

Each separate contractor shall be directly liable to the state of North Carolina and to the other separate contractors for the full performance of all duties and obligations due respectively under the terms of the separate contracts and in accordance with the plans and specifications, which shall specifically set forth the duties and obligations of each separate contractor. For the purpose of this section, the wording, "separate contractor" is hereby deemed and held to mean any person, firm or corporation who shall enter into a contract with the state for the erection, construction or alteration of any building or buildings. (1925, c. 141, s. 2; 1929, c. 339, s. 2; 1931, c. 46; 1943, c. 387; 1945, c. 851; 1949, c. 1137, s. 1.)

Editor's Note. — The 1945 amendment added the second paragraph. The 1949 amendment substituted "fifteen thousand dollars" for "ten thousand dollars" in the first sentence of the first paragraph and added the last sentence thereto.

For temporary act authorizing the hospitals board of control to construct, alter, remove, etc., buildings upon property at Camp Butner without complying with the provisions of this article, see Session Laws 1949, c. 1230.

§ 143-129. Procedure for letting of public contracts; purchases from federal government by state, counties, etc.

All proposals shall be opened in public and shall be recorded on the minutes of the board or governing body and the award shall be made to the lowest responsible bidder, taking into consideration quality and the time specified in the proposals for the performance of the contract. No proposal shall be considered or accepted by said board or governing body unless at the time of its filing the same shall be accompanied by a deposit with said board or governing body of cash or a certified check on some bank or trust company insured by the federal deposit insurance corporation, in an amount equal to not less than two per cent (2%) of the proposal. This deposit shall be retained if the successful bidder fails to execute the contract within ten days after the award or fails to give satisfactory surety as required herein.

Any board or governing body of the state or of any institution of the state government or of any county, city, town or other subdivision of the state may enter into any contract with the United States of America or any agency thereof for the purchase, lease or other acquisition of any apparatus, supplies, materials or equipment without regard to the provisions of this section which require:

(1) The posting of notices or public advertising for proposals or bids.

(2) The inviting or receiving of competitive bids.

(3) The delivery of purchases before payment.

(4) The posting of deposits or bonds or other sureties.

(5) The execution of written contracts.

The director of the division of purchase and contract, the governing board of any county, city, town or subdivision may designate any office holder or employee of the state, county, city, town or subdivision to enter a bid or bids in its behalf at any sale of apparatus, supplies, materials, equipment or other property owned by the United States of America, or any agency thereof, and may authorize such person to make any partial or down payment or payment in full that may be required by regulations of the United States of America or any agency thereof in connection with such bid or bids. (1931, c. 338, s. 1; 1933, cc. 50, 400, s. 1; 1937, c. 355; 1945, c. 144; 1949, c. 257.)

Local Modification.—Guilford: 1949, c. 440; Transylvania: 1947, c. 828 (temporary); City of Greensboro: 1949, c. 440.

Editor's Note. — The 1945 amendment directed that the last two paragraphs above be added at the end of this section. The 1949 amendment substituted the words "insured by the federal deposit insurance corporation" for the words "authorized to do business in this state" formerly appearing in line twelve of the seventh paragraph, which is the first paragraph set out above. As the rest of the section was not changed it is not set out.

For a brief comment on the 1949 amendment, see 27 N. C. Law Rev. 423.

The purpose of this section is to prevent favoritism, corruption, fraud and imposition in the awarding of public contracts by giving notice to the prospective bidders and thus assuring competition, which in turn guarantees fair play and reasonable prices in contracts involving the expenditure of a substantial amount of public money. Mullen v. Louisburg, 225 N. C. 53, 33 S. E. (2d) 484.

This section applies only to contracts where the bidders have the right to name the price for which they are willing to furnish supplies and materials. It has no application whatever to a contract between a municipality and a public utility, where there can be no competition between bidders because the municipality or the state has the power and authority to fix the price of the service to be rendered or the commodity to be furnished. Muller v. Louisburg, 225 N. C. 53, 33 S. E. (2d) 484.

The terms "apparatus," "materials" and "equipment," used in this section, denote particular types of tangible personal property and could not be construed to include electric current. Mullen v. Louisburg, 225 N. C. 53, 33 S. E. (2d) 484.

The word "supplies" in the section is used in conjunction with the term "apparatus," "materials" and "equipment," and its meaning is confined to property of like kind and nature. Mullen v. Louisburg, 225 N. C. 53, 33 S. E. (2d) 484.

But Contractor May Recover on Quantum Meruit.—Where the work under the contract has been actually done and accepted, the county, city or town is bound on a quantum meruit for the reasonable and just value of the work and labor done and material furnished. Hawkins v. Dallas, 229 N. C. 561, 50 S. E. (2d) 561.

Contract Made in Violation of This Section Is Void.—A contract involving more than $1,000.00 let without advertisement as required by this section is void, and the contractor may not recover on it. Hawkins v. Dallas, 229 N. C. 561, 50 S. E. (2d) 561.

§ 143-131. When counties, cities, towns and other subdivisions may let contracts on informal bids.

Local Modification.—Guilford: 1947, c. 78, s. 3.

§ 143-135. Limitation of application of article.—

This article shall not apply to the state or to subdivisions of the state of North Carolina in the expenditure of public funds where the total cost of any repairs, completed project, building or structure, shall not exceed the sum of fifteen thousand dollars ($15,000.00). (1933, c. 552, ss. 1, 2; 1949, c. 1137, s. 2.)

Local Modification.—For temporary act applicable to Duplin, Johnston, Lincoln, Nash, New Hanover, Swain, Wake and Wayne counties, see Session Laws 1947, c. 1038.

For temporary act applicable to Franklin and Wayne counties, see Session Laws 1949, c. 225.

Editor's Note.—The 1949 amendment rewrote this section.

Art. 9. Building Code.

§ 143-139. Building code council created; powers and duties; application of building code.

Local Modification.—Durham and City of Durham: 1945, c. 463.

Art. 12. Law Enforcement Officers' Benefit and Retirement Fund.

§ 143-166. Law enforcement officers' benefit and retirement fund.

The board of commissioners shall have the authority to formulate and promulgate rules and regulations under which any county, city, town or other subdivision of government in whose behalf any member performs service as a law enforcement officer, or any member, may, and is hereby authorized to, elect to pay into the fund for credit to the individual account of such member, either or both: (1) an amount which, when taken with any additional amount which may be permitted by the board to be paid on behalf of such member, shall not exceed in any year five per cent (5%) of such member's compensation; and (2) a sum not to exceed the value of prior service of such member as determined by the board of commissioners; such amounts so paid shall be accumulated in the individual account of such member at such rate of interest as the board of commissioners may from time to time determine and shall, upon retirement of such member be used to provide such additional benefits as the board of commissioners shall determine on the basis of the tables and rate of interest last adopted by the board of commissioners for this purpose: Provided, however, that the amounts paid under this provision by any county, city, town, or other subdivision of government shall revert to said county, city, town, or other subdivision of government upon the death or withdrawal from the fund of a member for whom such amounts were paid. The sums paid by any county, city, town or other subdivision of government as additional payments are hereby declared to be for a public purpose.

It shall be the duty of the state of North Carolina to finance and contribute, for the benefit of each member employed by the state as a law enforcement officer an amount equal to the value of his prior service and the cost of matching his contribution. Such contribution or financing on the part of the state shall be on a percentage basis and shall be credited to the individual account of such member, and upon the death or withdrawal from the fund of a member such sums credited to that individual member's account shall revert to the general fund or highway fund of the state of North Carolina according to the source of the original appropriation. The board of commissioners are hereby authorized to formulate and promulgate additional rules and regulations for the administration of the amounts herein authorized to be appropriated. There is hereby appropriated from the general fund of the state for those law enforcement officers whose salary is paid out of the general fund, and from the highway fund of the state for those law enforcement officers whose salary is paid out of the highway fund appropriation in such amount as may be necessary to pay the state's share of the cost of the financing of this provision for the biennium 1949-51. Such appropriation shall be made at the same time and manner as other state appropriations and in the sums and amounts as determined by the board of commissioners: Provided, that this provision as to the financing of a member's prior service and the cost of matching contribution on the part of the state of North Carolina shall apply only to those members who are law enforcement officers of the state of North Carolina and its departments, agencies and commissions and who would be eligible for membership in the teachers' and state employees' retirement system provided by chapter 135 of the General Statutes of North Carolina but for the fact that said officers are members of the law enforcement officers' benefit and retirement fund. (1949, c. 1055.)

Editor's Note.—The 1949 amendment directed that the above two paragraphs be added at the end of subsection (i). As the rest of the section was not changed only these two paragraphs are set out.

Policeman Excluded from Local Governmental Employees' Retirement System.—Policeman, who is entitled to the benefits of this section, is not eligible to become a member of the local governmental employees' retirement system, set out in § 128-24(2). Gardner v. Board of Trustees, 226 N. C. 465, 38 S. E. (2d) 314, 315.

Section Not Intended to Compensate Officers Making Arrests.—The additional cost in criminal cases provided by this section is not intended to be used to compensate the officers who make the arrests or participate in the prosecution, but is paid to the state treasurer and by him disbursed for the purposes of the Law Enforcement Officers' Retirement Act. Gardner v. Board of Trustees, 226 N. C. 465, 38 S. E. (2d) 314, 316.

Art. 15. Commission on Interstate Co-Operation.

§ 143-178. Senate members on interstate co-operation.—The president of the senate at each regular session of the general assembly shall designate five members of the senate as senate members of the commission on interstate co-operation. (1937, c. 374, s. 1; 1947, c. 578, s. 1.)

The 1947 amendment rewrote this section.

§ 143-179. House members on interstate co-operation.—The speaker of the house of representatives at each regular session of the general assembly shall designate five members of the house as house members of the commission on interstate co-operation. (1937, c. 374, s. 2; 1947, c. 578, s. 2.)

The 1947 amendment rewrote this section.

§ 143-180. Governor's committee on interstate co-operation.

The governor may, however, in his discretion, appoint one additional member of the said commission who is not an administrative official. (1937, c. 374, s. 3; 1949, c. 1065.)

Editor's Note.—The 1949 amendment added the above sentence at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

§ 143-181. North Carolina commission on interstate co-operation.—There is hereby established the North Carolina commission of interstate co-operation. This commission shall be composed of fifteen regular members, namely:

The five members named by the president of the senate;

The five members of the house designated by the speaker, and

The five members of the governor's committee on interstate co-operation.

The governor, the president of the senate and the speaker of the house of representatives shall

be ex-officio honorary non-voting members of this commission. Said commission shall meet before the adjournment of each regular session of the general assembly in the city of Raleigh and at such meeting organize by the election of a chairman and secretary thereof. (1937, c. 374, s. 4; 1947, c. 578, s. 3.)

Editor's Note.—The 1947 amendment rewrote the last sentence and made other changes.

§ 143-182. Members constituting senate and house council of American Legislators' Association.—The said members of the commission named by the president of the senate and the speaker of the house shall function during the regular sessions of the legislature and also during the interim periods between such sessions; their members shall serve until their successors are designated; and they shall respectively constitute for this state the senate council and house council of the American Legislators' Association. The incumbency of each administrative member of this commission shall extend until the first day of February next following his appointment, and thereafter until his successor is appointed. (1937, c. 374, s. 5; 1947, c. 578, s. 4.)

Editor's Note.—The 1947 amendment struck out the words "standing committee of the senate and the said standing committee of the house of representatives" near the beginning of the section and substituted in lieu thereof the words "members of the commission named by the president of the senate and the speaker of the house."

§ 143-183. Functions and purpose of commission.

Editor's Note.—The word "state" in the sixth line of subsection (2) of this section should read "states."

§ 143-185. Reports to the governor and general assembly; expenses; employment of secretary, etc.

The governor and the council of state are authorized to allocate from the contingency and emergency fund such sums as they shall find proper to provide for the necessary expenses which said commission is authorized to incur, as hereinbefore provided. (937, c. 374, s. 8; 1947, c. 578, s. 5.)

Editor's Note.—The 1947 amendment directed that the above sentence be added at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

Art. 17. State Post-War Reserve Fund.

§ 143-191. Appropriation for fund.

Editor's Note.—As to repeal of this article in so far as it conflicts with §§ 142-50 to 142-54, see note under § 142-50.

Art. 18. Rules and Regulations Filed with Secretary of State.

§ 143-195. Certain state agencies to file administrative regulations or rules of practice with secretary of state; rate, service or tariff schedules, etc., excepted.

For comment on this and the three following sections, see 21 N. C. Law Rev. 328.

Cited in State v. Speizman, 230 N. C. 459, 53 S. E. (2d) 133.

§ 143-198.1. State agencies and boards to file copy of certain administrative rules with clerks of superior courts; clerks to file as official records.—In addition to the requirements hereinbefore made in this article, every agency and administrative board of the state of North Carolina created by statute and authorized to exercise regulatory, administrative, or quasi-judicial functions, shall within ninety days of the ratification of this section file with the clerk of the superior court of each county in North Carolina, a certified indexed copy of all general administrative rules and regulations or rules of practice and procedure, the violation of which would constitute a crime, formulated or adopted by such agency or administrative board for the performance of its functions or for the exercise of its authority, and shall also mail to each member of the general assembly of 1949 a similar certified indexed copy.

In addition to the original statement filed with each clerk of the superior court, as required herein, each such agency or board shall, within fifteen days of the adoption of any additional or amendatory rule or regulation, file with each clerk of the superior court a certified indexed copy of such new or amendatory rule or regulation.

The clerk of the superior court of each county shall file as part of the records of his office all such rules and regulations. (1949, c. 378.)

Editor's Note.—The act inserting this section was ratified on March 17, 1949.

For a brief comment on this section, see 27 N. C. Law Rev. 408.

Art. 19. Roanoke Island Historical Association.

§ 143-199. Association under patronage and control of state.—Roanoke Island Historical Association, Incorporated is hereby permanently placed under the patronage and control of the state. (1945, c. 953, s. 1.)

§ 143-200. Members of board of directors; terms; appointment.—The governing body of said association shall be a board of directors consisting of the governor of the state, the attorney general and the director of the state department of archives and history as ex officio members, and the following twenty-one members: J. Spencer Love, Greensboro; Miles Clark, Elizabeth City; Mrs. Richard J. Reynolds, Winston-Salem; D. Hiden Ramsey, Asheville; Mrs. Charles A. Cannon, Concord; Dr. Fred Hanes, Durham; Mrs. Frank P. Graham, Chapel Hill; Bishop Thomas C. Darst, Wilmington; W. Dorsey Pruden, Edenton; John A. Buchanan, Durham; William B. Rodman, Jr., Washington; J. Melville Broughton, Raleigh; Melvin R. Daniels, Manteo; Paul Green, Chapel Hill; Samuel Selden, Chapel Hill; R. Bruce Etheridge, Manteo; Theodore S. Meekins, Manteo; Roy L. Davis, Manteo; M. K. Fearing, Manteo; A. R. Newsome, Chapel Hill. The members of said board of directors herein named other than the ex officio members, shall serve for a term of two years and until their successors are appointed. Appointments thereafter shall be made by the membership of the association in regular annual meeting or special meeting called for such purpose, and in the event the association through its membership should fail to make such appointments, then the appointments shall be made by the governor of the state. Vacancies occurring on the board of directors shall be filled by the governor of the state. (1945, c. 953, s. 2.)

§ 143-201. By-laws; officers of board.—The said board of directors when organized under the terms of this article shall have authority to adopt by-laws for the organization and said by-laws

shall thereafter be subject to change only by three fifths vote of a quorum of said board of directors; the board of directors shall choose from its membership or from the membership of the association a chairman, a vice chairman, a secretary and a treasurer, which offices in the discretion of the board may be combined in one, and also a historian and a general counsel. The board also in its discretion may choose one or more honorary vice chairmen. (1945, c. 953, s. 3.)

§ 143-202. Exempt from taxation; gifts and donations.—The said association is and shall be an educational and charitable association within the meaning of the laws of the state of North Carolina, and the property and income of such association, real and personal, shall be exempt from all taxation. The said association is authorized and empowered to receive gifts and donations and administer the same for the charitable and educational purposes for which the association is formed and in keeping with the will of the donors, and such gifts and donations to the extent permitted by law shall be exempted from the purpose of income taxes and gift taxes. (1945, c. 953, s. 4.)

§ 143-203. State auditor to make annual audit.—It shall be the duty of the state auditor to make an annual audit of the accounts of the association and make a report thereof to the general assembly at each of its regular sessions. (1945, c. 953, s. 5.)

§ 143-204. Authorized allotment from contingency and emergency fund.—The governor and council of state, in the event state aid is reasonably necessary for the restoration and production of the pageant known and designated as The Lost Colony, are authorized and empowered to allot a sum not exceeding ten thousand dollars ($10,000) a year from the contingency and emergency fund to aid in the restoration and production of said pageant, such allotment, however, to be made only upon evidence submitted to the governor and council of state by the association that during the immediately preceding season of production because of inclement weather or other circumstances or factors beyond the control of the association, the said Lost Colony was operated at a deficit. (1945, c. 953, s. 6.)

Art. 20. Recreation Commission.

§ 143-205. Recreation commission created.—There is hereby created an agency to be known as the North Carolina Recreation commission. (1945, c. 757, s. 1.)

Editor's Note.—Session Laws 1945, c. 757, s. 7, appropriated for the purpose of this article the sum of $7,500.00 for each year of the biennium 1945-1947 out of the general fund of the state.

§ 143-206. Definitions.—(1) "Recreation," for the purposes of this article, is defined to mean those activities which are diversionary in character and which aid in promoting entertainment, pleasure, relaxation, instruction, and other physical, mental, and cultural developments and experiences of a leisure time nature.

(2) "Commission" means the North Carolina recreation commission.

(3) "Committee" means the advisory recreation committee. (1945, c. 757, s. 2.)

§ 143-207. Membership; terms; removal; vacancies; meetings; expenses.—(1) The recreation commission shall consist of seven members, appointed by the governor, and the governor, superintendent of public instruction, commissioner of public welfare and director of the department of conservation and development as members ex officio.

(2) In making appointments to the commission, the governor shall choose persons, in so far as possible, who understand the recreational interests of rural areas, municipalities, private membership groups and commercial enterprises. The commission shall elect, with the approval of the governor, one member to act as chairman. At least one member of the commission shall be a woman, and at least one member shall be a negro. A majority of the commission shall constitute a quorum, but only when at least four of the appointed members are present.

(3) For the initial term of the appointed members of the commission, one shall be appointed for a term of one year, one for a term of two years, one for a term of three years, one for a term of four years, one for a term of five years, and two for a term of six years; and thereafter, the successor of each member shall be appointed for a term of four years and until his successor is appointed and qualified.

(4) Any appointed member of the commission may be removed by the governor.

(5) Vacancies in the commission shall be filled by the governor for the unexpired term.

(6) The commission shall meet quarterly in January, April, July, and October, on a date to be fixed by the chairman. The commission may be convoked at such other times as the governor or chairman may deem necessary.

(7) Members of the commission shall receive reasonable travel and maintenance expenses while attending meetings, but they shall not be reimbursed for travel and maintenance expenses for longer than four days for any one meeting. (1945, c. 757, s. 3.)

§ 143-208. Duties of commission.—It shall be the duty of the commission:

(1) To study and appraise recreational needs of the state and to assemble and disseminate information relative to recreation.

(2) To cooperate in the promotion and organization of local recreational systems for counties, municipalities, townships, and other political subdivisions of the state, and to aid them in designing and laying out recreational areas and facilities, and to advise them in the planning and financing of recreational programs.

(3) To aid in recruiting, training, and placing recreation workers, and promote recreation institutes and conferences.

(4) To establish and promote recreation standards.

(5) To cooperate with state and federal agencies, the recreation advisory committee, private membership groups, and with commercial interests in the promotion of recreational opportunities.

(6) To submit a biennial report of its activities to the governor. (1945, c. 757, s. 4.)

§ 143-209. Powers of commission.—The commission is hereby authorized:

(1) To make rules and regulations for the proper administration of its duties.

(2) To accept any grant of funds made by the United States, or any agency thereof, for the purpose of carrying out any of its functions.

(3) To accept gifts, bequests, devises, and endowments. The funds, if given as an endowment, shall be invested in such securities as designated by the donor, or, if there is no designation, in those in which the state sinking fund may be invested. All such gifts, bequests, devises and all proceeds from such invested endowments, shall be used for carrying out the purposes for which they are made.

(4) To administer all funds available to the commission.

(5) To act jointly, when advisable, with any other state agency, institution, department, board or commission in order to carry out the recreation commission's objectives and responsibilities. No activity of the commission, however, shall be allowed to interfere with the work of any other state agency.

(6) To employ, with the approval of the governor, an executive director, and upon the recommendation of the executive director, such other persons as may be needed to carry out the provisions of this article. The executive director shall act as secretary to the commission. (1945, c. 757, s. 5.)

§ 143-210. Advisory committee.—The governor shall name a recreation advisory committee consisting of thirty members who shall serve for a term of two years. The governor shall name one member to act as chairman of the committee. Vacancies occurring on the committee shall be filled by the governor for the unexpired term.

Members of the committee shall represent, in so far as feasible, all groups and phases of beneficial recreation in the state.

The committee shall meet once each year with the recreation commission at a time and place to be fixed by the governor. Members of the committee shall serve without compensation.

The committee shall act in an advisory capacity to the recreation commission, discuss recreational needs of the state, exchange ideas, and make to the commission recommendations for the advancement of recreational opportunities. (1945, c. 757, s. 6.)

Art. 21. State Stream Sanitation and Conservation Committee.

§ 143-211. Declaration of policy.—It is hereby declared to be the public policy of the state that our water courses shall be prudently utilized in the best interest of the people. (1945, c. 1010, s. 1.)

§ 143-212. Duties of committee.—The activities of the state board of health and the department of conservation and development shall be coordinated through a committee hereby designated as the state stream sanitation and conservation committee. It shall be the duty of this committee, acting through the facilities of the member agencies, to locate and study instances of stream pollution tending to impair their best usage; to determine the nature and circumstances of the pollution; to determine in general detail the technical and economic feasibility of remedying or improving the situtation; and to appraise the streams with respect to present and probable future dominant use, and to make recommendations as to the future course to be followed with regard to stream sanitation. (1945, c. 1010, s. 2.)

§ 143-213. Creation of committee; membership; terms of office and vacancies.—For the purpose of carrying out the provisions of this article, there is hereby created a permanent committee to be known as the state stream sanitation and conservation committee. The committee shall be composed of members appointed by the governor of North Carolina and there shall be appointed as ex officio members the following: The director of the department of conservation and development, the state health officer, the chief engineer of conservation and development, the chief engineer of the state board of health, one member from the engineering staff of the school of public health, university of North Carolina, and one member representing the state planning board. The ex officio members shall serve as long as the committee continues to function. In addition to the ex officio members, there shall be appointed certain members representing the public and industry, as follows: One member representing the pulp paper industry, one member representing the textile industry, three members representing the municipalities, one member representing agriculture, one member representing industry at large, one member representing the tanning industry, one member representing the clay industry, and one member representing the fertilizer industry. The terms of office of the members representing the public and industry shall be so arranged and fixed by the governor that the terms of two members shall expire each year. Thereafter, in each year, the governor shall in like manner appoint two persons to fill the vacancies thus created. All vacancies occurring in the entire membership of the committee by reason of death, resignation or other than the expiration of the term of office shall be filled by the governor, and some person shall be appointed from the industry or agency represented to fill said vacancy. Appointments to fill vacancies where there is a fixed term of office shall be for the unexpired term of the member replaced. The members of the stream sanitation and conservation committee, appointed by the governor, shall each receive ten dollars ($10.00) per day, including necessary time spent in traveling to and from their places of residence within the state to any place of meeting or while traveling on official business, and in addition thereto shall receive mileage at the rate of six cents (6c) per mile in going to and from any place of meeting or while traveling on official business. (1945, c. 1010, s. 3; 1947, c. 786, s. 1.)

Editor's Note.—The 1947 amendment added the last sentence.

§ 143-214. Organization of committee.—The committee shall within thirty days after its appointment meet and organize and shall elect a chairman and secretary, and shall adopt its own rules and procedure to be followed in carrying out the duties of the committee. (1945, c. 1010, s. 4.)

§ 143-215. Cooperation with other agencies.—In the interest of efficient use of personnel, and facili-

ties in execution of surveys, studies, and research, the committee is authorized to cooperate with technical divisions of state institutions, and with municipalities, industries, federal agencies, adjoining states, and others. (1945, c. 1010, s. 5.)

§ 143-215.1. Powers of committee.—The state stream sanitation and conservation committee shall have the authority to employ clerical, technical and professional personnel with such qualifications as the committee may prescribe in accordance with the state personnel regulations and budgetary laws and shall have the authority to pay such personnel from any appropriations made to the committee or from any appropriations made to any other agency of the state for the benefit of the committee. The state stream sanitation and conservation committee shall have the power and authority to establish any and all necessary standards, regulations and procedures for the management of its affairs within the scope of the duties and powers of the committee. The state stream sanitation and conservation committee is hereby authorized and empowered to act as an agency of the state of North Carolina, or to act in conjunction with any other agency of the state of North Carolina, for the purpose of setting up and administering any state-wide plan relating to stream conservation, sanitation and stream pollution which is now or may be required in order to comply with any federal law and in order to receive and administer any funds which may be provided by an act of congress for such a purpose; and said committee, as such agency of the state of North Carolina, or acting in conjunction with any other agency of the state of North Carolina, shall have the right in order to comply with federal regulations only to promulgate such state-wide plans or such other plans and regulations as may be found desirable and necessary in order to meet such requirements and receive the benefits of any federal legislation with regard thereto. The said committee, either by itself or in conjunction with any other agency of the state of North Carolina, is authorized to receive and administer any funds which may be appropriated by any act of congress for stream sanitation, control of stream pollution, stream conservation or any other objectives related thereto, which may at any time in the future become available for such purposes; and in connection therewith, the committee is authorized to adopt such rules and regulations as may be necessary, together with such suitable standards as may be proper, and fully cooperate with any federal agency in the use of any funds provided by the federal government for the purposes hereinbefore mentioned and at all times to make such reports and give such information to any proper federal agency as may be required. (1947, c. 786, s. 2.)

Art. 22. State Ports Authority.

§ 143-216. Creation of authority; membership.—The North Carolina state ports authority is hereby created, consisting of and governed by a board of nine members, said North Carolina state ports authority being hereinafter for convenience styled the authority. The director of the department of conservation and development shall be ex officio a member of the said board. The governor shall apoint the other members of said board and the membership thereof shall be selected from the state at large, so as to fairly represent each section of the state and all of the business, agricultural and industrial interests of the state. The terms of office of the members of the board appointed on account of residence in Carteret, New Hanover and Brunswick counties shall terminate on the effective date of this section, and the governor shall appoint their successors for the unexpired terms held by them. The terms of office of the other members of the board shall continue until the expiration of their terms for which they were appointed. The one additional member of the board shall be appointed by the governor for a term of six years from and after the first day of May, 1949. Upon the termination of the term of office of each member their successors shall be appointed for a term of six years and until their successors shall have been appointed and qualified. In the event of a vacancy, however caused, the successor shall be appointed by the governor for the unexpired term. The board shall elect one of their number as chairman, one as vice chairman and shall also elect a secretary and a treasurer who may not necessarily be a member of the authority. The board shall meet upon the call of its chairman and a majority of its members shall constitute a quorum for the transaction of its business. The members of the authority shall not be entitled to compensation for their services but shall be reimbursed for their actual expenses necessarily incurred in the performance of their duties. (1945, c. 1097, s. 1; 1949, c. 892, s. 1.)

Editor's Note.—The 1949 amendment, effective April 11, 1949, rewrote this section.

§ 143-217. Purposes of authority.—Through the authority hereinbefore created, the state of North Carolina may engage in promoting, developing, constructing, equipping, maintaining and operating the harbors and seaports within the state, or within the jurisdiction of the state, and works of internal improvements incident thereto, including the acquisition or construction, maintenance and operation at such seaports or harbors of watercraft, terminal railroad and facilities and highways and bridges thereon or essential for the proper operation thereof. Said authority is created as an instrumentality of the state of North Carolina for the accomplishment of the following general purposes:

A. To develop and improve the harbors or seaports at Wilmington, Morehead City and Southport, North Carolina, and such other places as they may deem feasible for the more expeditious and efficient handling of waterborne commerce from and to any part of the state of North Carolina and other states and foreign countries.

B. To acquire, construct, equip, maintain, develop and improve the port facilities at said ports and to improve such portions of the waterways thereat as are within the jurisdiction of the federal government.

C. To foster and stimulate the shipment of freight and commerce through said ports, whether originating within or without the state of North Carolina, including the investigation and handling of matters pertaining to all transportation rates and rate structures affecting the same.

D. To cooperate with the United States of America and any agency, department, corporation or instrumentality thereof in the maintenance, development, improvement and use of said harbors and seaports in connection with and in furtherance of the war operations and needs of the United States.

E. To accept funds from any of said counties or cities wherein said ports are located and to use the same in such manner, within the purposes of said authority, as shall be stipulated by the said county or city, and to act as agent or instrumentality, of any of said counties or cities in any matter coming within the general purposes of said authority.

F. To act as agent for the United States of America or any agency, department, corporation or instrumentality thereof, in any matter coming within the purposes or powers of the authority.

G. And in general to do and perform any act or function which may tend to or be useful toward the development and improvement of the said harbors and seaports of the state of North Carolina, and to increase the movement of water-borne commerce, foreign and domestic, through said harbors and seaports.

The enumeration of the above purposes shall not limit or circumscribe the broad objective of developing to the utmost the port possibilities of the state of North Carolina. (1945, c. 1097, s. 2.)

§ 143-218. Powers of authority.—In order to enable it to carry out the purposes of this article, the said authority shall:

A. Have the powers of a body corporate, including the power to sue and be sued, to make contracts, and to adopt and use a common seal and to alter the same as may be deemed expedient.

Have the authority to make all necessary contracts and arrangements with other port authorities of this and other states for the interchange of business, and for such other purposes as will facilitate and increase the business of the North Carolina state ports authority.

B. Be authorized and empowered to rent, lease, buy, own, acquire, mortgage, otherwise encumber, and dispose of such property, real or personal, as said authority may deem proper to carry out the purposes and provisions of this article, all or any of them.

C. Be authorized and empowered to acquire, construct, maintain, equip and operate any wharves, docks, piers, quays, elevators, compresses, refrigeration storage plants, warehouses and other structures, and any and all facilities needful for the convenient use of the same in the aid of commerce, including the dredging of approaches thereto, and the construction of belt line roads and highways and bridges and causeways thereon, and other bridges and causeways necessary or useful in connection therewith, and shipyards, shipping facilities, and transportation facilities incident thereto and useful or convenient for the use thereof, including terminal railroads.

D. Appoint an executive director for the said ports authority to serve at the pleasure of the board and, with the approval of the governor, to fix his compensation; appoint and employ and dismiss at pleasure, such employees as may be selected by the authority board, and to fix and pay the compensation thereof. The governing board of said ports authority shall annually appoint an executive committee of three members of the board, which executive committee shall be vested with authority to do all acts which might be performed by the whole board, provided the board has not theretofore acted upon such matters. The members of the said executive committee shall serve until their successors are duly appointed.

E. Establish an office for the transaction of its business at such place or places as, in the opinion of the authority, shall be advisable or necessary in carrying out the purposes of this article.

F. Be authorized and empowered to create and operate such agencies and departments as said board may deem necessary or useful for the furtherance of any of the purposes of this article.

G. Be authorized and empowered to pay all necessary costs and expenses involved in and incident to the formation and organization of said authority, and incident to the administration and operation thereof, and to pay all other costs and expenses reasonably necessary or expedient in carrying out and accomplishing the purposes of this article.

H. Be authorized and empowered to apply for and accept loans and grants of money from any federal agency or the state of North Carolina or any political subdivision thereof for any and all of the purposes authorized in this article, and to expend the same in accordance with the directions and requirements attached thereto, or imposed thereon by any such federal agency, the state of North Carolina, or any political subdivision thereof, and to give such evidences of indebtedness as shall be required by any such federal agency, provided, however, that no indebtedness of any kind incurred or created by the authority shall constitute an indebtedness of the state of North Carolina, or any political subdivisions thereof, and no such indebtedness shall involve or be secured by the faith, credit or taxing power of the state of North Carolina, or any political subdivision thereof.

I. Be authorized and empowered to act as agent for the United States of America, or any agency, department, corporation, or instrumentality thereof, in any matter coming within the purposes or powers of the authority.

J. Have power to adopt, alter or repeal its own bylaws, rules and regulations governing the manner in which its business may be transacted and in which the power granted to it may be enjoyed, and may provide for the appointment of such committees, and the functions thereof, as the authority may deem necessary or expedient in facilitating its business.

K. Be authorized and empowered to do any and all other acts and things in this article authorized or required to be done, whether or not included in the general powers in this section mentioned; and

L. Be authorized and empowered to do any and all things necessary to accomplish the purposes of this article: Provided, that said authority shall not engage in shipbuilding.

The property of the authority shall not be subject to any taxes or assessments thereon. (1945, c. 1097, s. 3; 1949, c. 892, s. 2.)

Editor's Note.—The 1949 amendment added the second paragraph to subsection A and rewrote subsection D.

§ 143-219. Issuance of bonds.—As a means of raising the funds needed from time to time in the acquisition, construction, equipment, maintenance and operation of any facility, building, structure, terminal railroad or any other matter or thing which the authority is herein authorized to acquire, construct, equip, maintain, or operate, all or any of them, the said authority is hereby authorized at one time or from time to time to issue negotiable revenue bonds of the authority. The principal and interest of such revenue bonds shall be payable solely from the revenue to be derived from the operation of all or any part of its properties and facilities.

(a) A pledge of the net revenues derived from the operation of said properties and facilities, all or any of them, shall be made to secure the payment of said bonds as and when they mature.

(b) Revenue bonds issued under the provisions of this article shall not be deemed to constitute a debt of the state of North Carolina or a pledge of the faith and credit of the state. The issuance of such revenue bonds shall not directly or indirectly or contingently obligate the state to levy or to pledge any form of taxation whatever therefor or to make any appropriation for their payment.

(c) Such bonds and the income thereof shall be exempt from all taxation within the state. (1945, c. 1097, s. 4.)

As to State Ports Bond Act of 1949, see Session Laws 1949, c. 820.

§ 143-220. Power of eminent domain.—For the acquiring of rights of way and property necessary for the construction of terminal railroads and structures, including railroad crossings, airports, seaplane bases, naval bases, wharves, piers, ships, docks, quays, elevators, compresses, refrigerator storage plants, warehouses and other riparian and littoral terminals and structures and approaches thereto and transportation facilities needful for the convenient use of same, and belt line roads and highways and causeways and bridges and other bridges and causeways, the authority shall have the right and power to acquire the same by purchase, by negotiation, or by condemnation, and should it elect to exercise the right of eminent domain, condemnation proceedings shall be maintained by and in the name of the authority, and it may proceed in the manner provided by the general laws of the state of North Carolina for the procedure by any county, municipality or authority organized under the laws of this state, or by the North Carolina state highway department, or by railroad corporations, or in any other manner provided by law, as the authority may, in its discretion, elect. The power of eminent domain shall not apply to property of persons, state agency or corporations already devoted to public use. (1945, c. 1097, s. 5.)

§ 143-221. Exchange of property; removal of buildings, etc.—The authority may exchange any property or properties acquired under the authority of this chapter for other property, or properties usable in carrying out the powers hereby conferred, and also may remove from lands needed for its purposes and reconstruct on other locations, buildings, terminals, railroads, or other structures, upon the payment of just compensation, if in its judgment, it is necessary or expedient so to do in order to carry out any of its plans for port development, under the authorization of this article. (1945, c. 1097, s. 6.)

§ 143-222. Dealing with federal agencies.—The authority board is authorized to assign, transfer, lease, convey, grant or donate to the United States of America, or to the appropriate agency or department thereof, any or all of the property of the authority, for the use by such grantee for any purpose included within the general purposes of this article, as stated in § 143-217, such assignment, transfer, lease, conveyance, grant or donation to be upon such terms as the authority board may deem advisable. In the event the United States of America should decide to undertake the acquisition, construction, equipment, maintenance or operation of the airports, seaplane bases, naval bases, wharves, piers, ships, refrigerator storage plants, warehouses, elevators, compresses, docks, shipyards, shipping and transportation facilities before referred to, including terminal railroads, roads, highways, causeways, or bridges and should itself decide to acquire the lands and properties necessarily needed in connection therewith by condemnation or otherwise, the authority board is further authorized to transfer and pay over to the United States of America or to the appropriate agency or department thereof, such of the moneys belonging to the authority board as may be found needed or reasonably required by said United States of America to meet and pay the amount of judgments or condemnation, including costs, if any be taxed thereon, as may from time to time be rendered against the United States of America, or its appropriate agency, or as may be reasonably necessary to permit and allow said United States of America, or its appropriate agency, to acquire and become possessed of such lands and properties as are reasonably required for the construction and use of said facilities before referred to. (1945, c. 1097, s. 7.)

§ 143-223. Terminal railroads.—The authority shall have the power and authority to acquire, own, lease, locate, install, construct, equip, hold, maintain, control and operate at harbors and seaports a line of terminal railroads with necessary sidings, turn outs, spurs, branches, switches, yard tracks, bridges, trestles, and causeways and in connection therewith or appurtenant thereto shall have the further right to lease, install, construct, acquire, own, maintain, control and use any and every kind or character of motive power and conveyances or appliances necessary or proper to carry passengers, goods, wares, and merchandise over, along or upon the track of such railroad or other conveyances. And the authority shall have the right and authority to make agreements as to scale of wages, seniority, and working conditions with locomotive engineers, locomotive firemen, switchmen and switch engine foremen and hostlers engaged in the operation of the terminal railroads provided for in this section, and the service and equipment pertinent thereto. And should the said department exercise the authority herein given, then in such event it shall be the duty of the said department to make such agreements with said employees hereinabove specified, in accordance with the act of congress known as the Railroad Labor Act (U.S.C. Title 45, sections

151-163) as amended or as hereafter amended to the end that the same agreements as to seniority and working conditions will obtain as to said employees and the standard rate of pay be provided, as are in force relative to like employees of interstate railroads operating in the same territory with terminal railroads authorized hereby. The authority shall have the right and authority with its terminal railroads to connect with or cross any other railroad upon payment of just compensation and to receive, deliver to and transport the freight, passengers, and cars of common carrier railroads as though it were an ordinary common carrier. (1945, c. 1097, s. 8.)

§ 143-224. Jurisdiction of the authority.—The jurisdiction of the authority in any of said harbors or seaports within the state shall extend over the waters and shores of such harbors or seaports and over that part of all tributary streams flowing into such harbors or seaports in which the tide ebbs and flows, and shall extend to the outer edge of the outer bar at such harbors or seaports. (1945, c. 1097, s. 9.)

§ 143-225. Treasurer of the authority.—The authority shall select one of its members to serve as its treasurer. The authority shall require a surety bond of such appointee in such amount as the authority may fix, and the premium or premiums thereon shall be paid by said authority as a necessary expense of said authority. (1945, c. 1097, s. 10.)

§ 143-226. Deposit and disbursement of funds.—All authority funds shall be deposited in a bank or banks to be designated by the authority. Funds of the authority shall be paid out only upon warrants signed by the treasurer of the authority and countersigned by the chairman or the acting chairman. No warrants shall be drawn or issued disbursing any of the funds of the authority except for a purpose authorized by this article and only when the account of expenditure for which the same is to be given in payment has been audited and approved by the authority. Any and all net revenues or earnings not necessary or desirable for the operation of its business shall be held subject to the further action of the general assembly. (1945, c. 1097, s. 11.)

§ 143-227. Publication of financial statement.—At least once in each year the authority shall publish once in some newspaper published in Wake county, North Carolina, a complete detailed statement of all moneys received and disbursed by the authority during the preceding year. Such statement shall also show the several sources from which funds were received, and the balance on hand at the time of publishing the statement, and shall show the complete financial condition of the authority. (1945, c. 1097, s. 12.)

§ 143-228. Liberal construction of article.—It is intended that the provisions of this article shall be liberally construed to accomplish the purposes provided for, or intended to be provided for, herein, and where strict construction would result in the defeat of the accomplishment of any of the acts authorized herein, and a liberal construction would permit or assist in the accomplishment thereof, the liberal construction shall be chosen. (1945, c. 1097, s. 13.)

Art. 23. Armory Commission.

§ 143-229. Definitions.—The terms used in this article mean:

(a) Commission: The armory commission created by this article.

(b) Unit: Any national guard unit active or inactive or state guard unit or other organized military unit of which the governor is commander-in-chief.

(c) Funds: Any funds appropriated by any municipality, county or the United States of America and made available for the purpose of acquiring armory sites or constructing or repairing any armory, warehouse, or other facility for the use of any unit or for any other purpose in connection with the housing, training, instruction or promotion of interest of any unit. It shall also include funds which may be donated for the benefit, directly or indirectly, of any unit.

(d) Armory: Any building and/or land suitable for armory purposes with area adjacent thereto, and any building and/or land suitable for warehousing, motor parking, instruction, training, or any other use necessary for any unit.

(e) Armory Site: Any land suitable for the construction of an armory as defined in (d) above, with the adjacent area thereto necessary for motor parking, instruction and training of any unit.

(f) Facilities: Furniture, equipment, warehouses, motor sheds, target ranges and any other adjunct necessary to administration, instruction and training of any unit.

(g) Municipality: Any incorporated city or town and any unincorporated city or town. (1947, c. 1010, s. 1.)

§ 143-230. Composition of commission.—The governor of the state of North Carolina, the attorney general of North Carolina, the adjutant general of North Carolina, together with two federally recognized officers on the active list of the North Carolina national guard to be appointed by the governor and to serve at the pleasure of the governor, shall constitute the North Carolina armory commission. The governor shall be its chairman and the adjutant general shall be its secretary. (1947, c. 1010, s. 2.)

§ 143-231. Location of principal office; service without pay; travel expenses; meetings and quorum.—The commission above named shall have its principal office in Raleigh. The members shall serve without compensation and shall be allowed their reasonable expense incurred in attending meetings of the commission or while traveling under orders for the performance of duty in connection with the business of the commission. Such expense shall be payable out of any funds available to the commission or, if the governor so directs, out of the appropriation for the adjutant general's department. The commission shall hold regular or special meetings at Raleigh or other designated places at the direction and on call of the governor, after reasonable notice. A majority of the members shall constitute a quorum for the consideration of business. (1947, c. 1010, s. 3.)

§ 143-232. Authority to foster development of armories and facilities.—The commission is authorized and empowered to foster the development in North Carolina of adequate armories and other necessary facilities for the proper housing,

instruction, training and administration of all units and facilities necessary for the proper protection, care, maintenance, repair, issue and up-keep of public and military property issued to or for the use of any unit. (1947, c. 1010, s. 4.)

§ 143-233. Powers of commission specified.—The commission is further authorized and empowered:

(a) To act as an agency of the state of North Carolina for the purpose of setting up and administering any state-wide plan for the acquisition of armories and armory sites, for the construction and maintenance of armories and for providing facilities which are now or may be necessary in order to comply with any federal law and in order to receive, administer and disburse any funds which may be provided by act of congress for such purpose.

(b) As such agency of the state of North Carolina, to promulgate state-wide plans for the acquisition of armories and armory sites, for the construction and maintenance of armories and such other facilities as may be found desirable or necessary to meet the requirements and receive the benefits of any federal legislation with respect thereto.

(c) To receive and administer any funds which may be appropriated by any act of congress or otherwise for the acquisition of armories and armory sites, for the construction and maintenance of armories and for providing facilities, which may at any time become available for such purposes.

(d) To receive and administer any other funds which may be available in furtherance of any activity in which the commission is authorized and empowered to engage under the provisions of this article.

(e) To adopt such rules and regulations as may be necessary to carry out the intent and purpose of this article. (1947, c. 1010, s. 5.)

§ 143-234. Power to acquire land, make contracts, etc.—In furtherance of the duties, powers and authority given herein, the commission is authorized and empowered to accept and hold title to real property in the name of the state of North Carolina, and to engage in contracts and do any and all things necessary to carry out any state-wide program for the acquisition of armories and armory sites, for the construction and maintenance of armories and to provide facilities which may be considered by it as necessary for any unit and which may be authorized by act of congress or otherwise. (1947, c. 1010, s. 6.)

§ 143-235. Counties and municipalities may lease, convey or acquire property for use as armory.—Every municipality and county of the state of North Carolina is hereby authorized and empowered to lease or convey by deed to the state of North Carolina: (1) any existing armory and the land adjacent thereto; (2) any real property suitable for the construction of an armory, warehouse or other facility; and (3) any real property suitable for use in the administration, instruction and training of any unit. Every municipality and county is further authorized and empowered to acquire any real property which may be suitable for use as an armory or for the construction of an armory thereon, or for any other purpose of a unit. Contracting of an indebtedness and expenditure of public funds by any municipality or county to comply with the provisions of this article are hereby declared to be a necessary expense and for a public purpose. (1947, c. 1010, s. 7; 1949, c. 1066, s. 1.)

Editor's Note.—The 1949 amendment struck out the words "hereafter acquired" formerly appearing after the word "any" in line five.

§ 143-235.1. Prior conveyances validated.—All conveyances of real property heretofore made by any municipality or county of the state of North Carolina to the state of North Carolina for armory purposes are hereby validated and ratified in every respect. (1949, c. 1066, s. 2.)

Section 4 of the act from which this section was codified made it effective from and after its ratification, which took place on April 20, 1949.

§ 143-236. County and municipal appropriations for benefit of military units.—Every municipality and county is hereby authorized and empowered to appropriate for the benefit of any unit or units such amounts of public funds from year to year as the governing body of such municipality or county may deem wise, patriotic and expedient; and is further authorized, either alone or in connection with others, to provide heat, light, water, telephone service and/or other costs of operation and maintenance of any armory. (1947, c. 1010, s. 8.)

Art. 24. Wildlife Resources Commission.

§ 143-237. Title.—This article shall be known and may be cited as the North Carolina Wildlife Resources Law. (1947, c. 263, s. 1.)

§ 143-238. Definitions.—As used in this article unless the context clearly requires otherwise:

(1) The word "commission" shall mean the North Carolina wildlife resources commission.

(2) The word "director" shall mean the executive director of the North Carolina wildlife resources commission.

(3) The terms "wildlife resources" and "wildlife" shall mean and include game birds and other game animals, game and fresh-water fishes, fur bearing animals, song and insect-eating birds, non-game mammals and birds, and all other naturally wild aquatic and terrestrial animals, except those species of fish and other wild aquatic animals which shall come under the classification of commercial fisheries. (1947, c. 263, s. 2.)

§ 143-239. Statement of purpose.—The purpose of this article is to create a separate State agency to be known as the North Carolina wildlife resources commission, the function, purpose, and duty of which shall be to manage, restore, develop, cultivate, conserve, protect, and regulate the wildlife resources of the state of North Carolina, and to administer the laws relating to game, game and fresh-water fishes, and other wildlife exclusive of commercial fisheries, enacted by the general assembly to the end that there may be provided a sound, constructive, comprehensive, continuing, and economical game, game fish, and wildlife program directed by qualified, competent, and representative citizens, who shall have knowledge of or training in the protection, restoration, proper use and management of wildlife resources. (1947, c. 263, s. 3.)

§ 143-240. Creation of wildlife resources commission; districts; qualifications of members.—There is hereby created a commission to be known as the North Carolina wildlife resources commission. The commission shall consist of nine citizens of North Carolina, who shall be competent and qualified as herein provided, and who shall be appointed by the governor. One and only one of the commission members shall be appointed from each of the following geographical districts:

First district to be composed of the following counties:

Bertie, Camden, Chowan, Currituck, Dare, Gates, Hertford, Hyde, Martin, Pasquotank, Perquimans, Tyrrell, Washington.

Second district to be composed of the following counties:

Beaufort, Carteret, Craven, Duplin, Greene, Jones, Lenoir, Onslow, Pamlico, Pender, Pitt.

Third district to be composed of the following counties:

Edgecombe, Franklin, Halifax, Johnston, Nash, Northampton, Vance, Wake, Warren, Wayne, Wilson.

Fourth district to be composed of the following counties:

Bladen, Brunswick, Columbus, Cumberland, Harnett, Hoke, New Hanover, Robeson, Sampson, Scotland.

Fifth district to be composed of the following counties:

Alamance, Caswell, Chatham, Durham, Granville, Guilford, Lee, Orange, Person, Randolph, Rockingham.

Sixth district to be composed of the following counties:

Anson, Cabarrus, Davidson, Mecklenburg, Moore, Montgomery, Richmond, Rowan, Stanly, Union.

Seventh district to be composed of the following counties:

Alexander, Alleghany, Ashe, Davie, Forsyth, Iredell, Stokes, Surry, Watauga, Wilkes, Yadkin.

Eighth district to be composed of the following counties:

Avery, Burke, Caldwell, Catawba, Cleveland, Gaston, Lincoln, McDowell, Mitchell, Rutherford, Yancey.

Ninth district to be composed of the following counties:

Buncombe, Cherokee, Clay, Graham, Haywood, Henderson, Jackson, Macon, Madison, Polk, Swain, Transylvania.

Each member of the commission shall be an experienced hunter, fisherman, farmer, or biologist, who shall be generally informed on wildlife conservation and restoration problems. (1947, c. 263, s. 4.)

§ 143-241. Appointment of commission members.—After passage of this article and on or before the first day of July, 1947, the governor shall appoint the members of the commission as follows:

Three members whose terms shall expire on the fourth Tuesday of January, 1949; three members whose terms shall expire on the fourth Tuesday of January, 1951; three members whose terms shall expire on the fourth Tuesday of January, 1953; as the said terms expire, and thereafter, all regular appointments to the commission shall be for terms of 6 years each, provided that any member of the commission appointed pursuant to this section may be removed by the governor for cause. (1947, c. 263, s. 5.)

§ 143-242. Vacancies by death, resignation, removal, or otherwise.—Vacancies in the commission resulting from death, resignation, removal, or from any other cause, shall be filled by appointment by the governor of a competent person for the unexpired term. (1947, c. 263, s. 6.)

§ 143-243. Organization of the commission; election of officers.—The commission shall hold at least two meetings annually in the city of Raleigh, one in January and one in July, and five members of the commission shall constitute a quorum for the transaction of business. Additional meetings may be held at such other times and places within the state as may be deemed necessary for the efficient transaction of the business of the commission. The commission may hold additional or special meetings at any time at the call of the chairman or on call of any three members of the commission. The commission shall determine its own organization and methods of procedure in accordance with the provisions of this article, and shall have an official seal, which shall be judicially noticed. At the first meeting of the commission, which shall be held in the city of Raleigh on or before the first day of July, 1947, it shall elect one of its members as chairman and one of its members as vice chairman; thereafter, at the meeting held in January, 1948, and annually thereafter, the commission shall elect one of its members as chairman and one of its members as vice chairman; such officers to hold office for a period of one year. (1947, c. 263, s. 7.)

§ 143-244. Location of offices.—The board of public buildings and grounds shall provide the commission with offices in the city of Raleigh, North Carolina. (1947, c. 263, s. 8.)

§ 143-245. Compensation of commissioners.—The members of the commission shall receive not more than ten dollars ($10.00) per diem and actual travel expenses while in attendance of meetings of the commission or engaged in the business of the commission; all travel expenses shall be paid in accordance with the provisions of the Executive Budget Act, article 1, chapter 143 of the General Statutes of North Carolina. (1947, c. 263, s. 9.)

§ 143-246. Executive director; appointment, qualifications, duties, oath of office, and bond.—The North Carolina wildlife resources commission as soon as practicable after its organization shall select and appoint a competent person qualified as hereinafter set forth as executive director of the North Carolina wildlife resources commission. The executive director shall be charged with the supervision of all activities under the jurisdiction of the commission and shall serve as the chief administrative officer of the said commission. Subject to the approval of the commission and the director of the budget, he is hereby authorized to employ such clerical and other assistants as may be deemed necessary. The person selected as executive director shall have had training and experience in conservation, protection and management of wildlife resources. The salary of such director shall be fixed by the governor

vith the approval of the commission, and said irector shall be allowed actual expenses incurred vhile on official duties away from resident headuarters; said salary and expenses to be paid from he wildlife resources fund subject to the proisions of the Executive Budget Act. The term f office of the executive director shall be at the leasure of the commission. Before entering upon he duties of his office, the executive director shall ake the oath of office as prescribed for public fficials and shall execute and deposit with the tate treasurer a bond in the sum of ten thousand ollars ($10,000.00), to be approved by the state reasurer, said bond to be conditioned upon the aithful performance of his duties of office. The aid executive director shall be clothed and vested vith all powers, duties, and responsibilities herebfore exercised by the commissioner of game and nland fisheries relating to wildlife resources. (1947, . 263, s. 10.)

§ 143-247. Transfer of powers, duties, jurisdiction, and responsibilities.—All duties, powers, urisdiction, and responsibilities now vested by tatute in and heretofore exercised by the departnent of conservation and development, the board f conservation and development, the director of onservation and development, the division of ame and inland fisheries, the commissioner of ame and inland fisheries, or any predecessor rganization, board, commission, commissioner r official relating to or pertaining to the wildlife esources of North Carolina, exclusive of commerial fish and fisheries, are hereby transferred to nd vested by law in the North Carolina wildlife esources commission hereby created, subject to ne provisions of this article. The powers, duties, urisdiction, and responsibilities hereby transferred hall be vested in the commission immediately pon its organization under the provisions of this rticle. Provided however, that no provision of nis article shall be construed as transferring to r conferring upon the North Carolina wildlife esources commission, herein created, jurisdicion over the administration of any laws regulting the pollution of streams or public waters in Jorth Carolina. (1947, c. 263, s. 11.)

§ 143-248. Transfer of lands, buildings, records, quipment, and other properties.—There is hereby ransferred to the North Carolina wildlife reources commission all lands, buildings, strucures, records, reports, equipment, vehicles, supplies, materials, and other properties, and the ossession and use thereof, which have heretobre been acquired or obtained and now remain n the possession of, or which are now and herebfore have been used or intended for use by the epartment of conservation and development, the irector of conservation and development, the ivision of game and inland fisheries, and the ommission of game and inland fisheries, and any redecessor organization or division or official of ither, for the purpose of protecting, propagating, nd developing, game fur bearing animals, game sh, inland fisheries, and all other wildlife reources, exclusive of commercial fish or fisheries, vhich heretofore have been used or held by them n connection with any program conducted for aid purposes, whether said lands or properties vere acquired, purchased, or obtained by deed, gift, grant, contract, or otherwise; the said lands and other properties hereby transferred, subject to the limitations hereinafter set forth to the said wildlife resources commission shall be held and used by it subject to the provisions of this article and other provisions of law in furtherance of the intents, purposes, and provisions of this article and other provisions of law in such manner and for such purposes as may be determined by the commission. In the event that there shall arise any conflict in the transfer of any properties or functions as herein provided, the governor of the state is hereby authorized and empowered to issue such executive order, or orders, as may be necessary clarifying and making certain the issue, or issues, thus arising. Provided, further, nothing herein contained shall be construed to transfer any of the state parks or state forests to the North Carolina wildlife resources commission. Provided, further, title to the property transferred by virtue of the provisions of this article shall be held by the state of North Carolina for the use and benefit of the North Carolina wildlife resources commission and the use, control and sale of any of such property shall be governed by the general law of the state affecting such matters. (1947, c. 263, s. 12.)

§ 143-249. Transfer of personnel.—Upon the effective date of this article the division of game and inland fisheries of the North Carolina department of conservation and development shall cease to exist and all employees of said division shall continue as employees of the commission at their option or until further action by the commission. (1947, c. 263, s. 13.)

§ 143-250. Wildlife resources fund.—All monies in the game and fish fund or any similar state fund when this article becomes effective shall be credited forthwith to a special fund in the office of the state treasurer, and the state treasurer shall deposit all such monies in said special fund, which shall be known as the wildlife resources fund.

All unexpended appropriations made to the department of conservation and development, the board of conservation and development, the division of game and inland fisheries or to any other state agency for any purpose pertaining to wildlife and wildlife resources, exclusive of commercial fish and fisheries, shall also be transferred to the wildlife resources fund.

On and after the effective date of this article all monies derived from hunting, fishing, trapping, and related license fees, exclusive of commercial fishing license fees, and all funds thereafter received from whatever sources shall be deposited to the credit of the wildlife resources fund and made available to the commission until expended subject to the provisions of this article. The wildlife resources fund herein created shall be subject to the provisions of the Executive Budget Act, chapter 143, article 1 of the General Statutes of North Carolina as amended, and the provisions of the Personnel Act, chapter 143, article 2 of the General Statutes of North Carolina as amended.

All monies credited to the wildlife resources fund shall be made available to carry out the intent and purposes of this article in accordance

with plans approved by the North Carolina wildlife resources commission, and all such funds are hereby appropriated, reserved, set aside and made available until expended, for the enforcement and administration of this article.

In the event any uncertainty should arise as to the funds to be turned over to the North Carolina wildlife resources commission the governor shall have full power and authority to determine the matter and his recommendation shall be final and binding to all parties concerned. (1947, c. 263, s. 14.)

§ 143-251. Cooperative agreements.—In furtherance of the purposes of this article the commission is hereby authorized and empowered to enter into cooperative agreements pertaining to the management and development of the wildlife resources with federal, state, and other agencies, or governmental subdivisions. (1947, c. 263, s. 15.)

§ 143-252. Article not applicable to commercial fish or fisheries.—None of the provisions of this article shall be construed to apply to commercial fish or fisheries, or to repeal or modify any existing laws or regulations governing commercial fish or fisheries. (1947, c. 263, s. 16.)

§ 143-253. Jurisdictional questions.—In the event of any question arising between the department of conservation and development and North Carolina wildlife resources commission as to any duty or responsibility or authority imposed upon either of said bodies by law, or in case of any conflicting rules or regulations or administrative practices adopted by said bodies, such questions or matters shall be determined by the governor of the state and his determination shall be binding on each of said bodies. (1947, c. 263, s. 17.)

§ 143-254. Conflicting laws; regulations of department continued.—All laws and clauses of laws in conflict with the provisions of this article are hereby modified and amended so as to conform with the provisions of this article; and all laws and clauses of laws pertaining to the wildlife resources, as herein defined, not in conflict with the provisions thereof are to remain and continue in full force and effect.

Provided further, that all rules and regulations now in force with respect to wildlife resources as herein defined, promulgated by the department of conservation and development under chapter 113 of the General Statutes of North Carolina, shall continue in full force and effect until altered, modified, amended, or rescinded by the commission created under this article, or repealed or modified by law. (1947, c. 263, s. 18.)

Art. 25. National Park, Parkway and Forests Development Commission.

§ 143-255. Commission created; members appointed.—There is hereby created a commission to be known as the North Carolina national park, parkway and forests development commission, which commission, in addition to the duties hereafter specified, shall succeed to the general functions heretofore exercised by those commissions and agencies referred to in former sections 113-78 to 113-81 and in repealed chapter 48 of the Public Laws of 1927. The commission hereby created shall consist of seven members, one member of which shall be a resident of Buncombe county, one member a resident of Haywood county, one member a resident of Jackson county, one member a resident of Swain county, three members residents of counties adjacent to or affected by the development or completion of the Blue Ridge Parkway, the Great Smoky Mountains National Park or the Pisgah or Nantahala National Forests. The chairman of the state highway and public works commission and the director of the department of conservation and development, shall be ex-officio members of the commission. There shall be transferred to the commission herein created all records, documents, accounts, funds, appropriations and all other properties and interests whatsoever heretofore owned or held by any commission or agency under the provisions of article 6 of chapter 113 of the General Statutes of North Carolina, as amended, or chapter 48 of the Public Laws of 1927, as amended, and the commission herein created is hereby authorized to receive, hold, use, convey and expend the same, subject to the approval of the director of the budget, and in furtherance of the purposes of this article. (1947, c. 422, s. 3.)

§ 143-256. Appointment of commissioners; term of office.—On or before July 1st, 1947, the governor of North Carolina shall appoint seven members of the original commission, two to serve for two years, two to serve for four years, and three to serve for six years, and as the terms of these commissioners expire, the governor shall thereafter appoint members of the commission to serve for terms of six years. Members of the commission shall be eligible for reappointment. The governor shall also accept the resignation of members of the commission and shall appoint members to serve the unexpired terms caused by the resignation or death of any of the members of the commission. (1947, c. 422, s. 4.)

§ 143-257. Meetings; election of officers.—The commission shall at its first meeting elect a chairman, a vice-chairman and a secretary. The chairman and the vice-chairman shall all be members of the commission, but the secretary need not be a member of the commission. These officers shall perform the duties usually pertaining to such offices and when elected shall serve for a period of one year, but may be re-elected. In case of vacancies by resignation or death, the office shall be filled by the commission for the unexpired term of said officer. The commission shall meet monthly at the time and place designated by its chairman, or upon order duly made by the commission it shall meet only upon call of its chairman. The commission shall adopt such other rules, regulations and by-laws governing the operation of the commission as it shall deem necessary. Five members of the commission shall constitute a quorum for the transaction of business. (1947, c. 422, s. 5.)

§ 143-258. Duties of the commission.—The commission shall endeavor to promote the development of that part of the Smoky Mountains National Park lying in North Carolina, the completion and development of the Blue Ridge Parkway in North Carolina, the development of the Nantahala and Pisgah National Forests, and the development of other recreational areas in that part of North Carolina immediately affected by

the Great Smoky Mountains National Park, the Blue Ridge Parkway, or the Pisgah or Nantahala National Forests. It shall be the duty of the commission to study the development of these areas and to recommend a policy that will promote the development of the entire area generally designated as the mountain section of North Carolina, with particular emphasis upon the development of the scenic and recreational resources of the region, and the encouragement of the location of tourist facilities along lines designed to develop to the fullest these resources in the mountain section. It shall confer with the various departments, agencies, commissions and officials of the federal government and governments of adjoining states in connection with the development of the federal areas and projects named in this section. It shall also advise and confer with the various officials, agencies or departments of the state of North Carolina that may be directly or indirectly concerned in the development of the resources of these areas, but shall not in any manner take over or supplant these agencies in their work in this area, except in so far as expressly provided in this article in respect to those commissions and agencies provided for in article 6 of chapter 113 of the General Statutes of North Carolina, as amended, or chapter 48 of the Public Laws of 1927, as amended. It shall also advise and confer with the various interested individuals, organizations or agencies that are interested in developing this area and shall use its facilities and efforts in formulating, developing and carrying out over-all programs for the development of the area as a whole. It shall study the need for additional entrances to the Great Smoky Mountains National Park, together with the need for additional highway approaches and connections, and its findings in this connection shall be filed as recommendations with the national park service of the federal government, and the North Carolina state highway and public works commission. (1947, c. 422, s. 6.)

§ 143-259. The commission to make reports.—The commission shall make a biennial report to the governor covering its work up to January 1st preceding each session of the general assembly. It shall also file any such suggestions or recommendations as it deems proper with the department of conservation and development and the state highway and public works commission in respect to such matters as might be of interest to, or affect such department or commission. (1947, c. 422, s. 7.)

§ 143-260. Compensation of commissioners.—The members of the commission shall receive their necessary traveling expenses incurred while attending meetings of the commission and also such additional traveling expenses in connection with the business of the commission as shall be approved by the director of the budget. (1947, c. 422, s. 8.)

Art. 26. State Education Commission.

§ 143-261. Appointment and membership; duties.—The governor of North Carolina is hereby authorized to appoint a commission to be known as the state education commission, consisting of eighteen members, six of whom shall be selected from educational groups within the state, and twelve of whom shall be selected from the agricultural, business, industrial, and professional life of the state. It shall be the duty of this commission to study all educational problems to the end that a sound overall educational program may be developed in North Carolina, and to report their findings and make recommendations to the governor and the general assembly of 1949. (1947, c. 724, s. 1.)

§ 143-262. Organization meeting; election of officers; status of members.—After their appointment, the commission shall meet in the office of the governor of North Carolina not later than the 15th of May, 1947, and upon the recommendation of the governor, elect a chairman and a full time executive secretary. The secretary may or may not be a member of the commission. Membership on the commission herein authorized shall not constitute public office but shall be considered as a commissioner for a special purpose; and the governor may appoint as ex-officio member, or members, on said commission any public official without violating the provisions of article XIV, § 7, of the state constitution. (1947, c. 724, s. 2.)

§ 143-263. Comprehensive study of education problems.—This commission shall make a comprehensive study of organization, administration, finance, teacher education, supervision, curriculum, standardization, consolidation, transportation, buildings, personnel, a merit rating system for teachers, vocational education, and any other problems related to the overall educational program of the state. (1947, c. 724, s. 3.)

Cross Reference.—As to authority of state board of education to continue study, see note under § 115-19.

§ 143-264. Per diem and travel allowances.—Each member of the commission shall be entitled to per diem and travel the same as is paid to the state board of education, when attending any meeting of the commission or while engaged in the performance of any duties of the commission. (1947, c. 724, s. 4.)

§ 143-265. Salary of executive secretary.—The commission is authorized to set the salary of a full time executive secretary, with the approval of the director of the budget. (1947, c. 724, s. 5.)

§ 143-266. Powers of executive secretary.—The executive secretary of the commission shall have the authority and power to subpoena witnesses and compel their attendance to testify and/or produce records at any hearing before the commission, or any committee thereof, under the same provisions of the law as now applies to attendance of witnesses before legislative committees. (1947, c. 724, s. 6.)

Art. 27. Settlement of Affairs of Certain Inoperative Boards and Agencies.

§ 143-267. Release and payment of funds to state treasurer; delivery of other assets to director of the division of purchase and contract.—Whenever the statutes creating, or granting authority to, any licensing, regulatory, or examining board or agency have been or are hereafter repealed, or declared unconstitutional or invalid by the supreme court of North Carolina, every officer or other person responsible for or having control or custody of any funds, records, equip-

ment or any other assets held or owned by any such board or agency which was theretofore authorized by any such statute to exercise licensing or regulatory powers or conduct examinations in respect to the right to practice any profession or engage in any trade, business, craft or calling, shall forthwith release and deliver all such funds to the state treasurer of North Carolina, and shall forthwith release and deliver all other assets of every nature whatsoever to the director of the division of purchase and contract for the state of North Carolina. (1949, c. 740, s. 1.)

§ 143-268. Official records turned over to department of archives and history; conversion of other assets into cash; allocation of assets to state agency or department.—The director of the division of purchase and contract shall receive all such assets so delivered and, after they have served their purpose in the liquidation of the affairs of such board or agency, shall turn over all official records of such board or agency to the department of archives and history, to be held pursuant to the statutes relating to such department. The director of the division of purchase and contract shall proceed to convert all other such assets into cash by public sale to the highest bidder, and shall deposit the net proceeds of any such sale with the state treasurer: Provided, that the director of the division of purchase and contract, in his discretion, may allocate to any state agency or department, the whole or any part of such assets, the sale of which is not required to discharge the obligations of the board or agency being liquidated. (1949, c. 740, s. 2.)

§ 143-269. Deposit of funds by state treasurer.—The state treasurer shall receive all funds delivered to him under this article and shall deposit the same in a special fund for the account of the board or agency whose affairs are being liquidated, to be held and applied as hereinafter provided. (1949, c. 740, s. 3.)

§ 143-270. Statement of claims against board or agency; time limitation on presentation.—Any person having any claim or cause of action against any board or agency whose affairs are being liquidated under this article, may present a verified statement of the same to the director of the division of purchase and contract, who shall investigate and approve or disapprove such claim; any claim not presented to the director of the division of purchase and contract within one year from the time such board or agency becomes inoperative by law shall be barred, and no claim shall be approved or paid which is barred by any statute of limitation or any statutory prohibition in respect to the payment of any claim, or the refund of any deposit, dues, assessment, or examination or license fee. (1949, c. 740, s. 4.)

§ 143-271. Claims certified to state treasurer; payment; escheat of balance to University of North Carolina.—The director of the division of purchase and contract shall certify to the state treasurer a schedule of all claims approved or disapproved, and after one year from the time at which the board or agency became inoperative under the law, the state treasurer shall, out of the funds in his hands for the account of such board or agency, pay all approved claims in full, or if such funds are insufficient for full payment, then he shall equally prorate said claims and make partial payment in so far as funds are available. Should any balance remain in the hands of the treasurer after the payment of all approved claims, such balance shall escheat and be paid over to the University of North Carolina, to be held in accordance with the statutes governing escheats. (1949, c. 740, s. 5.)

§ 143-272. Audit of affairs of board or agency; payment for audit and other expenses.—Irrespective of the provisions of § 143-271 of this article, the state treasurer is specifically authorized, in his discretion, to cause audit to be made of the affairs of any such board or agency, and to immediately pay the cost of such audit, together with the expenses of transferring records and assets, and other necessary costs of liquidation, out of the first funds coming into his hands for the account of such board or agency. (1949, c. 740, s. 6.)

Art. 28. Communication Study Commission.

§ 143-273. Creation of commission.—There is hereby created an agency to be known as the North Carolina communication study commission, which shall function for four years pursuant to the provisions of this article. (1949, c. 1077, s. 1.)

Editor's Note.—As to appropriation for purposes of article, see Session Laws 1949, c. 1077, s. 7.

§ 143-274. Definitions.—As used in this article.

(1) "Communication" is defined as those methods, namely radio, motion pictures, still photography, slides, film strips, models, maps, charts, illustrated publications, facsimile and television, by means of which activities and materials of an educational nature are disseminated to the people of North Carolina at pre-school, primary, secondary, college, and adult levels.

(2) "Commission" means the North Carolina communication study commission.

(3) "Committee" means the advisory communication committee of the North Carolina communication study commission. (1949, c. 1077, s. 2.)

§ 143-275. Membership of commission; term.—(1) The commission shall consist of the governor, superintendent of public instruction, and director of the department of conservation and development, as members ex officio, together with seven members appointed by the governor.

(2) In making appointment to the commission, the governor shall choose three persons who understand the entire educational program of the state, two persons from the field of radio and two persons who shall represent business in the state. The commission shall elect with the approval of the governor one member to act as chairman. A majority of the commission shall constitute a quorum.

(3) The seven members appointed by the governor shall serve for a term of four years, from July 1, 1949, through June 30, 1953.

(4) Any appointed member of the commission may be removed by the governor.

(5) Vacancies in the commission shall be filled by the governor for the unexpired term.

(6) The commission shall meet quarterly, in

January, April, July, and October, on a date to be fixed by the chairman. The commission may be convened at such other times as the governor or chairman may deem necessary.

(7) Members of the commission shall be paid seven dollars ($7.00) per day for each day required in attendance on meetings of the commission and going to and returning from meetings and the same subsistence and travel allowance for attendance at meetings as is provided for state employees. (1949, c. 1077, s. 3.)

§ 143-276. Duties of commission.—It shall be the duty of the commission:

(1) To survey, study and appraise the need in North Carolina for an over-all plan in the use of all methods of educational communication at all levels of education in North Carolina.

(2) To survey, study and appraise the potential uses of these educational communication methods in North Carolina's program of conservation and development of natural, industrial and human resources.

(3) To survey, study and appraise the potentialities which might lead to more effective cooperation among the communication industries and between the communication industries and the educational institutions.

(4) To survey, study and appraise the need and procedure for setting up facilities to train communication specialists and to train teachers in the use of communication equipment and materials in the classroom.

(5) To survey, study and appraise the educational use of radio, television, motion pictures and any other methods of educational communication which may come to the attention of the commission.

(6) To guide the growth and development of educational communication in North Carolina as it relates to the education, health, economy and general welfare of the people of North Carolina.

(7) To cooperate in the promotion of local, regional and state-wide use of all methods of educational communication as they relate to the education, health, economy and general welfare of the people of North Carolina.

(8) To establish and promote educational communication standards.

(9) To cooperate with state and federal communication agencies, the communication advisory committee, and with commercial communication interests in the promotion of educational opportunities through the methods of educational communication.

(10) To recommend biennially on the basis of its surveys, studies and appraisals specific actions to the general assembly.

(11) To submit a biennial report of its activities to the governor and the general assembly. (1949, c. 1077, s. 4.)

§ 143-277. Powers of commission.—The commission is hereby authorized:

(1) To make rules and regulations for the proper administration of its duties.

(2) To accept any grant of funds made by the United States or any agency thereof for the purpose of carrying out its functions.

(3) To accept gifts, bequests, devises and endowments. The funds, if given as an endowment, shall be invested in such securities as designated by the donor, or, if there is no designation, in those in which the state sinking fund may be invested. All such gifts, bequests, devises, and all proceeds from such invested endowments shall be used for carrying out the purpose for which they are made.

(4) To administer all funds available to the commission.

(5) To act jointly when advisable with any other state agency, institution, department or commission in order to carry out the commission's objectives and responsibilities. No activity of the commission, however, shall be allowed to interfere with the work of any other state agency, provided, however, that the work of the commission shall, to the extent possible, be coordinated with the work and objectives of the department of education.

(6) To employ, with the approval of the governor, and executive director, and upon the recommendation of the executive director, such other persons and/or companies as may be needed to carry out the provisions of this article. The executive director shall act as secretary to the commission.

(7) To do any and all other things reasonably necessary to carry out the purposes of this article. (1949, c. 1077, s. 5.)

§ 143-278. Advisory committee.—The governor shall name a communication advisory committee consisting of thirty members who shall serve for a term of two years, from July 1, 1949, to July 1, 1951, and their successors shall be appointed for a term of two years beginning July 1, 1951, and ending June 30, 1953. The governor shall name one member to act as a chairman of the committee. Vacancies occurring on the committee shall be filled by the governor for the unexpired term. Members of the committee shall be representative in so far as possible of North Carolina education in general, the communication industries of North Carolina, and all other groups who might derive benefit from or be beneficial to education in North Carolina.

The committee shall meet at least once each year with the commission at times and places to be fixed by the governor. Members of the committee shall serve without compensation, but shall be paid the same subsistence and travel allowance for attendance at meetings as is provided for state employees.

The committee shall act in an advisory capacity to the commission. It shall help the commission in every way possible by means of suggestion, discussions, and knowledge of educational needs throughout the state in the advancement of educational opportunities through the methods of communication. (1949, c. 1077, s. 6.)

Art. 29. Commission to Study the Care of the Aged and Handicapped.

§ 143-279. Establishment and designation of commission.—A commission is hereby established for the study of the problems relating to the care of the aged with especial reference to those failing mentally and the intellectually or physically handicapped of all ages and this commission shall be known as "the commission for the study of

problems of the care of the aged and intellectually or physically handicapped. (1949, c. 1211, s. 1.)

§ 143-280. Membership.—The commission shall consist of one member from the North Carolina hospitals board of control, one member from the state board of health, one member from the state board of public welfare, one member from the boards of county commissioners, one county superintendent of public welfare, one county health officer, one clerk of the superior court. (1949, c. 1211, s. 2.)

§ 143-281. Appointment and removal of members.—The governor shall appoint the members of this commission, and may remove any member; he shall not be required to give any reason for the removal of any member. (1949, c. 1211, s. 3.)

§ 143-282. Duties of commission; recommendations.—This commission shall study the problems relating to the care of the aged with especial reference to those failing mentally and shall inquire into the methods of meeting and handling this problem in other states. It shall make a similar study of the problem of the care of the feebleminded, with especial attention to the custodial care of intellectually handicapped persons not teachable or trainable. It shall make a study of the problems relating to the care of the physically handicapped with a special reference to those whose physical handicap renders them incapable of self-support and shall inquire into the methods of meeting and handling this problem in other states.

It shall make recommendations to the governor offering plans for dealing with the problem of the care needed for this group, and means of clarification of the responsibility of the state and respective counties. (1949, c. 1211, s. 4.)

§ 143-283. Compensation.—The members of the commission shall receive for each day in actual performance of duties under this article, a per diem of seven dollars ($7.00), and necessary travel and subsistence expenses, to be paid out of the contingency and emergency fund. (1949, c. 1211, s. 5.)

Chapter 144. State Flag, Motto and Colors.

Sec.
144-6. State colors.

§ 144-6. State colors.—Red and blue, of shades as adopted and appearing in the North Carolina state flag and the American flag, shall be, and hereby are, declared to be the official state colors for the state of North Carolina.

The use of such official state colors on ribbons attached to state documents with the great seal and/or seals of state departments is permissive and discretionary but not directory. (1945, c. 878.)

Chapter 146. State Lands.

Sec.

Art. 6. Correction of Grants.

146-66.1. Further extension of time for registering grants from the state.

Art. 12. Sale of Lands.

146-99. State board of education authorized to convey or lease marsh and swamp lands to state department of conservation and development.
146-100. Conveyances to contain reversionary clause.
146-101. Board to retain mineral, gas, oil and similar rights.

SUBCHAPTER I. ENTRIES AND GRANTS.

Art. 1. Lands Subject to Grant.

§ 146-1. Vacant lands; exceptions.

Applied in Davis v. Morgan, 228 N. C. 78, 44 S. E. (2d) 593.

§ 146-4. Swamp lands defined.

Cited in Kelly v. King, 225 N. C. 709, 36 S. E. (2d) 220.

Art. 6. Correction of Grants.

§ 146-66.1. Further extension of time for registering grants from the state.—The time for the registration of grants issued by the state of North Carolina, or copies of such grants duly certified by the secretary of state under his official seal, be and the same hereby is extended for a period of two years from January 1st, 1947, next ensuing, and such grants or copies thereof duly certified as above set forth may be registered within such time as fully as the original might have been registered at any time heretofore: Provided, that nothing herein contained shall be held or have the effect to divest any rights, titles, or equities in or to the land covered by such grants of any of them, acquired by any person from the state of North Carolina by or through any entry or grant made or issued since such grants were respectively issued, or those claiming through or under such subsequent entry or grant. (1947, c. 99.)

Editor's Note.—The act inserting this section provides that it shall not affect pending litigation.

SUBCHAPTER II. LANDS CONTROLLED BY STATE BOARD OF EDUCATION.

Art. 11. Controversies Concerning Lands.

§ 146-90. Title presumed in the board; tax titles.

Effect of Presumption as to Title on Interpretation of Deed.—The description "to the high water mark" of nonnavigable arm of the sea, a broad shallow sound, restricts or limits conveyance to correctly located line of mean high water as indicated on the ground, particularly where title to marsh lands was at time lots were laid off held by state subject to disposition by state board of education, since title to swamp lands is presumed to be in board or its assignees until a valid title to such land is shown otherwise. Kelly v. King, 225 N. C. 709, 714, 36 S. E. (2d) 220.

Art. 12. Sale of Lands.

§ 146-99. State board of education authorized to convey or lease marsh and swamp lands to state department of conservation and development.—The state board of education is authorized and empowered in its discretion to transfer or lease to the state department of conservation and development, any or all of the marsh and swamp lands owned by it in the state, for the purpose of development, supervision, and administration of game refuges, or game preserves, or as a public hunting ground. (1945, c. 783, s. 1.)

§ 146-100. Conveyances to contain reversionary clause.—Any of the said marsh and swamp lands conveyed to the department of conservation and development for the purposes specified in § 146-99 shall contain a reversionary clause providing that upon the said state department of conservation and development ceasing to use said lands for said purposes, the same should revert back to the state board of education. (1945, c. 783, s. 2.)

§ 146-101. Board to retain mineral, gas, oil and similar rights.—All of the mineral, gas, oil, and similar rights in said land shall be reserved by the state board of education and the state department of conservation and development shall not acquire any rights to any mineral, gas, or oil rights in such marsh and swamp lands by virtue of any conveyance authorized under § 146-99. (1945, c. 783, s. 3.)

Chapter 147. State Officers.

Art. 3. The Governor.

§ 147-11. Salary of governor.—The salary of the governor shall be ten thousand five hundred dollars ($10,500.00) per annum. He shall be allowed annually the sum of six hundred dollars ($600.00) as traveling expenses in attending to the business for the state and for expenses out of the state and in the state in representing the interest of the state and people, incident to the duties of his office, the said allowance to be paid monthly. In addition to the foregoing allowance, the actual expenses of the governor while traveling outside the state on business incident to his office shall be paid by the state treasurer on a warrant issued by the auditor. Provided, that from and after the first day of January, 1949, the governor shall receive an annual salary of fifteen thousand dollars ($15,000.00), payable monthly. (Rev., s. 2736; Code, s. 3720; 1879, c. 240; 1901, c. 8; 1907, c. 1009; 1911, c. 89; 1917, cc. 11, 235; 1919, c. 320; 1929, c. 276, s. 1; 1947, c. 994; C. S. 3858.)

Editor's Note.—
The 1947 amendment added the proviso.

§ 147-15. Private secretary to governor; salary; fees.—The salary of the private secretary to the governor shall be fixed by the governor, with the approval of the advisory budget commission, and shall not be in excess of five thousand dollars ($5,000.00) per annum, and when so fixed shall be effective from and after January fourth, one thousand nine hundred and forty-five.
(1945, c. 45.)

Editor's Note.—The 1945 amendment increased the salary from $4,500 to $5,000 per annum. As only the first sentence was changed, the rest of the section is not set out.

§ 147-32. Compensation for widows of governors.—All widows of the governors of the state of North Carolina who were married to said governors before or during their term of office as governor of the state of North Carolina shall be paid the sum of twelve hundred ($1,200.00) dollars per annum during the term of their natural lives, the same to be paid in equal monthly installments of one hundred ($100.00) dollars per month out of the state treasury upon warrant duly drawn thereon: Provided, that no payment shall be made under this section unless and until the council of state shall find that the beneficiary does not have an income adequate for her support. Provided, further that such compensation shall terminate upon the subsequent remarriage of such persons. (1937, c. 416; 1947, c. 897, ss. 1, 2.)

Editor's Note.—The 1947 amendment added the last proviso and struck out the words "and who have attained, or shall hereafter attain, the age of sixty-five years" formerly appearing after the words "North Carolina" in line four.

§ 147-33. Compensation of lieutenant governor.—As authorized by article III, section eleven, of the constitution of North Carolina, the salary of the lieutenant governor is hereby fixed at two thousand and one hundred dollars ($2,100.00) per year, which amount shall be in addition to the compensation for the lieutenant governor as the presiding officer of the senate, provided by article II, section twenty-eight, of the constitution of North Carolina. Whenever the lieutenant governor shall attend any meeting of state officials, or other meetings which by law he is required to attend, he shall be paid his necessary traveling expenses in going to and from such meetings. (1911, c. 103; 1945, c. 1; C. S. 3862.)

Editor's Note.—The 1945 amendment added the salary provision. Formerly the lieutenant governor was entitled to a per diem while attending meetings. The amendment omitted the former provision relating to payment upon proper warrant.

Art. 3A. Emergency War Powers of Governor.

§ 147-33.1. Short title.

Editor's Note.—Session Laws 1945, c. 7, re-enacted without change the first six sections of this article.
For comment on this enactment, see 21 N. C. Law Rev. 372.

§ 147-33.7. Duration of article.—This article shall be in full force and effect while the existing state of war continues with any foreign power and for six months thereafter. None of the pow-

ers herein granted shall be thereafter exercised and no tract, order, rule or regulation made, or other action taken, pursuant to this article shall thereafter be enforceable or effective, except for the performance of an obligation theretofore incurred under this article or the prosecution of an act theretofore committed in violation thereof. Contracts, orders, rules or regulations made or other actions taken pursuant to this article prior to the convening of the general assembly of one thousand nine hundred and forty-five shall continue in effect according to their terms until the expiration date specified above, unless they shall be sooner repealed or modified by the governor, with the approval of the council of state, in the exercise of powers granted under this article, or by this or a subsequent session of the general assembly. (1943, c. 706, s. 8; 1945, c. 7.)

Editor's Note.—The 1945 amendment added the last sentence and made other changes.

Art. 4. Secretary of State.

§ 147-35. Salary of secretary of state.

Editor's Note.—Session Laws 1947, c. 1041, increased the salary of the secretary of state to $7,500.00 per year. And Session Laws 1949, c. 1278, effective April 23, 1949, provides that the salary, from and after the expiration of the present term of office of said officer, shall be $9,000.00 per year, payable in equal monthly installments.

§ 147-45. Distribution of copies of session laws, and other state publications by secretary of state.

Editor's Note.—

Session Laws 1945, c. 534 amended this section by increasing from 3 to 4 the number of copies of session laws and supreme court reports to be distributed to the industrial commission.

Session Laws 1949, c. 1178, increased from 59 to 65 the number of session laws, from 54 to 56 the number of house and senate journals, and from 65 to 71 the number of supreme court reports, to be distributed to the University of North Carolina at Chapel Hill.

§ 147-46.1. Publications furnished state departments, bureaus, institutions and agencies.—Upon request of any state department, bureau, institution or agency, and upon authorization by the governor and council of state, the secretary of state shall supply to such department, bureau, institution or agency copies of any state publications then available to replace worn, damaged or lost copies and such additional sets or parts of sets as may be requested to meet the reasonable needs of such departments, bureaus, institutions or agencies, disclosed by the request.

This section shall not authorize the reprinting of any state publications which would not be ordered without reference to the provisions hereof. (1947, c. 639.)

Art. 5. Auditor.

§ 147-55. Salary of auditor.

Editor's Note.—Session Laws 1947, c. 1041, increased the salary of the state auditor to $7,500.00 per year. And Session Laws 1949, c. 1278, effective April 23, 1949, provides that the salary, from and after the expiration of the present term of office of said officer, shall be $9,000.00 per year, payable in equal monthly installments.

§ 147-59. Warrants to bear limitations; presented within sixty days.—All warrants drawn by the state auditor or any state department, or agency, bureau, or commission on the treasurer, shall bear, and there shall be printed upon the face thereof in plain type so as to be easily read, the following words, to-wit: "This warrant will not be paid if presented to the treasurer after the expiration of sixty (60) days from the date hereof"; and the state treasurer is hereby prohibited from paying any warrant drawn by the state auditor, or any state department, or agency, bureau, or commission, unless the same shall be presented within sixty (60) days from the date of such warrant. (1925, c. 246, s. 1; 1945, c. 496, s. 1.)

Editor's Note.—Prior to the amendment this section applied only to warrants drawn by the state auditor.

§ 147-60. Surrender of barred warrant; issue of new warrant.—Any person, firm, or corporation holding a warrant drawn by the state auditor which cannot be paid because of the provisions of §§ 147-59 and 147-61 may present the same to the issuing state officer, department, agency, bureau, or commission, and upon satisfactory proof that such person, firm, or corporation is the owner thereof and is entitled to have and receive the proceeds of such warrant, and that the obligation for which the warrant is drawn is a subsisting obligation against the state of North Carolina, may surrender said warrant to the issuing state officer, department, agency, bureau, or commission, whereupon the issuing state officer, department, agency, bureau, or commission is authorized and empowered to issue another warrant for a like amount in lieu thereof. (1925, c. 246, s. 2; 1945, c. 496, s. 2.)

Editor's Note.—The 1945 amendment substituted the words "issuing state officer, department, agency, bureau, or commission" for the words "state auditor."

Art. 6. Treasurer.

§ 147-65. Salary of state treasurer.

Cross Reference.—As to settlement of affairs of inoperative boards and agencies, see §§ 143-267 to 143-272.

Editor's Note.—Session Laws 1947, c. 1041, increased the salary of the state treasurer to $7,500.00 per year. And Session Laws 1949, c. 1278, effective April 23, 1949, provides that the salary, from and after the expiration of the present term of office of said officer, shall be $9,000.00 per year, payable in equal monthly installments.

§ 147-68. To receive and disburse moneys; to make reports.

Cross Reference.—As to funds of inoperative boards and agencies, see §§ 143-267 to 143-272.

Editor's Note.—For act authorizing treasurer to pay certain bonds at exchange rate according to chapter 98 of the Public Laws of 1879, see Session Laws 1947, c. 610.

Applied in Gardner v. Board of Trustees, 226 N. C. 465, 38 S. E. (2d) 314.

§ 147-69. Deposits of state funds in banks regulated.—Banks having state deposits shall furnish to the auditor of the state, upon his request, a statement of the moneys which have been received and paid by them on account of the treasury. The treasurer shall keep in his office a full account of all moneys deposited in and drawn from all banks in which he may deposit or cause to be deposited any of the public funds, and such account shall be open to the inspection of the auditor. The treasurer shall sign all checks, and no depository bank shall be authorized to pay checks not bearing his official signature. No bank shall make any charge for exchange or for the collection of any warrant drawn on the treasurer or for the transmission of any funds which may come into the hands of the state treasurer, or any other state department, agency, bureau or commission; provided, that banks organized under the laws of the state of North Carolina may charge for each cashier's check issued to deputy

collectors of revenue as a means of transmitting to the commissioner of revenue the proceeds of collections of revenue, not over twenty cents (20c) for each check in the amount of not over one thousand dollars ($1,000.00), and for each check for an amount in excess of one thousand dollars ($1,000.00), such banks may charge not over twenty cents (20c) plus one-tenth of one per cent (.1%) of the amount of such check in excess of one thousand dollars ($1,000.00). The commissioner of banks and the bank examiners, when so required by the state treasurer, shall keep the state treasurer fully informed at all times as to the condition of all such depository banks, so as to fully protect the state from loss. The state treasurer shall, before making deposits in any bank, require ample security from the bank for such deposit.

(1945, c. 644; 1949, c. 1183.)

Editor's Note.—The 1945 amendment rewrote the fourth sentence of the first paragraph, and the 1949 amendment inserted the proviso thereto. As the second paragraph was not affected by the amendments it is not set out.

For comment on the 1949 amendment, see 27 N. C. Law Rev. 425.

§ 147-69.1. Deposit or investment of surplus state funds; reports of state treasurer.—It shall be the duty of the state treasurer, with assistance of the director of the budget, on or before the tenth day of each calendar month, and upon request of the governor or the council of state, at any other time, to carefully analyze the amount of cash in the general fund of the state and in all special funds credited to any special purpose designated by the general assembly or held to meet the budgets or appropriations for maintenance and permanent improvements of the several institutions, boards, departments, commissions, agencies, persons or corporations of the state, and to determine in his opinion when the cash in any such funds is in excess of the amount required to meet the current needs and demands on such funds, and report his findings to the governor and the council of state. The governor and the state treasurer, acting jointly, with the approval of the council of state, are hereby authorized and empowered to deposit such excess funds at interest with any official depository of the state upon such terms as may be authorized by applicable laws of the United States and the state of North Carolina, or to invest such excess funds in bonds or certificates of indebtedness or treasury bills of the United States of America, or in bonds, notes or other obligations of any agency or instrumentality of the United States of America, when the payment of principal and interest thereof is fully guaranteed by the United States of America, or in bonds or notes of the state of North Carolina, or in certificates of deposit issued by banks or official depositories within the state of North Carolina yielding a return at rates not less than U. S. treasury notes and certificates of indebtedness of comparable maturities. The said funds shall be so invested that in the judgment of the governor and state treasurer they may be readily converted into money at such time as the money will be needed. The interest received on all such deposits and the income from such investments, unless otherwise required by law, shall be paid into the state's general fund.

The state treasurer shall include in his biennial reports to the general assembly a full and complete statement of all funds invested by virtue of the provisions of this section, the nature and character of investments therein, and the revenues derived therefrom, together with all such other information as may seem to him to be pertinent for the full information of the general assembly with reference thereto.

The state treasurer shall also cause to be prepared a quarterly statement on or before the tenth day of each January, April, July and October in each year. This statement shall show the amount of cash on hand, the amount of money on deposit and the name of each depository, and all investments for which he is in any way responsible. This statement shall be delivered to the governor as director of the budget, and a copy thereof shall be posted in the office of the state treasurer for the information of the public. (1943, c. 2; 1949, c. 213.)

Editor's Note.—The 1949 amendment rewrote this section.

§ 147-72. Ex officio treasurer of state institutions; duties as such.—The treasurer shall be ex-officio the treasurer of the department of agriculture, of the North Carolina state college of agriculture and engineering, of the North Carolina school for the deaf and dumb at Morganton, of the North Carolina institution for the deaf and dumb and the blind at Raleigh, for the state hospitals (for the insane) at Raleigh, Morganton and Goldsboro and for the state's prison.

(1947, c. 781.)

Editor's Note.—The 1947 amendment struck out "soldiers home" from the list of institutions in the first sentence. As the rest of the section was not affected by the amendment it is not set out.

§ 147-77. Daily deposit of funds to credit of treasurer.—All funds belonging to the state of North Carolina, in the hands of any head of any department of the State which collects revenue for the State in any form whatsoever, and every institution, agency, officer, employee, or representative of the State, or any agency, department, division or commission thereof, except officers and the clerk of the Supreme Court, collecting or receiving any funds or money belonging to the State of North Carolina, shall daily deposit the same in some bank, or trust company, selected or designated by the State Treasurer, in the name of the State Treasurer, at noon, or as near thereto as may be, and shall report the same daily to said Treasurer: Provided, that the Treasurer may refund the amount of any bad checks which have been returned to the department by the Treasurer when the same have not been collected after thirty days trial. (1925, c. 128, s. 1; 1945, c. 159.)

Editor's Note.—The 1945 amendment struck out the words "or other designated depository" formerly appearing after the word "company" in line eleven.

Chapter 148. State Prison System.

Art. 3A. Prison Camp for Youthful and First Term Offenders.

Art. 6. Reformatory.

Art. 7. Bureau of Identification.

Art. 8. Compensation to Persons Erroneously Convicted of Felonies.

Art. 9. Prison Advisory Council.

Art. 3. Labor of Prisoners.

§ 148-44. Segregation as to race, sex and age.—The commission shall provide separate sleeping quarters and separate eating space for the different races and the different sexes; and shall provide for segregation of youthful offenders as required by §§ 15-210 to 15-215. (1933, c. 172, s. 25; 1947, c. 262, s. 2.)

Cross References.—As to segregation of youthful offenders generally, see §§ 15-210 to 15-216. As to prison camp for such offenders, see §§ 148-49.1 to 148-49.5.

Editor's Note.—The 1947 amendment rewrote the provision as to youthful offenders.

Art. 3A. Prison Camp for Youthful and First Term Offenders.

§ 148-49.1. Conversion of "Prisoners of War" Camp at Camp Butner into prison camp for youthful and first term offenders. — The state hospitals board of control be authorized and empowered to convert the old "Prisoners of War" Camp located on its property at Camp Butner into a modern prison camp or guardhouse with a capacity of one hundred (100) for the purpose of receiving and detaining such youthful and first term prisoners as may be sent it by the state highway and public works commission under such rules and regulations as may be jointly adopted by the state highway and public works commission and the North Carolina hospitals board of control. (1949, c. 297, s. 1.)

Cross Reference.—As to segregation of youthful offenders generally, see §§ 15-210 to 15-216.

§ 148-49.2. "Youthful offender" and "first term offender" defined.—For the purposes of this article a "youthful offender" and a "first term offender" is a person (1) who, at the time of imposition of sentence, is less than 25 years of age, and (2) who has not previously served a term in any jail or prison. (1949, c. 297, s. 2.)

§ 148-49.3. Employment and supervision of prisoners.—Prisoners received at Camp Butner prison shall be employed in work on the farm, workshops, the upkeep and maintenance of the property located at Camp Butner or in such other similar work as may be determined by the state hospitals board of control and the state highway and public works commission. The said prisoners to be under the general supervision of the agents and employees of the state highway and public works commission or of such employees of the state hospitals board of control as may be agreed upon by the two state agencies. (1949, c. 297, s. 3.)

§ 148-49.4. Expenses incident to conversion of camp and maintenance of prisoners.—All expenses incident to the conversion of the old "Prisoners of War" Camp shall be borne by the state hospitals board of control and paid out of the proceeds from the sale of surplus property owned by said board and located at Camp Butner. Said prison camp or guardhouse to fully meet the requirements of the state highway and public works commission as to construction, plans and specifications. The cost of the maintenance of prisoners assigned to said prison shall be borne by the state hospitals board of control. (1949, c. 297, s. 4.)

§ 148-49.5. Adoption of rules and regulations.—As soon as practicable the state hospitals board of control and the state highway and public works commission shall jointly adopt such rules and regulations as they may deem necessary to fully carry out the intents and purposes of this article. (1949, c. 297, s. 5.)

Art. 5. Farming out Convicts.

§ 148-66. Cities and towns and board of agriculture may contract for prison labor.

Editor's Note.—

For comment on the 1943 amendment, see 21 N. C. Law Rev. 333.

Art. 5A. Prison Labor for Farm Work.

§ 148-70.1. Commission authorized to furnish prison labor to farmers.

For comment on this and the six following sections, see 21 N. C. Law Rev. 333.

Art. 6. Reformatory.

§§ 148-71 to 148-73: Repealed by Session Laws 1947, c. 262, s. 3.

Art. 7. Bureau of Identification.

§ 148-79. Fingerprints taken; photographs.

No officer, however, shall take the photograph of a person arrested and charged or convicted of a misdemeanor unless such person is a fugitive from justice, or unless such person is, at the time of arrest, in the possession of goods or property reasonably believed by such officer to have been stolen, or unless the officer has reasonable grounds to believe that such person is wanted by the federal bureau of investigation, or the state bureau of

investigation, or some other law enforcing officer or agency. (1925, c. 228, s. 6; 1945, c. 967.)

Editor's Note.—The 1945 amendment added the above sentence at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

Art. 8. Compensation to Persons Erroneously Convicted of Felonies.

§ 148-82. Provision for compensation. — Any person who, having been convicted of felony and having been imprisoned therefor in a state prison of this state, and who was thereafter or who shall hereafter be pardoned by the governor upon the grounds that the crime with which he was charged either was not committed at all or was not committed by him, may as hereinafter provided present by petition a claim against the state for the pecuniary loss sustained by him through his erroneous conviction and imprisonment. (1947, c. 465, s. 1.)

Editor's Note.—For a brief comment on this article, see 25 N. C. Law Rev. 403.

§ 148-83. Form, requisites and contents of petition; nature of hearing.—Such petition shall be addressed to the commissioner of pardons, and must include a full statement of the facts upon which the claim is based, verified in the manner provided for verifying complaints in civil actions, and it may be supported by affidavits substantiating such claim. Upon its presentation the commissioner of pardons shall fix a time and a place for a hearing, and shall mail notice to the claimant, and shall notify the attorney general, at least fifteen days before the time fixed therefor. (1947, c. 465, s. 2.)

§ 148-84. Evidence; action by commissioner of pardons; payment and amount of compensation. —At the hearing the claimant may introduce evidence in the form of affidavits to support the claim, and the attorney general may introduce counter affidavits in refutation. If the commissioner of pardons finds from the evidence that the claimant was pardoned for the reason that the crime was not committed at all, or was not committed by the claimant, and that the claimant has been vindicated in connection with the alleged offense for which he was imprisoned; and that he has sustained pecuniary loss through such erroneous conviction and imprisonment, the commissioner of pardons shall report the facts, together with his conclusions and recommendations to the governor, and the governor, with the approval of the council of state, may pay to the claimant out of the contingency and emergency fund, or out of any other available state fund, such amounts as may partially compensate the claimant for such pecuniary loss as he may be found to have suffered by reason of his erroneous conviction and imprisonment, such compensation not to be in excess of five hundred dollars ($500.00) for each year of such imprisonment actually served; and in no event shall such compensation exceed a total amount of five thousand dollars ($5,000.00). (1947, c. 465, s. 3.)

Art. 9. Prison Advisory Council.

§ 148-85. Creation of council; purpose.—There is hereby created a prison advisory council (hereinafter called "the council") for the purpose of promoting in the state prison system practices consistent with the best modern concepts and experience, directed toward the rehabilitation of prisoners. (1949, c. 359.)

§ 148-86. Membership; chairman.—The council shall be composed of the following members: five persons to be appointed by the governor of North Carolina by reason of their interest in and knowledge of prison administration and the rehabilitation and the education of prisoners. One member shall be designated by the governor to be the chairman of the council. Initial appointments shall be for the following terms: one member for six years; two members for four years; and two members for two years. All appointments thereafter made shall be for terms of six years. In addition to the five regular members, the attorney general and the commissioner of public welfare shall be ex-officio members of the said council.

Each member of the council, except the ex-officio members, shall receive as compensation the amounts set forth in section 4 of the Budget Appropriation Bill for the Biennium 1949-51, this compensation to be paid out of the contingency and emergency fund. (1949, c. 359.)

§ 148-87. Meetings.—The council shall meet at least semi-annually and at any other time at the call of the chairman. After each meeting, a written report shall be sent to the chairman of the State highway and public works commission. (1949, c. 359.)

§ 148-88. Function.—It is the duty of the council to advise with the prison director on all matters pertaining to prison administration, the employment, training, custody, and discipline of prisoners and all other phases of prison management. The council shall study thoroughly the state prison system and shall from time to time make recommendations for the improvement thereof to the state highway and public works commission. (1949, c. 359.)

Chapter 150. Uniform Revocation of Licenses.

§ 150-1. Procedure for hearings on suspension or revocation of licenses by certain state boards and commissions. — No license issued by the state board of examiners of electrical contractors, state licensing board for contractors, state board of accountancy, state board of embalmers, board of chiropody examiners, North Carolina board of veterinary medical examiners, board of barber examiners, state board of registration for engineers and land surveyors, cosmetologists board, tile contractors board, plumbing and heating board, board of boiler rules, North Carolina board of nurse examiners, and board of photographic examiners shall be revoked or suspended except according to a procedure which shall conform as near as may be to the procedure now provided by law for hearings before referees in compulsory references and shall include (1) a notice in writing

to the person whose license is involved, stating the charge or charges against the said licensee and fixing a date and place for a hearing which shall not be less than thirty days from the issuance of said notice upon the person to whom it is issued, and shall be served upon the person named therein by an officer authorized by law to serve process, or by mailing by registered mail to the person named therein at the address given in the license or the last known address; (2) a hearing before the board, or a member thereof specifically designated by the board for the purpose of hearing the matters involved, at which hearing the accused shall have the right to be present to enter his defense, if any, and be represented by counsel and produce evidence by witnesses or records; (3) notice of action by the board which shall be a written report containing findings of fact and conclusions of law thereon; (4) appeal from the action of the board to the superior court of the county in which the hearing was held or to the superior court of Wake county upon filing of an appeal bond in the sum of fifty dollars which shall act as a supersedeas. (1939, c. 218, s. 1; 1947, c. 86, s. 1.)

Editor's Note.—
The 1947 amendment inserted "North Carolina board of nurse examiners" in the list of boards to which this section is applicable. Section 2 of the amendatory act provided that this chapter shall be applicable to all hearings on suspension or revocation of licenses by the North Carolina board of nurse examiners.

Chapter 151. Constables.

§ 151-1. Election and term.

Stated in Taylor v. Wake Forest, 228 N. C. 346, 45 S. E. (2d) 387.

§ 151-2. Oaths to be taken.

Stated in Taylor v. Wake Forest, 228 N. C. 346, 45 S. E. (2d) 387.

§ 151-7. Powers and duties.

Powers and Duties Are Co-Extensive with Limits of County.—Constables have the same power and authority as they were invested with prior to our constitutional and statutory provisions, and their powers and duties are co-extensive with the limits of the county in which they are elected. Taylor v. Wake Forest, 228 N. C. 346, 45 S. E. (2d) 387.

Chapter 152. Coroners.

§ 152-1. Election; vacancies in office; appointment by clerk in special cases.

Editor's Note.—
Delete the Editor's Note appearing in the original.
For an article discussing the provisions of this chapter and suggesting the abolition of the coroner system in North Carolina, see 26 N. C. Law Rev. 96.

§ 152-3. Coroner's bond.

Local Modification.—Yancey: 1945, c. 271.

§ 152-5. Fees of coroners.

Local Modification.—Buncombe: 1949, c. 910; Cabarrus: 1947, c. 410; Camden: 1947, c. 200; Pender: 1947, c. 52; Sampson: 1947, c. 747.

Chapter 153. Counties and County Commissioners.

Art. 2. County Commissioners.

Art. 7. Courthouse and Jail Buildings.

Art. 9. County Finance Act.

Art. 10A. Capital Reserve Funds.

Art. 1. Corporate Existence and Powers of Counties.

§ 153-1. County as corporation; acts through commissioners.

Must Act through Commissioners in Legal Session.—
In accord with original. See Jefferson Standard Life Ins. Co. v. Guilford County, 225 N. C. 293, 34 S. E. (2d) 430.

§ 153-2. Corporate powers of counties.

Cross References.—As to authority to lease, convey or acquire property for use as armory, see § 143-235. As to appropriations for benefit of military units, see § 143-236.

Suits in Name of County.—
In the absence of a refusal of the board of commissioners of a county to institute an action in its behalf, the action must be instituted in the name of the county or on relation of the county. Johnson v. Marrow, 228 N. C. 58, 44 S. E. (2d) 468.

Art. 2. County Commissioners.

§ 153-4. Election and number of commissioners.

Local Modification.—Forsyth: 1949, c. 851.

§ 153-8. Meetings of the board of commissioners.

Provided, that whenever the day set for the holding of any meeting of a board of county commissioners falls on a holiday, such meeting may be held on the next succeeding secular or business day. (Rev., s. 1317; Code, s. 706; 1945, c. 132; C. S. 1296.)

Editor's Note.—The 1945 amendment added the above pro-

viso at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

§ 153-9. Powers of board.

6. Special Tax Authorized for Certain Purposes; Limit of Rate.—

Local Modification.—Gaston: 1945, c. 207.

Tax within the Limitation of Const., Art. V, § 6.—Where a county levies a tax within the limitation of const., art. V, § 6, its levy for poor relief is limited to a tax rate of five cents under the provisions of this section. Atlantic Coast Line R. Co. v. Duplin County, 226 N. C. 719, 40 S. E. (2d) 371.

Resolution Correcting Record as to Purpose of Levy.—Where tax records of county disclose a fifteen-cent levy for general purposes and a seven-cent levy for county poor, two cents of the seven-cent levy is patently excessive and no part thereof can be justified for items of general expense, but where, in action by taxpayer to recover the amount paid under protest under the two-cent levy, defendant county introduces resolutions of the board correcting records to show that two cents was for administration of old age assistance and aid to dependent children, and for salaries of the county accounting and farm agent, nonsuit is proper, since levy is then for special purposes with special approval of the legislature under §§ 108-17, et seq., and §§ 108-44, et seq., and since, in the absence of evidence to the contrary the resolution correcting the records will be presumed bona fide. Atlantic Coast Line R. Co. v. Duplin County, 226 N. C. 719, 40 S. E. (2d) 371.

Levy for Public Welfare in Beaufort.—The board of county commissioners of Beaufort County having levied in the year 1942 a tax rate of fifteen cents on the one hundred dollars property valuation for general purposes, the limit fixed by Article V, section 6, of the North Carolina Constitution, the levy for public welfare or poor relief was limited to a rate of five cents on the one hundred dollars property valuation under provisions of this section. Atlantic Coast Line R. Co. v. Beaufort County, 224 N. C. 115, 118, 29 S. E. (2d) 201.

Conflict with Other Laws.—Cumberland County is authorized by this section to levy annually five cents only on the one hundred dollar valuation, for maintaining county homes for the aged and infirm and for similar purposes. Conceding that §§ 153-9, subsection 28, and 153-152 constitute special approval of the General Assembly for unlimited levy for a special purpose, they are general acts and conflict with the provisions of this section. Atlantic Coast Line R. Co. v. Cumberland County, 223 N. C. 750, 28 S. E. (2d) 238.

14. To Sell or Lease Real Property.—

Cross Reference.—As to execution of warranty deeds and relief from personal liability thereon, see § 160-61.1.

Commissioners Do Not Have Power to Mortgage.—The name "Vaughn" in the case cited in the original should be "Threadgill."

17. Roads and Bridges.—To supervise the maintenance of neighborhood public roads or roads not under the supervision and control of the State Highway and Public Works Commission and bridges thereon: Provided, however, county funds may not be expended for such maintenance except to the extent such expenditures are otherwise authorized by law; to exercise such authority with regard to ferries and toll bridges on public roads not under the supervision of the State Highway and Public Works Commission as is granted in § 136-88 of the Chapter on Roads and Highways or by other Statutes; to provide draws on all bridges not on roads under supervision of the State Highway and Public Works Commission where the same may be necessary for the convenient passage of vessels; to allow and contract for the building of toll bridges on all roads not under the supervision of the State Highway and Public Works Commission and to take bond from the builders thereof. It is the intent of this subsection that the powers and authorities herein granted shall be exercised in accordance with the provisions of the Chapter on Roads and Highways.

The boards of commissioners of the several counties likewise have power to close any street or road or portion thereof (except those lying within the limits of municipalities) that is now or may hereafter be opened or dedicated, either by recording of a subdivision plat or otherwise. Any individuals owning property adjoining said street or road who do not join in the request for the closing of said street or road shall be notified by registered letter of the time and place of the meeting of the commissioners at which the closing of said street or road is to be acted upon. Notice of said meeting shall likewise be published once a week for four weeks in some newspaper published in the county, or if no newspaper is so published, by posting a notice for thirty days at the courthouse door and three other public places in the county. No further notice shall be necessary: Provided, that if the street or road has previously been accepted by the state highway and public works commission for maintenance, the state highway and public works commission shall be likewise notified of said meeting by registered letter. If it appears to the satisfaction of the commissioners that the closing of said road is not contrary to the public interest and that no individual owning property in the vicinity of said street or road or in the subdivision in which is located said street or road will thereby be deprived of reasonable means of ingress and egress to his property, the board of commissioners may order the closing of said street or road; provided, that any person aggrieved may appeal within thirty days from the order of the commissioners to the superior court of the county, where the same shall be heard de novo. Upon such an appeal, the superior court shall have full jurisdiction to try said matter upon the issues arising and to order said street or road closed upon proper findings of fact by the jury. A certified copy of said order of the commissioners (or of the judgment of the superior court in the event of an appeal) shall be filed in the office of the register of deeds of said county. Upon the closing of a street or road in accordance with the provisions hereof, all right, title and interest in such portion of such street or road shall be conclusively presumed to be vested in those persons, firms or corporations owning lots or parcels of land adjacent to such portion of such street or road, and the title of each of such persons, firms or corporations shall, for the width of the abutting land owned by such persons, firms or corporations, extend to the center of such street or road. (1949, c. 1208, s. 1.)

Editor's Note. — The 1949 amendment added the second paragraph.

Power of Governing Body of Municipality to Close Streets, etc.—The board of aldermen or other governing body of any municipality shall have the same power and authority with respect to roads, streets or other public ways which are inside the corporate limits of such municipality as given to the county commissioners by the second paragraph of this subsection with respect to roads, streets or public ways outside the corporate limits of a municipality. (1949, c. 1208, s. 2.)

Recordation of Required Notices, Resolutions, etc.—Copies of the registered letters giving the notice required by the second paragraph of this subsection, and the return receipts or other good and sufficient evidence of giving the required notice, shall be recorded in the register of deeds office, together with the resolution of such county or municipal governing body (or with the judgment of the superior court, in cases where an appeal was taken). (1949, c. 1208, s. 3.)

28. To Erect, Divide and Alter Township.—

Conflict with § 153-9, subsection 6.—Conceding that this section and § 153-152 constitute special approval of the General Assembly for unlimited levy for a special purpose, they are general acts and conflict with the provisions of § 153-9, subsection 6. Atlantic Coast Line R. Co. v. Cumberland County, 223 N. C. 750, 28 S. E. (2d) 238.

Cited in Atlantic Coast Line R. Co. v. Beaufort County, 224 N. C. 115, 29 S. E. (2d) 201.

39. County Fire Departments.—Any county shall have power to provide for the organization, equipment, maintenance and government of fire companies and fire department; and, in its discretion, may provide for a paid fire department, fix the compensation of the officers and employees thereof, and make rules and regulations for its government. The board of commissioners of the county may make the necessary appropriations for the expenses thereof and levy annually taxes for the payment of same as a special purpose, in addition to any allowed by the constitution. (1945, c. 244.)

40. County Planning Board.—The county commissioners are authorized to create a board to be known as the planning board, whose duty it shall be to make a careful study of the resources, possibilities and needs of the county, particularly with respect to the conditions which may be injurious to the public welfare or otherwise injurious, and to make plans for the development of the county. The commissioners shall appoint not less than three nor more than five persons on said board.

The planning board, when established, shall make a report at least annually to the county commissioners, giving information regarding the condition of the county, and any plans or proposals for the development of the county and estimates of the cost thereof.

The county commissioners may appropriate to the planning board such amount as they may deem necessary to carry out the purposes of its creation and for the improvement of the county, and shall provide what sums, if any, shall be paid to such board as compensation.

The county commissioners are hereby authorized to enter into any agreements with any other county, city or town for the establishment of a joint planning board. (1945, c. 1040, s. 1.)

Local Modification.—Buncombe, Chatham, Stanly, Vance, Wake: 1945, c. 1040, ss. 2½, 3.

Editor's Note.—Session Laws 1949, c. 876, amended Session Laws 1945, c. 1040, s. 3, by striking out the words "Durham county," which had the effect of removing "Durham" from the list of counties appearing under "Local Modification" and making subsection 40 applicable to Durham county.

41. Expenditure of Surplus Funds for Library Purposes.—The board of county commissioners of any county is hereby authorized, in its discretion, to expend any surplus funds, which may be available, for the erection and/or purchase of library buildings and equipment. (1949, c. 1222.)

Editor's Note.—Only the subsections affected or added by the amendments are set out.

§ 153-9.1. Contract for photographic recording of instruments and documents filed for record.—The board of county commissioners of any county in North Carolina is hereby authorized and empowered to contract for the photographic recording of any instruments or documents filed for record in the offices of the register of deeds, the clerk of the superior court and other county offices, and such recording shall constitute a sufficient recording, provided the original sizes of such instruments or documents are not reduced to less than two-thirds the original sizes; and provided further that no such contract shall be made for such photographic service, for a longer period than five years from the date of the commencement of such contracted service, except that the contract may contain a provision for automatic extensions for additional five year periods in the absence of a sixty day written notice by either party to contract, giving sixty days or more before the expiration of any five year period, terminating the contract at the end of such period. (1945, c. 286, s. 1.)

Cross References.—As to provision for photostatic copies of plats, etc., see § 47-32. As to prior provision for photographic or photostatic registration, see § 47-22.

§ 153-9.2. Original instruments and documents constitute temporary recording; return to owners.—The register of deeds of any county, where such photographic recording is contracted for, shall use the original instruments or documents as a temporary recording, and shall keep them in a temporary binder arranged in the chronological order of filing for record, assigning to each page a number which shall be arranged in a consecutive order, and shall, at all times, keep a temporary index thereto. When the photographic copies are substituted for the originals, the photographic copies shall be set up in a permanent binder and in the same order as to time and page numbers, as in the temporary binder, and permanently indexed. When the photographic copies are substituted for the originals, then the originals shall be returned to the persons entitled thereto, if known, but in no event, where return is to be made, no such return shall be delayed more than sixty days from the date of filing. The same procedure shall apply to the temporary and permanent records of the several classes of instruments or documents, such as wills, judgments, reports, and corporate charters, in the office of the clerk of the superior court of any such county, from and after such contract for photographic recording becomes effective. (1945, c. 286, s. 2.)

§ 153-9.3. Preservation and use of film or sensitized paper.—Wherever the contract for such photographic recording is for the initial photographing on film or sensitized paper, the board of county commissioners shall provide a fire resisting vault space or lease lockbox space in which to permanently keep such film or sensitized paper, and to permit use of such film or sensitized paper from which to make copies, under such regulations as such board may prescribe. (1945, c. 286, s. 3; c. 944.)

§ 153-9.4. Removal of originals for photographing.—The official of any such county so contracting for photographic recording, who is in charge of any instruments or documents left with such official for recording, may permit temporary removal of the originals from the courthouse or other building for photographing, provided such originals are returned to such building within ten hours; provided further, that the board of county commissioners may when it appears necessary to complete the work, extend the time in which said photographing must be completed and returned to

the courthouse of the county. (1945, c. 286, s. 4; c. 944.)

§ 153-9.5. Removal of public records for photographing.—The official of any county, who is in charge of any public records, may permit temporary removal of such records from the county courthouse or other building for the purpose of photographing a portion or all of such records, provided such records are returned within ten hours and provided, that the board of county commissioners may when it appears necessary to complete work, extend the time in which said photographing must be completed and returned to the courthouse of the county. (1945, c. 286, s. 5; c. 944.)

§ 153-9.6. Photographic recording of public records; preservation and use of film or sensitized paper.—The board of county commissioners of any county in North Carolina may also contract for the photographing on film or sensitized paper of any county records, and, if such contract is made, such board of county commissioners shall provide a fire resisting vault space or lease lockbox space in which to keep such film or sensitized paper, and shall have authority to permit copies to be made from such film or sensitized paper, under such regulations as such board may prescribe. (1945, c. 286, s. 6; c. 944.)

§ 153-9.7. Sections 153-9.1 to 153-9.7 confer additional powers.—Sections 153-9.1 to 153-9.7 shall not be construed as a limitation on the powers of the several boards of county commissioners; but shall be construed as an enabling act only and in addition to existing powers of such boards. (1945, c. 286, s. 7.)

§ 153-10. Local: authority to interdict certain shows. — The boards of commissioners of the several counties shall have power to direct the sheriff or tax collector of the county to refuse to issue any license to any carnival company and shows of like character, moving picture and vaudeville shows, museums and menageries, merry-go-rounds and ferris-wheels, and other like amusement enterprises conducted for profit under the same management and filling week-stand engagements or in giving week-stand exhibitions, whether under canvas or not, whenever in the opinion of the board of county commissioners the public welfare will be endangered by the licensing of such companies. This section shall apply only to the counties of Anson, Bladen, Burke, Cabarrus, Carteret, Catawba, Duplin, Forsyth, Greene, Haywood, Harnett, Iredell, Lee, Madison, Mitchell, Nash, Orange, Pamlico, Pasquotank, Polk, Randolph, Robeson, Scotland, Tyrrell, Washington, Wilson, Yadkin. (1919, c. 164; 1949, c. 111; C. S. 1298.)

Editor's Note.—The 1949 amendment inserted "Harnett" in the last sentence.

§ 153-13. Compensation of county commissioners.

Local Modification.—Cabarrus: 1945, c. 165; Cumberland: 1945, c. 315; Richmond: 1947, c. 235, s. 2; Scotland: 1947, c. 641.

Art. 3. Forms of County Government.

II. Manager Form.

§ 153-20. Manager appointed or designated.

Adjustment of Compensation.—Under this section adjustment of compensation is limited to such officer or agent as may be designated in lieu of naming a whole-time chairman or county manager, and the term "manager" is used to indicate powers and duties which may be conferred upon a whole-time chairman, other officer or agent who may be acting in lieu of a county manager. Stansbury v. Guilford County, 226 N. C. 41, 36 S. E. (2d) 719, 721.

Board of commissioners was without legal authority to increase the salary of plaintiff in excess of that expressly fixed by statute (Ch. 427, Public-Local Laws of 1927), although resolution recited that chairman was performing duties of whole-time chairman in lieu of county manager. Id.

§ 153-23. Compensation.

Quoted in Stansbury v. Guilford County, 226 N. C. 41, 36 S. E. (2d) 719.

Art. 4. State Association of County Commissioners.

§ 153-38. Dues and expenses of members.—There shall be assessed against each county an annual membership fee of five dollars, which shall be paid by the county treasurer upon the order of the board of county commissioners, but the executive committee of the association may increase the annual membership fee to a sum not to exceed twenty-five dollars in counties having a population of forty thousand or over according to the last census; twenty dollars in counties having a population between thirty thousand and forty thousand according to said census, fifteen dollars in counties having a population between twenty thousand and thirty thousand according to the said census, and ten dollars in counties having a population less than twenty thousand according to said census. The various boards of commissioners are authorized to pay out of the county treasury the expenses of its members attending the meetings of the association. (1909, c. 870, ss. 5, 7; 1945, c. 327; C. S. 1307.)

Editor's Note.—Prior to the 1945 amendment the executive committee was only authorized to "increase the annual membership fee to a sum not to exceed ten dollars."

Art. 7. Courthouse and Jail Buildings.

§ 153-49.1. Inspection of jails.—(a) The state board of public welfare is hereby authorized and directed to consult regularly with an advisory committee of sheriffs and police officers regarding the personal safety, welfare, and care of the inmates incarcerated in county and municipal jails and city lock-ups, taking into account variations in the financial ability of cities and counties to maintain up-to-date facilities for prisoners. It shall be the duty of the state board of public welfare through its officers or agents to inspect periodically and regularly each and every county or district jail and all municipal jails or lock-ups in order to safeguard the welfare of the prisoners kept therein and in connection with said inspections to consult with the governing bodies of the local units.

(b) In the event that such inspections of jails and lock-ups disclose inadequate care or mistreatment of prisoners, or disclose that prisoners are being confined therein under conditions in violation of chapter 153, such findings shall be reported in writing to the governing body of the county or municipality concerned, which governing body shall at its next meeting fully consider the report and consult with the person making such report and findings and take such action

with reference to the report and findings as may be found proper and necessary.

(c) In the event such governing body fails to take action to correct the conditions reported, it shall be the duty of the state board of public welfare to present such matters to the attention of the judge of the superior court presiding at the next criminal court in the county in which such jail or lock-up is located to the end that such superior court judge may direct the grand jury of such county to inspect the jail or lock-up described in such report, and present its findings and recommendations to the court at said term.

(d) If conditions in said jail or lock-up continue not to be corrected within a reasonable time after such notice to the grand jury, then the judge of the superior court in his discretion may require immediate compliance with the report of the grand jury. For such purpose the court may convene at any time and place within the judicial circuit in chambers or otherwise. The proceeding shall be without jury and the hearings may be summarily or upon such notice as the court may prescribe.

(e) Pending a substantial compliance with the report and recommendations of the grand jury, the judge of the superior court shall have full power and authority under this section to refuse to allow prisoners to be placed in any jail or lock-up not deemed fit and may direct that any persons coming before him and being convicted of criminal offenses shall be confined only in a jail or lock-up that is deemed a proper place in which to confine prisoners. (1947, c. 915.)

Editor's Note.—The act inserting this section became effective on Jan. 1, 1948.

For a brief comment on this section, see 25 N. C. Law Rev. 401.

Art. 8. County Revenue.

§ 153-56. Taxes collected by sheriff or tax collector.

Local Modification.—Jackson: 1947, c. 17, s. 13.

§ 153-60. County officers receiving funds to report annually.

Local Modification.—Halifax: 1949, c. 389.

§ 153-64. Demand before suit against municipality; complaint.

Editor's Note.—As to notice of tort claims, see 27 N. C. Law Rev. 145.

Verification of Pleadings.—The requirement that when one pleading in a court of record is verified, every subsequent pleading in the same proceeding, except a demurrer, "must be verified also," is one which may be waived, except in those cases where the form and substance of the verification is made an essential part of the pleading; as in an action for divorce in which a special form of affidavit is required, § 50-8, in a proceeding to restore a lost record, § 98-14, and in an action against a county or municipal corporation, § 153-64. Calaway v. Harris, 229 N. C. 117, 47 S. E. (2d) 796.

Art. 9. County Finance Act.

§ 153-69. Short title.

Editor's Note.—For act validating certain notes of counties evidencing refunded loans from the state literary fund and special building funds of North Carolina and authorizing the issuance of refunding bonds under this article, see Session Laws 1945, c. 404.

Purpose of Act.—The legislature has prescribed in this article the machinery by which a county may issue lawful and valid obligations for public purposes and necessary expenses, and pledge its faith. Jefferson Standard Life Ins. Co. v. Guilford County, 225 N. C. 293, 34 S. E. (2d) 430.

Cited in Waldrop v. Hodges, 230 N. C. 370, 53 S. E. (2d) 263.

§ 153-77. Purposes for which bonds may be issued and taxes levied.

(a) Erection and purchase of schoolhouses, school garages, physical education and vocational education buildings, teacherages, lunchrooms, and other similar school plant facilities.

(d) Erection and purchase of hospitals; housing or quarters for public health departments or local public health departments; hospital facility as the term is defined in paragraph (c) of G. S. § 131-126.18.

(l) Acquisition and improvement of lands and the erection thereon of buildings to be used as a civic center or indoor or out of door stadium and as a living memorial to veterans of World War I and World War II.

(m) Erection and purchase of library buildings and equipment. (1927, c. 81, s. 8; 1929, c. 171, s. 1; 1931, c. 60, s. 54; 1933, c. 259, s. 2; 1935, c. 302, s. 2; 1939, c. 231, s. 2(c); 1947, cc. 520, 931; 1949, c. 354; c. 766, s. 3; c. 1270.)

Local Modification.—Halifax: 1949, c. 371; Surry: 1947, c. 315.

Editor's Note.—The first 1947 amendment added paragraph (l) and the second 1947 amendment rewrote paragraph (a). The first and third 1949 amendments added subsection (m), and the second 1949 amendment added that part of subsection (d) beginning with the word "housing" in line one. As the rest of the section was not affected by the amendments it is not set out.

For comment on the 1947 amendments, see 25 N. C. Law Rev. 462.

A bond order under § 153-78 must set forth one of the purposes enumerated in this section. Atkins v. McAden, 229 N. C. 752, 51 S. E. (2d) 484.

§ 153-78. Order of governing body required.

2. If the issuance of the bonds is required by the constitution to be approved by the voters, or if the governing body, although not required to obtain the approval of the voters before issuing the bonds, deems it advisable to obtain such approval, that the order shall take effect when approved by the voters of the county at an election as provided in this article; or

(1949, c. 497, s. 1.)

Editor's Note.—The 1949 amendment, effective March 22, 1949, rewrote clause 2 of subsection (e). As the rest of the section was not changed, only such clause is set out. See note under § 153-92.

A bond order may contain several sections and authorize the issue of bonds for different purposes, and § 153-77 sets out eleven (now twelve) different purposes for which bonds may be issued. Atkins v. McAden, 229 N. C. 752, 51 S. E. (2d) 484.

It Must Set Forth One of Purposes Enumerated in § 153-77.—A bond order under this section must set forth one of the purposes enumerated in § 153-77, but it is not required that it set out in detail the estimates of cost and descriptions of the particular projects for which the funds are proposed to be used, and their inclusion does not limit the allocation of the proceeds of the bonds under § 153-107, provided the use of the funds falls within the general purpose designated. Atkins v. McAden, 229 N. C. 752, 51 S. E. (2d) 484.

Board of Commissioners May Reallocate Proceeds of Bonds.—A bond order issued under § 153-78 set out in detail the estimates and projects for which the funds were proposed to be used in discharge of the constitutional requirement of a six months school term within the municipal administrative unit. It was held that § 153-107 did not preclude the board of county commissioners, upon its finding, after investigation, of changed conditions, from reallocating the proceeds of the bonds to different projects upon its further finding, after investigation provided for in § 115-83, that such reallocation of the funds was necessary to effectuate the purpose of the bond issue. Atkins v. McAden, 229 N. C. 752, 51 S. E. (2d) 484.

§ 153-87. Hearing; passage of order; debt limitations.

Local Modification.—Carteret: 1947, c. 32; Craven: 1947, c. 161, effective until Jan. 1, 1949.

§ 153-90. Limitation of action to set aside order.

Cited in Waldrop v. Hodges, 230 N. C. 370, 53 S. E. (2d) 263.

§ 153-92. What majority required.—If a bond order provides that it shall take effect when approved by the voters of the county, the affirmative vote of a majority of those who shall vote on the bond order shall be required to make it operative. (1927, c. 81, s. 22; 1949, c. 497, s. 2.)

Editor's Note.—The 1949 amendment, effective March 22, 1949, rewrote this section. Section 7 of the amendatory act made it retroactive as to elections held subsequent to November 24, 1948.

For a brief comment on the 1949 amendment, see 27 N. C. Law Rev. 454.

Construction of New School Building.—The vote on the question of issuance of bonds by a county for the construction of a new school building, a necessary expense, is not against the registration, and a favorable vote of the majority of those voting in the election is sufficient to validate the bond resolution and authorize the issuance and sale of the proposed bonds. Mason v. Moore County Board of Com'rs, 229 N. C. 626, 51 S. E. (2d) 6.

§ 153-92.1. General application of provision as to majority vote.—All provisions of public, public-local, private and special acts relating to counties, municipalities, school districts, or other political subdivisions in the state which require that a proposition for the issuance of bonds or levy of taxes of any such county, municipality, school district or other political subdivisions, or that any other proposition be approved by the vote of a majority of the registered voters of such county, municipality, school district or other political subdivision, are hereby amended so as to require that the same be approved by a majority of the qualified voters who shall vote on any such proposition. The provisions of this section shall be applicable to every such election held subsequent to March 22, 1949, notwithstanding the fact that any procedures or acts or actions required or permitted by statute were taken or had with respect to any such election prior to such date. (1949, c. 497, s. 8.)

Cross Reference.—For similar provision relating to school districts, see § 115-15.1.

§ 153-100. Limitation as to actions upon elections.

Cited in Waldrop v. Hodges, 230 N. C. 370, 53 S. E. (2d) 263.

§ 153-102. Within what time bonds issued.

Notwithstanding the foregoing limitations of time which might otherwise prevent the issuance of bonds, bonds authorized by an order which took effect prior to July 1st, 1948, and which have not been issued by July 1st, 1949, may be issued in accordance with all other provisions of law at any time prior to July 1st, 1951, unless such order shall have been repealed, and any loans made under authority of § 153-108 of this article in anticipation of the receipt of the proceeds of the sale of such bonds, or any renewals thereof, may be paid on or at any time prior to but not later than June 30th, 1951, notwithstanding the limitation of time for payment of such loans as contained in said section. (1927, c. 81, s. 32; 1939, c. 231, s. 2(d); 1947, c. 510, s. 1; 1949, c. 190, s. 1.)

The 1947 amendment added the above paragraph at the end of this section, and the 1949 amendment changed the dates therein. As the rest of the section was not affected by the amendments it is not set out.

For a brief comment on the 1947 amendment, see 25 N. C. Law Rev. 453.

Cited in Waldrop v. Hodges, 230 N. C. 370, 53 S. E. (2d) 263.

§ 153-107. Application of funds.

Right to Transfer and Allocate Funds.—This section does not place a limitation upon the legal right to transfer or allocate funds from one project to another included within the general purpose for which bonds were issued. The inhibition contained in the statute is to prevent funds obtained for one general purpose being transferred and used for another general purpose. For example, the statute prohibits the use of funds derived from the sale of bonds to erect, repair and equip school buildings, from being used to erect or repair a courthouse or a county home, or similar project. This view is in accord with the provisions of § 159-49.1. Atkins v. McAden, 229 N. C. 752, 51 S. E. (2d) 484.

Effect of Bond Order. — A bond order under § 153-78 must set forth one of the purposes enumerated in § 153-77, but it is not required that it set out in detail the estimates of cost and descriptions of the particular projects for which the funds are proposed to be used, and their inclusion does not limit the allocation of the proceeds of the bonds under this section, provided the use of the funds falls within the general purpose designated. Atkins v. McAden, 229 N. C. 752, 51 S. E. (2d) 484.

Art. 10. County Fiscal Control.

§ 153-114. Title; definitions.

Local Modification.—Forsyth: 1945, c. 87.

Accumulation of Surplus School Sinking Fund Not Authorized.—The law does not contemplate or authorize the accumulation of a surplus school sinking fund and the exemption of such surplus from the salutary provisions of the "County Fiscal Control Act." Johnson v. Marrow, 228 N. C. 58, 61, 44 S. E. (2d) 468.

The board of county commissioners may amend or clarify their records to make them speak the truth in order to list separately tax levies for general and special purposes as required by this section, and while this power exists only to make bona fide corrections, nothing else appearing, resolutions amending the records will be assumed to be what they purport to be, and not original actions. Atlantic Coast Line R. Co. v. Duplin County, 226 N. C. 719, 40 S. E. (2d) 371.

Quoted in Coe v. Surry County, 226 N. C. 125, 36 S. E. (2d) 910.

§ 153-115. County accountant.

Local Modification.—Jackson: 1947, c. 17, s. 13.

Art. 10A. Capital Reserve Funds.

§ 153-142.1 Short title.

For comment on this enactment, see 21 N. C. Law Rev. 357.

§ 153-142.4. Sources of capital reserve fund.—The capital reserve fund may consist of moneys derived from any one or more of the following sources:

(1945, c. 464, s. 2.)

Editor's Note.—The 1945 amendment deleted from the latter part of the preliminary paragraph the words "except that no money shall be deposited in such capital reserve fund after July tenth, one thousand nine hundred forty-five." As the rest of the section was not affected by the amendment it is not set out.

§ 153-142.6. When the capital reserve fund shall be deemed established.—The capital reserve fund shall be deemed established when the order passed under the provisions of § 153-142.5 is approved by the local government commission. After action is taken upon the provisions of said order by the local government commission the secretary of said commission shall notify the clerk in writing of the approval by said commission or disapproval, if the commission declines to approve the order, and the reasons therefor. Upon receipt

of the notice of such approval the clerk shall thereupon notify the financial officer of the county who shall immediately deposit in the designated depository the moneys stated as available in said order for the capital reserve fund and simultaneously report said deposit to the local government commission. (1943, c. 593, s. 6; 1945, c. 464, s. 2.)

Editor's Note.—The 1945 amendment struck out the former provision relating to the duty of the financial officer to make deposits and report same to the local government commission.

§ 153-142.6½. Increases to capital reserve fund.—No increase to a capital reserve fund shall be made except by resolution adopted by the governing body and the provisions thereof approved by the local government commission, which resolution shall state the source or sources of moneys from which such increase is intended to be made and the amount of the money from each such source, but each increase shall be from moneys derived from the identical source or sources as those stated in the order establishing the capital reserve fund or in an amendment thereto. The clerk shall transmit a certified copy of such resolution to the local government commission. After action is taken upon the provisions of said resolution by the local government commission the secretary of such commission shall notify the clerk in writing of the approval by said commission or disapproval, if the commission declines to approve the resolution, and the reasons therefor. Upon receipt of the notice of approval the clerk shall thereupon notify the financial officer of the county who shall immediately deposit in the duly designated depository the moneys stated in said resolution and simultaneously report such deposit to the local government commission. Deposits required in § 153-142.18 shall not be construed as increases of a capital reserve fund within the meaning of this section. (1945, c. 464, s. 2.)

§ 153-142.9. Purposes for which a capital reserve fund may be used.

(d) Investment in bonds, notes or certificates of indebtedness of the United States of America, in bonds or notes of the state of North Carolina, or in bonds of the county.

(f) When the order authorizing and establishing a capital reserve fund contains, as provided in clause (1) (a) of § 153-142.4, collections of ad valorem taxes levied for a special purpose, such special purpose. (1943, c. 593, s. 9; 1945, c. 464, s. 2; 1949, c. 196, s. 1.)

Editor's Note.—The 1945 amendment made clause (d) applicable to certificates of indebtedness. The 1949 amendment added clause (f). As the rest of the section was not affected by the amendments it is not set out.

§ 153-142.10. Restrictions upon use of the capital reserve fund.—No part of the capital reserve fund consisting of collections of ad valorem taxes levied for a special purpose within the meaning of the constitution of North Carolina shall be withdrawn and expended for any purpose except that for which such taxes were levied, but such collections may be used for either of the purposes stated in clauses (b), (d) and (f) of § 153-142.9, except that collections of taxes levied for debt service may be expended for either of the purposes stated in clauses (c) and (e) of said § 153-142.9. Upon written petition of the county board of education to the governing body requesting that any moneys deposited in the capital reserve fund, which prior to such deposit had been in the custody or control of the county board of education, be withdrawn and turned over to the county board of education for expenditure for the purposes stated in subclauses (1) and/or (9) of clause (a) of § 153-142.9, it shall be the duty of the governing body and other officers of the county to do all things necessary within the provisions of law to perfect such withdrawal and such moneys so withdrawn shall be deemed necessary for expenditure by the county as an administrative agency of the state for maintenance of the six months school term required by the constitution of North Carolina. (1943, c. 593, s. 10; 1945, c. 464, s. 2; 1949, c. 196, s. 2.)

Editor's Note.—The 1945 amendment rewrote the second sentence.

The 1949 amendment inserted the reference to clause (f) in line eight.

§ 153-142.11. Authorization of withdrawal from the capital reserve fund.—A withdrawal for any one of the purposes contained in clauses (b), (c), (d), (e) and (f) of § 153-142.9 shall be authorized by resolution duly adopted by the governing body. Each such resolution shall specify the purpose of the withdrawal, the amount of such withdrawal, the sources of moneys in the capital reserve fund for such withdrawal and the amount to be withdrawn from each such source. Each such resolution shall contain a request to the local government commission for its approval of the provisions thereof, shall be spread upon the minutes of the governing body and the clerk shall transmit a certified copy of such resolution to the local government commission. A resolution authorizing a withdrawal for the purpose stated in clause (b) of § 153-142.9 shall further specify the total appropriations contained in the annual appropriation resolution of the fiscal year in which such withdrawal is authorized and shall state the total amount of such withdrawals previously made in such fiscal year and the date upon which the withdrawal shall be repayable to the capital reserve fund. In any case where all or any part of the capital reserve fund has been withdrawn and invested in bonds, notes or certificates of indebtedness of the United States of America which are about to mature and it is desired to continue investment of like kind, such continuance may be effected by exchange of said maturing bonds, notes or certificates of indebtedness through the Treasury of the United States, or an authorized agent thereof, for bonds, notes or certificates of indebtedness of the United States of America of like principal amount and of later maturity or maturities: Provided, however, each such continuance and exchange shall first be authorized by resolution adopted by the governing body and the provisions thereof approved by the local government commission.

(1945, c. 464, s. 2; 1949, c. 196, s. 3.)

Editor's Note.—The 1945 amendment added the last sentence to the first paragraph, and the 1949 amendment inserted the reference to clause (f) near the beginning of the paragraph. As the rest of the section was not affected by the amendments it is not set out.

§ 153-142.16. How a withdrawal may be made.—No withdrawal from the capital reserve fund shall be made except pursuant to authority of the

governing body by resolution or order which has taken effect. Each withdrawal shall be for the full amount authorized, except a withdrawal for the purpose stated in clause (e) of § 153-142.9 which may be made for all or a part thereof from time to time according to the plan of amortization, and shall be by check drawn on the depositary signed by the financial officer of the county and payable to said financial officer, except that a check evidencing withdrawal for the purpose of investment may be made payable to the obligor or to the vendor of such bonds, notes or certificates of indebtedness in which investment has been duly authorized. Each such check shall bear a certificate on the face or reverse thereof signed by the secretary of the local government commission or by his duly designated assistant that the withdrawal evidenced thereby has been approved under the provision of the county capital reserve act of one thousand nine hundred and forty-three, and such certificate shall be conclusive evidence that such withdrawal has been approved by the local government commission: Provided, however, the state of North Carolina shall not be liable for misapplication of any moneys withdrawn from the capital reserve fund by reason of such certificate. (1943, c. 593, s. 16; 1945, c. 464, s. 2.)

Editor's Note.—The 1945 amendment added the exception clause to the second sentence.

§ 153-142.18. Certain deposits mandatory.

All deposits required in this section shall be made in the duly designated depositary of the capital reserve fund and it shall be the duty of the financial officer to simultaneously report each such deposit to the local government commission. (1943, c. 593, s. 18; 1945, c. 464, s. 2.)

Editor's Note.—The 1945 amendment added the above paragraph to this section. As the rest of the section was not affected by the amendment it is not set out.

§ 153-142.21. Termination of power to establish or increase a capital reserve fund.—No order establishing a capital reserve fund, or amendment thereto for including additional sources, shall be passed nor shall a resolution providing for increase of a capital reserve fund be adopted after July tenth, one thousand nine hundred forty-seven. (1945, c. 464, s. 2.)

Validation of Former Increase.—Session Laws 1945, c. 464, s. 3, provides: "Any increase heretofore made to a capital reserve fund with money from the same source or sources stated in the ordinance or order establishing said fund in accordance with the provisions of either the Municipal Capital Reserve Act of one thousand nine hundred forty-three or the County Capital Reserve Act of one thousand nine hundred forty-three, or stated in an amendment to said ordinance or order, is hereby validated."

Art. 13. County Poor.

§ 153-152. Support of poor; superintendent of county home; paupers removing to county; hospital treatment.—The board of commissioners of each county is authorized to provide by taxation for the maintenance of the poor, and to do everything expedient for their comfort and well-ordering. They may employ biennially some competent person as superintendent of the county home for the aged and infirm, and may remove him for cause. They may institute proceedings against any person coming into the county who is likely to become chargeable thereto, and cause his removal to the county where he was last legally settled; and they may recover from such county by action all charges and expenses incurred for the maintenance or removal of such poor person. The board of county commissioners of each county is hereby authorized to levy, impose and collect special taxes upon all taxable property, not to exceed five cents on the one hundred dollars valuation, required for the special and necessary purposes set forth above in addition to any taxes authorized by any other special or general act and in addition to the constitutional limit of taxes levied for general county purposes, it being the purpose of the general assembly hereby to give its approval for the levy of such special taxes for such necessary purposes.

This paragraph shall not apply to the counties of Ashe, Avery, Buncombe, Clay, Cumberland, Durham, Gates, Henderson, Jackson, Lee, Macon, Moore, Nash, Pasquotank, Robeson, Transylvania, Wilkes, Yadkin, Rowan, Gaston, Iredell, Surry, New Hanover, Washington, Bertie, Brunswick, Union, Stanley, Yancey, Warren, Vance, Currituck, Forsythe, McDowell, Johnston, Halifax, Edgecombe, Pitt, Richmond, Rockingham, Columbus, Guilford and Mecklenburg. (Rev., s. 1327; Code, s. 3540; 1891, c. 138; 1935, c. 65; 1945, c. 151; c. 562, s. 1; 1947, cc. 160, 672; C. S. 1335.)

Cross Reference.—
As to conflict between this section and other laws, see notes to § 153-9, subsection 6.

Editor's Note.—
The second 1945 amendment added the last sentence of the first paragraph. And the first 1945 amendment struck out "Chowan" from the list of counties appearing in the last sentence of the second paragraph. The 1947 amendments struck out "Sampson" and "Haywood" from such list. As the rest of said paragraph was not affected by the amendment it is not set out.

Cited in Atlantic Coast Line R. Co. v. Beaufort County, 224 N. C. 115, 29 S. E. (2d) 201.

§ 153-156. Property of indigent to be sold or rented.

The three-year statute of limitations applies to an action brought by a county against an inmate of county home to secure reimbursement or indemnity for sums expended for her upkeep in the home. Guilford County v. Hampton, 224 N. C. 817, 32 S. E. (2d) 606.

§ 153-159. Legal settlements; how acquired.

When Domicile and Settlement Different.—
The word "as" in the third line in original should be "and".

§ 153-160. Removal of indigent to county of settlement; maintenance; penalties.

Nothing contained herein shall be construed to prevent any county from rendering assistance to needy persons living within the county even though such persons may not have lived in the county for the length of time required to establish legal settlement and if such needy persons are eligible for old age assistance, aid to dependent children or any type of general assistance in which state and federal funds are involved, assistance may be granted, provided funds are available. (Rev., s. 1334; Code, s. 3545; R. C., c. 86, s. 13; 1777, c. 117, s. 17; 1834, c. 21; 1945, c. 562, s. 2; C. S. 1343.)

Editor's Note.—The 1945 amendment added the above sentence at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

Art. 15. County Prisoners.

§ 153-179. Jailer to cleanse jail, furnish food and water.

Action for Wrongful Death.—This section is not applicable in an action against a municipality for wrongful death allegedly caused by the chief of police and jailer. Gentry v. Hot Springs, 227 N. C. 665, 44 S. E. (2d) 85.

§ 153-180. Fees of jailers.

Local Modification.—Avery: 1947, c. 409; Guilford: 1947, c. 78, s. 1; McDowell: 1949, c. 325; Scotland: 1949, c. 80.

§ 153-183. United States prisoners to be kept.

Local Modification.—Guilford: 1947, c. 78, s. 2.

Chapter 154. County Surveyor.

§ 154-2. Bond required.

Local Modification.—Yancey: 1945, c. 270.

Chapter 155. County Treasurer.

§ 155-1. Election of county treasurer.

Local Modification.—Cumberland: 1947, c. 702.

§ 155-18. Officers failing to account to treasurer sued by commissioners.

Cited in Johnson v. Marrow, 228 N. C. 58, 44 S. E. (2d) 468.

Chapter 156. Drainage.

Art. 7A. Maintenance.

Sec.

156-93.1. Maintenance assessments and contracts; engineering assistance, construction equipment, etc.; joint or consolidated maintenance operations.

Art. 8. Assessments and Bond Issue.

156-124.1. Assessments for repair, etc., of canals; notice and publication; exceptions to report.

SUBCHAPTER I. DRAINAGE BY INDIVIDUAL OWNERS.

Art. 1. Jurisdiction in Clerk of Superior Court.

Part 1. Petition by Individual Owner.

§ 156-1. Name of proceeding.

Statutes Provide Flexible Procedure.—The statutes authorizing the creation, maintenance and improvements of drainage districts provide flexible procedure which may be modified and molded by decrees from time to time to promote the beneficial objects sought by the creation of the district, subject to the restrictions that there should be no material change nor any change that would impose additional costs upon landowners except to the extent of benefits to them. In re Lyon Swamp Drainage, etc., Dist., 228 N. C. 248, 45 S. E. (2d) 130.

Commissioners May Issue Bonds and Make Assessments Applicable Only to Section Benefited.—Where proposed improvements and repairs will primarily benefit lands embraced in one section of a drainage district and would be of no substantial benefit to landowners in another section thereof, the drainage commissioners have power under statutory authority to issue bonds and make assessments applicable only to the section benefited. In re Lyon Swamp Drainage, etc., Dist., 228 N. C. 248, 45 S. E. (2d) 130.

The correct procedure to secure additional authority for proper maintenance and improvements in a drainage district is by motion or petition in the original cause. In re Lyon Swamp Drainage, etc., Dist., 228 N. C. 248, 45 S. E. (2d) 130.

SUBCHAPTER II. DRAINAGE BY CORPORATION.

Art. 3. Manner of Organization.

§ 156-43. Incorporation of canal already constructed; commissioners; reports.

Assessment Can Be Levied Only on Property Benefited.—The general rule is well settled that a special assessment for a purpose of drainage can be levied only upon property benefited by the improvement. It is said that the legal theory underlying drainage assessments is one of benefit increasing the value of the land and justifying its assessment. In re Westover Canal, 230 N. C. 91, 52 S. E. (2d) 225.

Where it clearly appears that the canal will neither drain a particular tract of land nor render it more accessible, there is no valid reason for including it in the district, and if it is nevertheless arbitrarily made a part thereof, the owner may obtain relief. Id.

The statutory provisions determine the property liable to drainage assessment. Hence to constitute a valid assessment the particular land against which it is levied must come within the meaning of this section. In re Westover Canal, 230 N. C. 91, 52 S. E. (2d) 225.

"Land Tributary to the Canal."—As here used the phrases "land tributary thereto" and "land tributary to the canal" mean land from which water drains or flows into the canal. In re Westover Canal, 230 N. C. 91, 52 S. E. (2d) 225.

Burden of Proof on Appeal.—This section gives to any person dissatisfied with an assessment the right to appeal to a jury at a regular term of the superior court of the county. In such event, it would seem that the authority undertaking to establish the assessment would still have the burden of proving the provisions of the statute essential to the creation of a valid assessment. It may be that the order of the clerk of the superior court approving and confirming the assessment as proposed by the commissioners and the board of directors of the corporation creates a prima facie case. But a prima facie case, or prima facie evidence, does not change the burden of proof. In re Westover Canal, 230 N. C. 91, 52 S. E. (2d) 225.

In order to constitute a valid drainage assessment it is necessary that the land assessed drain or flow into the canal, and therefore on appeal to the superior court on a landowner's exceptions to the order of the clerk confirming assessments as proposed by the commissioners, the drainage district has the burden of proving the number of acres of land the exceptor owns which drain into the canal and what amount said land should be assessed per acre. The fact that exceptor first introduced evidence, presumably on the theory that the order of the clerk made out a prima facie case, does not alter the rule as to the burden of proof. Id.

SUBCHAPTER III. DRAINAGE DISTRICTS.

Art. 5. Establishment of Districts.

§ 156-54. Jurisdiction to establish districts.

For act relating to Scuppernong Drainage District in Washington County, see Session Laws 1947, c. 934.

Art. 6. Drainage Commissioners.

§ 156-79. Election and organization under original act.

Any vacancy thereafter occurring shall be filled by the clerk of the superior court.

(1947, c. 273.)

Editor's Note.—The 1947 amendment, effective March 11, 1947, and applicable to proceedings then pending before superior court clerks, substituted in the fifth sentence the words "by the clerk of the superior court" for the words "in like manner." As only this sentence was changed the rest of the section is not set out.

§ 156-81. Election and organization under amended act. — 1. Method of Election. — In the election of drainage commissioners by the owners of land, each landowner shall be entitled to cast the number of votes equaling the number of acres of land owned by him and benefited, as appears by the final report of the viewers. Each landowner may vote for the names of three persons for commissioners. If any person or persons in any district shall own land in any district containing an area greater than one-half of the total area in the district, such owner shall only be permitted to elect two of the drainage commissioners, and a separate election shall be held under the direction of the clerk by the minority landowners, who shall elect one member of the drainage commissioners.

In lieu of the above method of election of drainage commissioners, the clerk of the superior court may, in his discretion, appoint such drainage commissioners and such drainage commissioners so appointed by the clerk shall have the same authority as if they had been elected by the method above described.

7. Compensation.—The chairman of the board of drainage commissioners shall receive compensation and allowances as fixed by the clerk of the superior court. In fixing such compensation and allowances, the clerk shall give due consideration to the duties and responsibilities imposed upon the chairman of the board. The other members of the board shall receive a per diem not to exceed five dollars ($5.00) a day, while engaged in attendance upon meetings of the board, or in the discharge of duties imposed by the board. The secretary of the board shall receive such compensation and expense allowances as may be determined by the board.

The chairman and members of the board of drainage commissioners shall also receive their actual travel and subsistence expenses while engaged in attendance upon meetings of the board, or in the discharge of duties imposed by the board. The compensation and expense allowances as herein set out shall be paid from the assessments made annually for the purpose of maintaining the canals of the drainage district, or from any other funds of the district.

8. Application of Section. — The provisions of this section shall apply to all drainage districts now or hereafter existing in this state, without regard to the date of organization, whether before or after April 14, 1949.

9. Appointment by Clerk of Superior Court as Alternative to Election.—In lieu of the methods of election and filling of vacancies in the position of drainage commissioner as provided in § 156-79 and this section, the clerk of the superior court may, in his discretion, appoint such drainage commissioners and fill such vacancies, and such drainage commissioners so appointed by the clerk shall have the same authority and responsibility as if they had been elected or appointed as provided under § 156-79 or this section. (1917, c. 152, s. 5; 1919, cc. 109, 217; 1947, c. 935; 1949, c. 956, ss. 1-3; C. S. 5339.)

Editor's Note.—The 1947 amendment added the second paragraph of subsection 1. The 1949 amendment rewrote subsections 7 and 8 and added subsection 9. As subsections 2 through 6 were not affected by the amendments they are not set out.

Art. 7. Construction of Improvement.

§ 156-88. Drainage across public or private ways.—Where any public ditch, drain or watercourse established under the provisions of this subchapter crosses or, in the opinion of the board of viewers, should cross a public highway under the supervision of the state highway and public works commission the actual cost of constructing the same across the highway shall be paid for from the funds of the drainage district, and it shall be the duty of the commission, upon notice from the court, to show cause why it should not be required to repair or remove any old bridge and/or build any new bridge to provide the minimum drainage space determined by the court; whereupon the court shall hear all evidence pertaining thereto and shall determine whether the commission shall be required to do such work, and whether at its own expense or whether the cost thereof should be prorated between the commission and the drainage district. Either party shall have the right of appeal from the clerk to the superior court and thence to the supreme court, and should the court be of the opinion that the cost should be prorated then the percentage apportioned to each shall be determined by a jury.

Whenever the commission is required to repair or remove any old bridge and/or build any new bridge as hereinbefore provided, the same may be done in such manner and according to such specifications as it deems best, and no assessment shall be charged the commission for any benefits to the highway affected by the drain under the same, and such bridge shall thereafter be maintained by and at the expense of the commission.

Where any public ditch, drain, or watercourse established under the provisions of this subchapter crosses a public highway or road, not under the supervision of the state highway and public works commission, the actual cost of constructing the same across the highway or removing old bridges or building new ones shall be paid for from the funds of the drainage district. Whenever any highway within the levee or drainage district shall be beneficially affected by the construction of any improvement or improvements in such district it shall be the duty of the viewers appointed to classify the land, to give in their report the amount of benefit to such highway, and notice shall be given by the clerk of the superior court to the commissioners of the county where the road is located, of the amount of such assessment, and the county commissioners shall have the right to appear before the court and file objections, the same as any landowner. When it shall become necessary for the drainage commissioners to repair any bridge or construct a new bridge across a public highway or road not

under the supervision of the state highway and public works commission, by reason of enlarging any watercourse, or of excavating any canal intersecting such highway, such bridge shall thereafter be maintained by and at the expense of the official board of authority which by law is required to maintain such highway so intersected.

Where any public canal established under the provisions of the general drainage law shall intersect any private road or cartway the actual cost of constructing a bridge across such canal at such intersection shall be paid for from the funds of the drainage district and constructed under the supervision of the board of drainage commissioners, but the bridge shall thereafter be maintained by and at the expense of the owners of the land exercising the use and control of the private road; provided, if the private road shall be converted into a public highway the maintenance of the bridge shall devolve upon the state highway and public works commission or such other authority as by law shall be required to maintain public highways and bridges. (1909, c. 442, s. 25; 1911, c. 67, s. 6; 1917, c. 152, s. 6; 1947, c. 1022; C. S. 5345.)

Editor's Note.—The 1947 amendment inserted the first two paragraphs and made changes in the third paragraph.

§ 156-92. Control and repairs by drainage commissioners.—Whenever any improvement constructed under this subchapter is completed it shall be under the control and supervision of the board of drainage commissioners. It shall be the duty of the board to keep the levee, ditch, drain, or watercourse in good repair, and for this purpose they may levy an assessment on the lands benefited by the maintenance or repair of such improvement in the same manner and in the same proportion as the original assessments were made, and the fund that is collected shall be used for repairing and maintaining the ditch, drain, or watercourse in perfect order: Provided, however, that if any repairs are made necessary by the act or negligence of the owner of any land through which such improvement is constructed or by the act or negligence of his agent or employee, or if the same is caused by the cattle, hogs, or other stock of such owner, employee, or agent, then the cost thereof shall be assessed and levied against the lands of the owner alone, to be collected by proper suit instituted by the drainage commissioners. It shall be unlawful for any person to injure or damage or obstruct or build any bridge, fence, or floodgate in such a way as to injure or damage any levee, ditch, drain, or watercourse constructed or improved under the provisions of this subchapter, and any person causing such injury shall be guilty of a misdemeanor, and upon conviction thereof may be fined in any sum not exceeding twice the damage or injury done or caused. (1909, c. 442, s. 29; 1947, c. 982, s. 1; C. S. 5349.)

Editor's Note.—
The 1947 amendment substituted "maintenance or repair" for "construction" in line eight.

Cited in Robeson County Drainage Dist. v. Bullard, 229 N. C. 633, 50 S. E. (2d) 742.

Art. 7A. Maintenance.

§ 156-93.1. Maintenance assessments and contracts; engineering assistance, construction equipment, etc.; joint or consolidated maintenance operations.—(1) The board of drainage commissioners may annually levy maintenance assessments in the same ratio as the existing classification of the lands within the district. The amount of these assessments shall be determined by the board of commissioners and shall not exceed an average of one dollar ($1.00) per acre per year and the amount of these assessments shall be approved by the clerk of the superior court prior to their annual levy. The proceeds of these assessments shall be used for the purpose of maintaining canals of the drainage district in an efficient operating condition and for the necessary operating expenses of the district as approved by the clerk of the superior court.

The board of drainage commissioners shall have the authority to employ engineering assistance, construction equipment, superintendents and operators for the equipment necessary for the efficient maintenance of the canals, or the maintenance may be done by private contract made after due advertisement as required for the original construction work.

(2) The board of drainage commissioners of a drainage district may join with the commissioners of one or more districts for the purpose of employing engineering assistance, equipment, superintendents and equipment operators for the maintenance of the canals in the several districts desiring to coordinate their maintenance operations and the drainage districts desiring to coordinate a common maintenance force may have a common office with the necessary employees for the furtherance of the joint operations for maintenance. The districts may coordinate their work without regard to county lines.

(3) The board of commissioners of a drainage district may, individually or jointly with the commissioners of other drainage districts, purchase, lease, rent, sell, or otherwise dispose of at public or private sale, equipment for the original construction or maintenance of the canals in the individual or joint districts or the said drainage districts may make contracts with private construction firms for the maintenance and construction of their canals. Contracts made with private construction companies are to be advertised as provided for the contract for the original construction of the canals.

The drainage districts may use the equipment owned by them for the purpose of maintenance of the canals and the construction of extensions to the system of canals in the individual or several drainage districts.

(4) The drainage districts desiring to consolidate their maintenance services and equipment may set up a board composed of one member from each district for the purpose of control and use of the personnel and equipment employed on a joint basis, and in all matters coming before the joint board, the representative of each district shall have a voting strength equal to the proportionate acreage of his drainage district as compared with the total acreage of the combined districts.

(5) The collection of the annual maintenance assessments shall be made by the county tax collector. The board of county commissioners of the county in which a drainage district is located shall upon the request of the board of drainage commissioners of the said district cause to be shown on the tax

statement or notice issued by the county to its taxpayers the amount due the drainage district by the landowners in the same manner as other special assessments are shown thereon. This amount shall be collected by the county tax collector in the same manner as county taxes and deposited to the credit of the district in which the land is located. (1949, c. 1216.)

Art. 8. Assessments and Bond Issue.

§ 156-98. Form of bonds; excess assessment.

Cited in Robeson County Drainage Dist. v. Bullard, 229 N. C. 633, 50 S. E. (2d) 742.

§ 156-103. Assessment rolls prepared.

Cited in Robeson County Drainage Dist. v. Bullard, 229 N. C. 633, 50 S. E. (2d) 742.

§ 156-116. Modification of assessments.

Cited in Robeson County Drainage Dist. v. Bullard, 229 N. C. 633, 50 S. E. (2d) 742.

§ 156-120. Disallowance of petition; order; reclassification of lands; map and profile.—If the board of viewers do not favor the bond issue, it would be the duty of the clerk not to allow the same, but the petition may be presented again at any time after six months. If the board of viewers report that a bond issue is preferable, the clerk shall order the board of viewers to make a profile as is required when the district is first formed. If, in the opinion of the board of drainage commissioners, a new property map of the district should accompany the profiles, the clerk shall order the board of viewers to make such new map, showing the present owners in the district or in that portion thereof to be benefited by the proposed repairs, maintenance or improvement. The board of viewers shall with their profile or profiles file a report showing the lands to be benefited by the proposed repairs or maintenance or other improvements, the estimated costs thereof and the proportion or percentage which each tract of land shall bear for such repair, maintenance or improvement. Only those lands benefited by the proposed expenditures for repair, maintenance or improvement shall be assessed, and the assessment so made shall be in proportion to the benefits to be derived therefrom. The property maps, profiles and estimates of costs of repair, maintenance or improvement and lands benefited and benefits received shall be filed with the clerk in the time and manner prescribed for the filing of such reports when the district is first created. (1923, c. 231, s. 3; 1947, c. 982, s. 2; C. S. 5373(c).)

Editor's Note.—The 1947 amendment repealed the former section and substituted the above section therefor.

§ 156-124.1. Assessments for repair, etc., of canals; notice and publication; exceptions to report.—All assessments for repair, maintenance or enlargement or other improvements of any canal or canals in any drainage district shall be levied against the lands benefited by such repair, enlargement or improvement. The drainage commissioners shall give notice of the proposed assessments by publication at least once a week for a period of four weeks in some newspaper published in the county in which said district was created, or if there be no such newspaper, by posting a notice at the courthouse door in said county for thirty days. Any property owner may within said thirty-day period file exceptions to said report, whereupon the clerk shall fix a time for the hearing of all exceptions which may be filed, and at said time the clerk shall hear said exceptions and render such judgment as may be mete and proper. Any property owner not having excepted to the proposed assessment within the time herein provided for shall be concluded and bound by the assessment as proposed. (1947, c. 982, s. 3.)

SUBCHAPTER IV. DRAINAGE BY COUNTIES.

Art. 12. Protection of Public Health.

§ 156-139. Cleaning and draining of streams, etc., under supervision of governmental agencies.

For comment on this and the following two sections, see 21 N. C. Law Rev. 352.

Chapter 157. Housing Authorities and Projects.

Art. 1. Housing Authorities Law.

§ 157-2. Finding and declaration of necessity.

Editor's Note.—Chapter 1081 of Session Laws 1949, which amended §§ 160-417 and 160-421 and struck out § 160-423, re-enacted all of chapter 2 of the Public Laws of 1938, as thereby amended.

§ 157-3. Definitions.

Editor's Note.—Chapter 1081 of Session Laws 1949, which amended §§ 160-417 and 160-421 and struck out § 160-423, re-enacted all of chapter 2 of the Public Laws of 1938, as thereby amended.

Chapter 159. Local Government Acts.

Art. 1. Local Government Commission and Director of Local Government.

Art. 1. Local Government Commission and Director of Local Government.

§ 159-7. Application to commission for issuance of bonds or notes. — Before any bonds or notes may be issued by or in behalf of a unit the board authorized by law to issue the same, or a duly authorized agent of said board, shall file application with the commission on a form prescribed by the commission for its approval of the proposed bonds or notes, which application shall state such facts and shall have annexed thereto such exhibits in regard to such bonds or notes and to such unit and its financial condition as may be required by the commission. In any case where the question of issuance of proposed bonds or notes is required by law or the constitution to be submitted to the voters at an election such election with respect to such bonds or notes shall not be valid unless the

application required herein shall have been filed not later than forty days (Sundays and holidays included) prior to such election. A statement signed by either the chairman or secretary of the commission directed to the board authorized by law to issue the proposed bonds or notes and containing the date on which such application was filed and either a description of the proposed bonds or notes as set forth in the application or reference to the order, ordinance or resolution pursuant to which the proposed bonds or notes may be issued shall be conclusive evidence that the provisions of this section are complied with. The commission shall consider such application and shall determine whether the issuance of such bonds or notes is necessary or expedient. (1931, c. 60, s. 11; 1949, c. 1085.)

Editor's Note.—The 1949 amendment rewrote this section.

§ 159-42. Law applicable to all counties, cities and towns.—The provisions of this article shall apply to every unit having the power to levy taxes ad valorem, regardless of any provisions to the contrary in any general, special or local act enacted before the adjournment of the regular session of the General Assembly in one thousand nine hundred and forty-nine. (1931, c. 60, s. 74; 1935, c. 356, s. 3; 1941, c. 191; 1947, c. 992; 1949, c. 925.)

Editor's Note.—The 1947 amendment substituted "forty-seven" for "forty-one" in the last line.

The 1949 amendment substituted "forty-nine" for "forty-seven," and inserted the word "general" in line four.

For a brief comment on the 1947 amendment, see 25 N. C. Law Rev. 455.

§ 159-49.1. Investment of unused proceeds of sale of bonds by counties, cities and towns in designated securities.

For comment on this section, see 21 N. C. Law Rev. 357.

§ 159-49.2. Investment of bond proceeds pending use.—When the proceeds of any bonds heretofore or hereafter sold by any county, city or town, shall not be needed for a period of not less than ninety days to meet contractual or other obligations in connection with the purposes for which such bonds were issued, such county, city or town may, with the prior approval of the local government commission, invest the proceeds of such bonds not so needed in the securities listed in G. S. § 159-49.1; provided, the maturities of such securities conform to the date or dates such county, city or town will need the moneys so invested. (1949, c. 858.)

Chapter 160. Municipal Corporations.

Art. 6. Sale of Municipal Property.

Sec.

160-61.1. Certain counties and municipalities authorized to execute warranty deeds; relief from personal liability.

Art. 8. Public Libraries.

160-77. Joint libraries.

Art. 12. Recreation Systems and Playgrounds.

160-155. Title.
160-156. Declaration of state public policy.
160-157. Definitions.
160-158. Powers.
160-159. Funds.
160-160. System conducted by unit or recreation board.
160-161. Appointment of members to board.
160-162. Power to accept gifts and hold property.
160-163. Petition for establishment of system and levy of tax; election.
160-164. Joint playgrounds or neighborhood recreation centers.

Art. 18. Powers of Municipal Corporations.

Part 6. Fire Protection.

160-238. Fire protection for property outside city limits; injury to employee of fire department.

Art. 19. Exercise of Powers by Governing Body.

Part 3. Officers.

160-278. City clerk elected; appointment of deputy clerk; powers and duties.

Part 4. Contracts Regulated.

160-280. Separate specifications for contracts; responsible contractors; liability of separate contractors.

Art. 34. Revenue Bond Act of 1938.

Sec.

160-423. [Struck out.]

Art. 34A. Bonds to Finance Sewage Disposal System.

160-424.1. Issuance of bonds by municipality.
160-424.2. Additional powers of municipality.
160-424.3. Fixing or revising schedule of rates, etc., for services and facilities.
160-424.4. Authority to charge and collect rates, fees, etc.; basis of computation; additional charge for cause.
160-424.5. Inclusion of charges as part of water bill; water disconnected upon failure to pay charges.
160-424.6. Revenues pledged to bond retirement.
160-424.7. Powers herein granted are supplemental.

Art. 35. Capital Reserve Funds.

160-429. How the capital reserve fund may be established; revenues derived from public utilities.
160-430.1. Increases to capital reserve fund.
160-444. Termination of power to establish and increase capital reserve fund.

Art. 36. Extension of Corporate Limits.

160-445. Procedure for adoption of ordinance extending limits; effect of adoption when no election required.
160-446. Referendum on question of extension.
160-447. Extent of participation in referendum; call of election.
160-448. Action required by county board of elections; publication of resolution as to election; costs of election.
160-449. Ballots; effect of majority vote for extension.

SUBCHAPTER I. REGULATIONS INDEPENDENT OF ACT OF 1917.

Art. 1. General Powers.

§ 160-1. Body politic.

The implied powers of a municipality are those which are necessarily or fairly implied in or incident to the powers expressly granted, or essential to the accomplishment of the purposes of the corporation. Green v. Kitchin, 229 N. C. 450, 50 S. E. (2d) 545. For a leading article on this case, see 27 N. C. Law Rev. 500.

§ 160-2. Corporate powers.

10. To establish, erect, repair, maintain and operate a city or town jail or guardhouse, and to raise by taxation the moneys necessary therefor. (Rev., s. 2916; Code, ss. 704, 3117; 1901, c. 283; 1905, c. 526; 1907, c. 978; P. L. 1917, c. 223; Ex. Sess. 1921, c. 58; 1927, c. 14; 1933, c. 6; 1949, c. 938; C. S. 2623.)

Cross References.—As to authority to lease, convey or acquire property for use as armory, see § 143-235. As to appropriations for benefit of military units, see § 143-236.

Editor's Note.—The 1949 amendment added subsection 10. As the rest of the section was not affected by the amendment it is not set out.

For a brief comment on the 1949 amendment, see 27 N. C. Law Rev. 473.

Subsection 5.

Local Modification.—City of Reidsville: 1949, c. 323.

Subsection 6.

When Approval of Voters Not Required.—Where a municipality decides to abandon the generation of electricity by the use of Diesel engines and substitute therefor electricity purchased wholesale for distribution through its electric plant, and in pursuance of such change of policy, advertises a sale of Diesel engines under § 160-59, there is no sale by such municipality of its electric plant requiring approval of a majority of the qualified voters under this section. Mullen v. Louisburg, 225 N. C. 53, 33 S. E. (2d) 484.

Discretion of Local Body.—The terms and conditions upon which franchises to public utilities are to be granted, unless clearly unreasonable or expressly prohibited by law, rest in the sound discretion of the local body. Mullen v. Louisburg, 225 N. C. 53, 33 S. E. (2d) 484.

Statutory Term Read into Contract.—Where a franchise granted by a municipality fails to stipulate a term, the statutory term of sixty years will be read into the contract as a part thereof. Boyce v. Gastonia, 227 N. C. 139, 41 S. E. (2d) 355.

Art. 2. Municipal Officers.

Part 1. Commissioners.

§ 160-9. Commissioners appoint other officers and fix salaries.

Cited in Green v. Kitchin, 229 N. C. 450, 50 S. E. (2d) 545.

Part 3. Constable and Policemen.

§ 160-20. Policemen appointed.

Municipality May Send Policemen to Training School.—The explicit power of a municipality to appoint and employ police contemplates that the persons so engaged be qualified and competent, and therefore a municipality has implied authority, exercisable within the discretion of its governing body, to send its policemen to a police training school and to make proper expenditures for this purpose. Green v. Kitchin, 229 N. C. 450, 50 S. E. (2d) 545. For a leading article on this case, see 27 N. C. Law Rev. 500.

§ 160-21. Policemen execute criminal process.

Arrest without a Warrant.—A police officer within the limits of the city which has clothed him with authority, like a sheriff or constable, may summarily and without warrant arrest a person for a misdemeanor committed in his presence. This is a necessary concomitant of police power and essential for police protection. But in such case it is the duty of the officer to inform the person arrested of the charge against him and immediately take him before someone authorized to issue criminal warrants and have a warrant issued, giving him opportunity to provide bail and communicate with counsel and friends. Perry v. Hurdle, 229 N. C. 216, 49 S. E. (2d) 400.

Cited in Green v. Kitchin, 229 N. C. 450, 50 S. E. (2d) 545.

Part 4. Planning Boards.

§ 160-22. Creation and duties.

The governing body of any city or town is hereby authorized to enter into any agreements with any other city, town or county for the establishment of a joint planning board. (1919, c. 23, s. 1; 1945, c. 1040, s. 2; C. S. 2643.)

Local Modification.—Buncombe, Chatham, Stanly, Vance, Wake: 1945, c. 1040, ss. 2½, 3.

Editor's Note.—The 1945 amendment added the above sentence at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

Session Laws 1949, c. 876, amended Session Laws 1945, c. 1040, s. 3, by striking out the words "Durham county." This had the effect of removing "Durham" from the list of counties appearing under "Local Modification" and of making this section applicable to Durham county.

Part 5. General Qualification of Officers.

§ 160-25. Must be voters in town or city.

Local Modification.—Town of Andrews: 1947, c. 419; city of Bryson City: 1947, c. 363; town of Franklin: 1947, c. 38; town of Highlands: 1947, c. 45; town of Marion: 1947, c. 793; town of Mars Hill: 1947, c. 566; town of Old Fort: 1947, c. 793; town of Robbinsville: 1949, c. 55; town of Sylva: 1947, c. 11; town of Wallace: 1947, c. 799; municipalities in Transylvania: 1947, c. 246.

Art. 3. Elections Regulated.

§ 160-29. Application of law, and exceptions.

Local Modification.—City of Lenoir: 1947, c. 615, s. 2.

§ 160-30. When election held.

Editor's Note.—Session Laws 1947, c. 615, s. 1, provides: "The provisions of sections 160-30 through 160-51 of the General Statutes shall be applicable to all municipal elections held in the city of Lenoir in Caldwell county, except primary elections."

§ 160-35. Notice of new registration.

Local Modification.—Town of Brevard: 1949, c. 852, s. 2.

§ 160-40. Practice in challenges.

Local Modification.—Town of Brevard, temporary: 1949, c. 852, s. 5.

Art. 4. Ordinances and Regulations.

§ 160-52. General power to make ordinances.

Editor's Note.—As to ordinances "inconsistent with this chapter and the law of the land," see 27 N. C. Law Rev. 567.

Cited in State v. Stallings, 230 N. C. 252, 52 S. E. (2d) 901.

§ 160-54. Repair streets and bridges.—The board of commissioners shall provide for keeping in proper repair the streets and bridges in the town, in the manner and to the extent they may deem best; may cause such improvements in the town to be made as may be necessary: Provided, however, so long as the maintenance of any streets and/or bridges within the corporate limits of any town be taken over by the state highway and pub-

lic works commission, such town shall not be responsible for the maintenance thereof and shall not be liable for injuries to persons or property resulting from the failure to maintain such streets and bridges. (Rev., s. 2930; Code, s. 3803; R. C., c. 111, s. 16; 1949, c. 862; C. S. 2675.)

Editor's Note.—The 1949 amendment added the proviso. For a brief comment on the 1949 amendment, see 27 N. C. Law Rev. 474.

City Cannot Plead Governmental Immunity.—A municipality cannot, with impunity, create in its streets a condition palpably dangerous, neglect to provide the most ordinary means of protection against it, and avoid liability for proximate injury on the plea of governmental immunity. Hunt v. High Point, 226 N. C. 74, 36 S. E. (2d) 694, 696.

This section imposes on towns and cities a positive duty to maintain streets in a reasonably safe condition for travel, and negligent failure to do so renders municipality liable to private action for proximate injury. Hunt v. High Point, 226 N. C. 74, 36 S. E. (2d) 694, 695.

Duty to Take Measures to Avert Injury.—Negligent failure to take such measures as ordinary prudence requires to avert injury, where the municipality has actual or imputable knowledge of the dangerous condition, will render municipality liable for injury proximately caused. Hunt v. High Point, 226 N. C. 74, 78, 36 S. E. (2d) 694.

Failure to Light Street.—While a city may not be under legal necessity of lighting its streets at all, where it does maintain street lights its failure to provide lighting which is reasonably required at a particular place because of the dangerous condition of street is negligent failure to discharge its duty to maintain the streets in a reasonably safe condition for travel. Hunt v. High Point, 226 N. C. 74, 36 S. E. (2d) 694.

§ 160-55. May abate nuisances. — The board of commissioners may pass laws for abating or preventing nuisances of any kind, and for preserving the health of the citizens. Provided, however, it shall not be a nuisance for an employee or servant of a railroad company to make necessary smoke when stoking or operating a coal burning locomotive. (Rev., s. 2929; Code, s. 3802; R. C., c. 111, s. 15; 1949, c. 594, s. 1; C. S. 2676.)

Editor's Note.—The 1949 amendment added the proviso. For a brief comment on the 1949 amendment, see 27 N. C. Law Rev. 474.

Art. 5. Municipal Taxation.

§ 160-56. Commissioners may levy taxes.—The board of commissioners may annually levy and cause to be collected for municipal purposes an ad valorem tax not exceeding the limitation expressed in § 160-402, and one dollar on each poll, on all persons and property within the corporation, which may be liable to taxation for state and county purposes; and may annually lay a tax on all trades, professions and franchises carried on or enjoyed within the city, unless otherwise provided by law; and may lay a tax on all such shows and exhibitions for reward as are taxed by the general assembly; and on all dogs, and on swine, horses and cattle, running at large within the town: Provided, however, the board of commissioners may re-adopt any existing ordinance or ordinances levying, assessing, imposing and defining the license and privilege taxes of any city by reference, without reading the same in detail, and by the reading of any amendments or additions thereto. (Rev., s. 2924; Code, s. 3800; R. C., c. 111, s. 13; 1862, c. 51; 1949, c. 933; C. S. 2677.)

Editor's Note.—The 1949 amendment added the proviso.

Art. 6. Sale of Municipal Property.

§ 160-59. Public sale by mayor and commissioners.

Local Modification.—City of Reidsville: 1949, c. 323.

Applied in Mullen v. Louisburg, 225 N. C. 53, 33 S. E. (2d) 484.

§ 160-61.1. Certain counties and municipalities authorized to execute warranty deeds; relief from personal liability.—1. The governing bodies of counties and municipal corporations are hereby authorized and empowered to execute and deliver conveyances to any property, whether acquired by tax or assessment foreclosure or otherwise, with full covenants of warranty whenever in the discretion of said governing bodies it is to the best interest of said counties or municipal corporations to convey by warranty deed.

2. Members of the governing bodies of counties and municipal corporations are hereby relieved of any personal or individual liability by reason of the execution of any such conveyances with covenants of warranty.

3. This section shall apply only to Wake County and the municipal corporations therein, Forsyth county and the municipal corporations therein, Rowan county and the municipal corporations therein, and to the following named counties and the municipal corporations therein, to-wit: Wayne, Lenoir, Beaufort, New Hanover, Union, Franklin, Bertie, Bladen, Pender, Orange, Wilson, Richmond, Davidson, Halifax, Gates, Nash, Edgecombe. (1945, c. 962.)

Art. 8. Public Libraries.

§ 160-65. Library established upon petition and popular vote.—The governing body of any incorporated city or county, upon petition of fifteen per cent (15%) of the registered voters in said city or county who voted in the last election for governor, may submit the question of the establishment and support of a free public library to the voters at a special election for that purpose. Such special election shall be called by the proper election authorities of the incorporated city or county, and at least twenty days' public notice of same shall be given prior to the opening of the registration books. The registration books shall remain open for the same period of time before said special election as is required by law for them to remain open for a regular election. A new registration of the qualified voters shall be ordered before said special election is held and such new registration shall be made in accordance with the laws for the registration of voters in municipal elections as provided by chapter one hundred and sixty of the General Statutes of North Carolina and as provided by chapter one hundred and sixty-three of the General Statutes of North Carolina in the case of a county. At said special election there shall be submitted to the voters qualified to vote in said election the question of whether a special tax shall be levied and a free public library established or maintained as herein provided. The ballot to be used in voting on whether any tax authorized by this section shall be levied and a free public library established shall contain the following question: "Shall a special tax be levied for the establishment, maintenance and support of public libraries?", with appropriate spaces for marking "yes" or "no." If a majority of the qualified voters voting at said special election vote in the affirmative, the governing body of the voting unit shall establish the library

and may levy, and cause to be collected as other general taxes are collected, a special tax in the amount requested by the petition, which shall not be more than ten cents (10c) nor less than three cents (3c) on the one hundred dollars ($100.00) of the assessed value of the taxable property of such unit. The funds so derived shall constitute the library fund, and shall be kept separate from the other funds of the city or county, to be expended exclusively on such library. When such library has been established, it may be abolished only by a vote of the people in the same manner in which it was established.

In any city or county in which a tax for library purposes has been voted under this section or any other law, the governing body thereof, on the recommendation of the board of trustees of the library, may submit to the voters of such city or county the question as to an increase or decrease, within the limitations of this section, of such tax so authorized. The question shall be submitted to the voters in the manner provided by this section. No election under this section shall be held on the day of any biennial election for county officers, or within sixty days of such an election.

The provisions of this section shall apply to the territory in any county in this state situated outside incorporated cities or towns therein which have established libraries upon petitions and popular elections under this section. It is the intent and purpose of this section to authorize qualified voters in the territory lying outside incorporated cities and towns in this state to file petitions with the governing body of the county in which they are situated, and to be permitted to vote for the establishment of libraries in said territory, and to levy and collect taxes for the establishment and maintenance of the same in the manner and within the limitations set out in this section. (1911, c. 83, s. 1; 1927, c. 31, s. 1; 1933, c. 365, s. 1; 1945, c. 1005; 1949, cc. 351, 353; C. S. 2694.)

Editor's Note.—

The 1945 amendment rewrote this section.

The first 1949 amendment added the last paragraph, and the second 1949 amendment substituted "ten cents (10c)" for "five cents (5c)" in the second from the last sentence of the first paragraph.

§ 160-77. Joint libraries.—Two or more counties or municipalities, or a county or counties and a municipality or municipalities, may join for the purpose of establishing and maintaining a free public library under the terms and provisions contained in this article.

Such combined governmental units shall have the same privileges and shall be subject to the same restrictions as a single unit under this article, and all the provisions of this article, unless inconsistent, shall be applicable to the combined units.

The governing bodies of the combined units shall perform their appropriate duties with regard to the library in the same manner as for a single unit under this article.

Such joint library shall be governed by a board of trustees to be composed of three persons from each of the participating units. The governing body of each unit shall choose the three persons to represent it from the citizens at large with reference to their fitness for such office. For the initial term, one member shall be appointed for two years, one for four years, and one for six years, and until their successors are appointed and qualified. Thereafter, the terms of members shall be for six years and until their successors are appointed and qualified. Vacancies occurring on the board shall be filled by the governing body of the appointing unit for the unexpired term. Any member may be removed by the governing body appointing him for incapacity, unfitness, misconduct or neglect of duty. The board shall serve without compensation.

The amount each participating unit shall contribute to the establishment and support of the joint library shall be based upon relative population and the total assessed value of property in each unit.

Should any county at any time desire to withdraw from such combination, the said county shall be entitled to such proportion of the property as may have been agreed upon in the terms of combination at the time such joint action was taken. (1933, c. 365, s. 7; 1945, c. 401.)

Editor's Note.—The 1945 amendment rewrote this section.

Art. 9. Local Improvements.

§ 160-78. Explanation of terms.

"Street improvement" includes the grading, regrading, paving, repaving, macadamizing, remacadamizing and bituminous surface treatment constructed on a soil stabilized base course with a minimum thickness of four inches, (such soil stabilizing agents to be top soil, sand clay, sand clay gravel, crushed stone, stone dust, portland cement, tar, asphalt or any other stabilizing materials of similar character, or any combination thereof,) of public streets and alleys, and the construction, reconstruction, and altering of curbs, gutters and drains in public streets and alleys. (1945, c. 461.)

Editor's Note.—The 1945 amendment inserted in the paragraph defining "Street improvement" the provision as to bituminous surface treatment. As the rest of the section was not affected by the amendment it is not set out.

Cited in Raleigh v. Mechanics, etc., Bank, 223 N. C. 286, 26 S. E. (2d) 573.

§ 160-83. What resolution shall contain.

Cited in Salisbury v. Arey, 224 N. C. 260, 29 S. E. (2d) 894.

§ 160-85. Assessments levied.

School Property Subject to Assessment for Street Improvements.—Lands owned by "The School Committee of Raleigh Township, Wake County," and used exclusively for public school purposes, are liable for assessment for street improvements made by the city of Raleigh under this article. Raleigh v. Raleigh City Administrative Unit, 223 N. C. 316, 26 S. E. (2d) 591.

§ 160-88. Hearing and confirmation; assessment lien.

Priority of Lien.—

In an action to foreclose street assessment liens it was said that if it be thought that effect should be given to the provisions relative to ad valorem taxes in § 105-340, that the lien for taxes levied shall attach to all the real estate of the taxpayer and shall continue until such taxes shall be paid, it may be noted that this section, relating to local assessments provides only that the assessment when confirmed shall be a lien on the real property against which it is assessed, superior to all other liens. Raleigh v. Mechanics, etc., Bank, 223 N. C. 286, 295, 26 S. E. (2d) 573.

§ 160-90. Power to adjust assessments.

An extension resolution providing a new series of installment payments does not invalidate the lien of a municipality for an assessment for public improvements where the sums of the new installments in the aggregate exceed the

amount actually due at the time of the extension. Differences may be adjusted under this section. Salisbury v. Arey, 224 N. C. 260, 29 S. E. (2d) 894.

§ 160-91. Payment of assessment in cash or by installments.

Right to Declare All Installments Due.—
In accord with original. See Salisbury v. Arey, 224 N. C. 260, 29 S. E. (2d) 894.

When It Is Mandatory upon City to Allow Installment Payment.—The provisions in this section were enacted for the benefit of the property owner, giving the owner a period of thirty days from the date notice is given as required by the following section, in which to pay the assessment in cash, without interest; or, if he should so elect and give notice in writing to the municipality within said period of thirty days, that he desires to pay his assessment in installments, then it becomes mandatory upon the city to permit such property owner to pay his assessment in installments. Salisbury v. Arey, 224 N. C. 260, 265, 29 S. E. (2d) 894.

The option passes to the municipality to proceed to foreclose and collect the entire assessment or to collect the assessment in installments, as provided in the original resolution authorizing the improvements where the property owner remains silent and neither pays in cash within the thirty-day period nor signifies in writing his election to pay in installments. Salisbury v. Arey, 224 N. C. 260, 266, 29 S. E. (2d) 894.

Cited in Raleigh v. Mechanics, etc., Bank, 223 N. C. 286, 26 S. E. (2d) 573.

§ 160-92. Payment of assessment enforced.

Cross Reference.—See annotations under preceding section.

Cited in Raleigh v. Mechanics, etc., Bank, 223 N. C. 286, 26 S. E. (2d) 573.

§ 160-93. Sale or foreclosure for unpaid assessments barred in ten years; no penalties.

Editor's Note.—For article on collectibility of special assessments more than ten years delinquent, see 22 N. C. Law Rev. 123.

Section Applies to Action to Foreclose Drainage Assessment.—This section applies to an action brought by a drainage district for foreclosure of delinquent drainage assessments, and authorizes "one reasonable attorney's fee for the plaintiff" to be included and taxed in the costs in such an action. Robeson County Drainage Dist. v. Bullard, 229 N. C. 633, 50 S. E. (2d) 742.

When Allowance of Attorney's Fee to Be Made.—It would seem that the legislature intended that the allowance of an attorney's fee under this section should be made at the conclusion of the proceeding and not in the course of it. Robeson County Drainage Dist. v. Bullard, 229 N. C. 633, 50 S. E. (2d) 742.

Cited in Raleigh v. Raleigh City Administrative Unit, 223 N. C. 316, 26 S. E. (2d) 591.

§ 160-94. Extension of time for payment of special assessments.

Editor's Note.—
For article on collectibility of special assessments more than ten years delinquent, see 22 N. C. Law Rev. 123.

Extension Contrary to Section Is Not Void.—A resolution of the governing body of a municipality, providing for an extension of the payments of an assessment for local improvement in installments, which is contrary to this section, is defective but not void, and may be amended by a subsequent resolution to conform to the statutory requirements. Salisbury v. Arey, 224 N. C. 260, 29 S. E. (2d) 894.

When Statute of Limitations Begins to Run.—Where a new series of installment payments of an assessment for local improvements is provided, under this section, the ten-year statute of limitations begins to run on each new installment as it becomes due. Salisbury v. Arey, 224 N. C. 260, 29 S. E. (2d) 894.

§ 160-100. Assessment books prepared.

Stated in Salisbury v. Arey, 224 N. C. 260, 29 S. E. (2d) 894.

Art. 10. Inspection of Meters.

§ 160-114. Free access to meters.

Cited in Raleigh v. Mechanics, etc., Bank, 223 N. C. 286, 26 S. E. (2d) 573.

Art. 11. Regulation of Buildings.

§ 160-122. County electrical inspectors.

—The county commissioners of each county may, in their discretion, designate and appoint one or more electrical inspectors, who shall qualify as hereinafter prescribed, whose duty shall be to enforce all state and local laws governing electrical installations and materials, to issue permits for and to make inspections of all new electrical installations and such re-inspections as may be prescribed by the county commissioners in buildings located in any town of one thousand population or less and/or those buildings located outside the corporate limits of all cities and towns, and not otherwise included in this article, and to issue a certificate of inspection where such installations fully meet the requirements for such installations as set forth in this article, or such additional requirements as the board of county commissioners may prescribe. Nothing contained in this article shall be construed as prohibiting said board of county commissioners designating as county inspector any person who also has or may be designated as electrical inspector in any city or town located within said county, or from prohibiting two or more counties from designating the same inspector to perform the duties herein mentioned for such two or more counties. The county commissioners shall also fix the fees to be charged by such county inspector, which fees shall be paid by the owner of the properties so inspected.

The fees collected by the inspector may be retained by him in payment for his services, or the county commissioners, in their discretion, may pay the inspector a fixed salary, in which case the fees collected for permits and inspections shall be paid to the county treasury.

It shall be unlawful for the county electrical inspector or any of his authorized agents to engage in the business of installing electrical wiring, devices, appliances or equipment, and he shall have no financial interest in any concern engaged in such business in the county at any time while holding such office as herein provided for.

Before confirmation of his appointment, the electrical inspector shall take and pass a qualifying examination to be based on the last edition of the National Electrical Code, as filed with the secretary of state. This examination shall be in writing and shall be conducted according to the rules and regulations prescribed by and under the supervision of the state electrical engineer and inspector and the board of examiners of electrical contractors. The prescribed rules and regulations may provide for the appointment of class I, class II and class III inspectors in accordance with the qualifications revealed by the examination with respect to the installation of various types and character of equipment and facilities. Examinations shall be given quarterly in Raleigh, or in such other places as may be designated by the state electrical engineer and inspector, at his discretion. Examinations shall be based on the type and character of electrical installations being made in the territory in which the applicant wishes to serve as electrical inspector. An electrical inspector having qualified for a class I appointment shall be eligible without further exami-

nation to serve as electrical inspector anywhere in the state, but an inspector having qualified for a class II or class III appointment shall be limited to the territory for which he may qualify.

Upon passing the required examination by any person, a certificate approving him as inspector for a designated territory shall be issued by the commissioner of insurance. Such certificate must be renewed annually between January 1st and January 31st and shall be subject to cancellation at any time if the inspector is removed from office for cause by the board of county commissioners, which removal is hereby authorized. The fee for examination shall be five dollars ($5.00), to be returned if the applicant fails to pass. The annual renewal fees for a certificate of appointment shall be one dollar ($1.00). If the person appointed as electrical inspector by the county commissioners fails to take the examination or to make the necessary passing grade, the county commissioners shall continue to make such appointments until one or more applicants has passed the examination. In the interim, a temporary inspector may act with the approval of the commissioner of insurance.

The inspector appointed shall give a bond approved by the county commissioners for the faithful performance of his duties. (1937, c. 57; 1941, c. 105; 1947, c. 719.)

Editor's Note.—
The 1947 amendment made changes in the first paragraph and added all of the section beginning with the second paragraph.

§ 160-141. Electric wiring of houses.

Local Modification.—City of Salisbury: 1949, c. 1044.

§ 160-146. Fees of inspector.

Local Modification.—City of Salisbury: 1949, c. 1044.

Art. 12. Recreation Systems and Playgrounds.

§ 160-155. Title.—This article shall be known and may be cited as the "Recreation Enabling Law." (1945, c. 1052.)

Editor's Note.—
The 1945 amendment rewrote this article, formerly containing twelve sections, to appear as set out herein. The amendatory act provides: "Nothing in this act shall have the effect of repealing Public-Local or Private Acts creating or authorizing the creation of any recreational system by a unit or relating to the management thereof."

Cited in Purser v. Ledbetter, 227 N. C. 1, 40 S. E. (2d) 702.

§ 160-156. Declaration of state public policy.—As a guide to the interpretation and application of this article, the public policy of this state is declared to be as follows: The lack of adequate recreational programs and facilities is a menace to the morals, happiness and welfare of the people of this state in times of peace as well as in time of war. Making available recreational opportunities for citizens of all ages is a subject of general interest and concern, and a function requiring appropriate action by the governing bodies of the several political and educational subdivisions of the state. The legislature, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this state require an adequate recreation program and that the creation, establishment and operation of a recreation system is a governmental function and a necessary expense as defined by article VII, section seven, of the constitution of North Carolina. (1945, c. 1052.)

Dedication for Recreation Facilities Is for Public Purpose.—The power of cities to dedicate real property for use as recreation centers and for other recreational purposes is expressly conferred by this section, and the exercise of this power is in the public interest and for a public purpose. Brumley v. Baxter, 225 N. C. 691, 36 S. E. (2d) 281, 286, 162 A. L. R. 930, citing Atkins v. Durham, 210 N. C. 295, 186 S. E. 330; White v. Charlotte, 209 N. C. 573, 575, 183 S. E. 730.

Stated in Purser v. Ledbetter, 227 N. C. 1, 40 S. E. (2d) 702.

§ 160-157. Definitions.—(1) Recreation, for the purpose of this article, is defined to mean those activities which are diversionary in character and which aid in promoting entertainment, pleasure, relaxation, instruction, and other physical, mental, and cultural development and experiences of a leisure time nature.

(2) Unit, for the purpose of this article, means county, city and town. (1945, c. 1052.)

§ 160-158. Powers.—The governing body of any unit, as defined in § 160-157, may exercise the following powers for recreational purposes:

(1) Establish and conduct a system of supervised recreation for such unit.

(2) Set apart for use as parks or playgrounds, recreational centers or facilities, any lands or buildings owned by or leased to such unit and may improve and equip such lands or buildings.

(3) Acquire lands or buildings by gift, purchase, lease or loan, or by condemnation as provided by chapter forty, Eminent Domain, of the General Statutes.

(4) Accept any gift or bequest of money or other personal property or any donation to be applied principal or income for recreational use.

(5) Provide, construct, equip, operate and maintain parks, playgrounds, recreation centers and recreation facilities, and all buildings and structures necessary or useful in connection therewith

(6) Appropriate funds for the purpose of carrying out the provisions of this article. (1945, c. 1052.)

§ 160-159. Funds.—If the governing body of any unit, as defined in § 160-157, finds it necessary for the purpose of carrying out the provisions of this article, the governing body is hereby authorized to call a special election without a petition for that purpose as provided by § 160-163, and submit as therein provided to the qualified voters of said unit the question of whether or not a special tax shall be levied and/or bonds issued for the purpose of acquiring lands for parks, playgrounds and buildings, and the improvement thereof, and for equipping and operating same. (1945, c. 1052.)

Cited in Purser v. Ledbetter, 227 N. C. 1, 40 S. E. (2d) 702.

§ 160-160. System conducted by unit or recreation board.—If a recreational system is established, it may be conducted by the unit as any other department of the unit is conducted, or if the governing body of the unit determines that it is for the best interest of the system that it be supervised and directed by a recreation board or commission, then such governing body may create such board or commission by ordinance or resolution to be known as the "recreation board or commission of the unit" and may vest such board or com-

mission with the authority to provide, maintain, conduct and operate the recreational system with authority to employ directors, supervisors and play leaders and such other officers or employees as may be deemed best within the budget provided for the commission or board by the unit or from appropriations made by it, or from other funds in the hands of the commission or board. The board or commission may be vested with such powers and duties as to the governing body may seem proper. (1945, c. 1052.)

§ 160-161. Appointment of members to board.—The board or commission shall be appointed by the governing body of the unit and shall consist of ten members, four of whom shall be ex officio members, one of whom shall represent the governing body of the unit, one the school system serving the unit, one the welfare department serving the unit, and one the health department serving the unit. The ex officio members shall serve and have the same powers and duties as other members. Six members shall be appointed to represent the public at large, two of whom shall be appointed for a term of one year; two for a term of two years; and two for a term of three years. Upon the expiration of their original terms of office, each succeeding term shall be for three years but no member at large shall immediately succeed himself beyond two consecutive terms and no ex officio member shall serve beyond the term of the office he represents or serve continuously to exceed six years. The members shall serve without compensation. Vacancies in the board or commission shall be filled for the unexpired term by appointment of the governing body of the unit. The recreation board or commission at its first meeting shall appoint a chairman and such other officers as may be deemed proper for the conduct of its business, and shall adopt rules and regulations to govern its procedures. Rules and regulations may be adopted from time to time for the purpose of governing the use of the parks, playgrounds, recreation centers and facilities. (1945, c. 1052; 1949, c. 1204.)

Editor's Note.—The 1949 amendment rewrote the former first two sentences to appear as the present first three sentences.

§ 160-162. Power to accept gifts and hold property.—The recreation board or commission may accept any grant, lease, loan, or devise of real estate or any gift or bequest of money or other personal property, or any donation to be applied, principal or income, for either temporary, immediate or permanent recreational use; but if the acceptance of any grant or devise of real estate, or gift or bequest of money or other personal property will subject the unit to expense for improvement or maintenance, the acceptance thereof shall be subject to the approval of the governing body of such unit. Lands or devises, gifts or bequests, may be accepted and held subject to the terms under which such land or devise, gift or bequest, is made, given or received. (1945, c. 1052.)

§ 160-163. Petition for establishment of system and levy of tax; election.—A petition signed by at least fifteen per cent of the qualified and registered voters in the unit may be filed in the office of the clerk or other proper officer of such unit requesting the governing body of such unit to do any one or all of the following things:

(1) Provide, establish, maintain and conduct a supervised recreation system for the unit.

(2) Levy an annual tax of not less than three cents (3c) nor more than ten cents (10c) on each one hundred dollars of assessed valuation of the taxable property within such unit for providing, conducting and maintaining a supervised recreation system.

(3) Issue bonds of the unit in an amount specified therein and levy a tax for the payment thereof, for the purpose of acquiring, improving and equipping lands or buildings or both for parks, playgrounds, recreation centers and other recreational facilities.

When the petition is filed, it shall be the duty of the governing body of such unit to cause the question petitioned for to be submitted to the voters at a special election to be held in such unit within ninety days from the date of the filing, which election shall be held as now provided by law for the holding of general elections in such units, except in all such elections a special registration shall be provided.

If the proposition submitted at such election shall receive a majority vote of the qualified registered electors at such election, the governing body of the unit shall, by appropriate ordinance or resolution, put into effect such proposition as soon as practicable. (1923, c. 83, s. 8; 1945, c. 1052; C. S. 2776(h).)

Cited in Purser v. Ledbetter, 227 N. C. 1, 40 S. E. (2d) 702.

§ 160-164. Joint playgrounds or neighborhood recreation centers.—Any two or more units may jointly provide and establish, operate and conduct and maintain a supervised recreation system and acquire, operate, improve and maintain property, both real and personal, for parks, playgrounds, recreation centers and other recreational facilities and activities, the expense thereof to be proportioned between the units participating as may to them seem just and proper. (1945, c. 1052.)

Art. 14. Zoning Regulations.

§ 160-172. Grant of power.

Building Inspector Must Follow Literal Provisions of Regulations.—In the issuing of building permits the building inspector, a purely administrative agent, must follow the literal provisions of the zoning regulations. Lee v. Board of Adjustment, 226 N. C. 107, 37 S. E. (2d) 128, 131.

Power to Zone Cannot Be Delegated.—The power to zone is conferred upon the governing body of the municipality and cannot be delegated to the board of adjustment. Hence a board of adjustment has no power either under this section or under ordinance to permit a type of business or buildng prohibited by the ordinance, for to do so would be an amendment of the law and not a variance of its regulations. James v. Sutton, 229 N. C. 515, 50 S. E. (2d) 300.

Variance and Nonconforming Buildings.—The privilege of erecting a nonconforming building or a building for a nonconforming use may not be granted under the guise of a variance permit, and action to that effect is in direct conflict with the general purpose and intent of the ordinance and does violence to its spirit. Lee v. Board of Adjustment, 226 N. C. 107, 37 S. E. (2d) 128, 133.

Validity of Ordinance.—

A zoning ordinance covering all land within the municipality and separating commercial and industrial districts of the city from those set apart for residences, schools, parks, libraries, churches, etc., and which is uniform and operates alike on all territory within the respective zones, bears a reasonable relation to the health, safety, morals and general welfare of the entire community and is a valid and constitutional exercise of the delegated police power of the

municipality. Kinney v. Sutton, 230 N. C. 404, 53 S. E. (2d) 306.

The fact that a lot would be more valuable if devoted to a nonconforming use does not deprive the owner of property without due process of law when the zoning regulations are uniform in their application to all within the respective districts, and the differentiation of the uses of property within the respective districts is in accordance with a comprehensive plan in the interest of the health, safety, morals or general welfare of the entire community. Id.

City May Limit Use of Property in Residential District.—This section authorizes municipalities to enact zoning ordinances prohibiting the use of property within a residential district for business or commercial purposes. Kinney v. Sutton, 230 N. C. 404, 53 S. E. (2d) 306.

Ordinance Held Not Discriminatory.—Provision of a zoning ordinance which permits commercial and industrial activities within a residential district provided such activities are carried on by members of the immediate family and not more than two persons are employed therein, does not render the ordinance void as being discriminatory, since the commercial activities permitted thereunder in a residential district are so intrinsically different from unlimited commercial and industrial activities in general as to permit their separate classification. Kinney v. Sutton, 230 N. C. 404, 53 S. E. (2d) 306.

Applied in Kass v. Hedgpeth, 226 N. C. 405, 38 S. E. (2d) 164.

§ 160-173. Districts.

Local Modification.—Elizabeth City: 1945, c. 301; town of Asheboro: 1947, c. 428; Wake: 1945, c. 532.

§ 160-175. Method of procedure.

Local Modification.—Granville: 1949, c. 598.

Effect of Noncompliance with Section.—Where original zoning ordinances, which did not include defendant's land within area prohibited for business structures, and amendment thereto which purported to do so, were not adopted in accordance with the enabling provisions of this and the following sections, such ordinances were invalid and ineffective as zoning regulations. Kass v. Hedgpeth, 226 N. C. 405, 38 S. E. (2d) 164, 165, citing Eldridge v. Mangum, 216 N. C. 532, 5 S. E. (2d) 721; Lee v. Board of Adjustment, 226 N. C. 107, 37 S. E. (2d) 128.

§ 160-178. Board of adjustment.—Such legislative body may provide for the appointment of a board of adjustment consisting of five members, each to be appointed for three years; provided, that such legislative body in the appointment of the original members of such board, or in the filling of vacancies caused by the expiration of the terms of the existing members of any such board, may make appointments of certain members for less than three years to the end that thereafter the terms of all members shall not expire at the same time. Such legislative body may, in its discretion, appoint not more than two alternate members to serve on such board in the absence, for any cause, of any regular member. Such alternate member or members shall be appointed for the same term or terms as regular members, and shall be appointed in the same manner as regular members and at the regular times for appointment; provided, however, that in the case of the first appointment of alternate members subsequent to the effective date of this article the appointment shall be for a term which shall expire at the next time when the term of any regular member expires. Such alternate member, while attending any regular or special meeting of the board and serving in the absence of any regular member, shall have and exercise all the powers and duties of such regular member so absent. Such board of adjustment shall hear and decide appeals from and review any order, requirement, decision or determination made by an administrative official charged with the enforcement of any ordinance adopted pursuant to this article. It shall also hear and decide all matters referred to it or upon which it is required to pass under any such ordinance. The concurring vote of four members of the board shall be necessary to reverse any order, requirement, decision or determination of any such administrative official, or to decide in favor of the applicant any matter upon which it is required to pass under any such ordinance or to effect any variation in such ordinance. Every decision of such board shall, however, be subject to review by proceedings in the nature of certiorari. Such appeal may be taken by any person aggrieved or by an officer, department, board or bureau of the municipality. Such appeal shall be taken within such time as shall be prescribed by the board of adjustment by general rule, by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal, specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken. An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board of adjustment, after the notice of appeal shall have been filed with him, that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property, in which case proceedings shall not be stayed otherwise than by a restraining order, which may be granted by the board of adjustment or by a court of record on application, on notice to the officer from whom the appeal is taken and on due cause shown. The board of adjustment shall fix a reasonable time for the hearing of the appeal and give due notice thereof to the parties, and decide the same within a reasonable time. Upon the hearing, any party may appear in person or by agent or by attorney. The board of adjustment may reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from, and shall make such order, requirement, decision or determination as in its opinion ought to be made in the premises, and to that end shall have all the powers of the officer from whom the appeal is taken. Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of such ordinance, the board of adjustment shall have the power, in passing upon appeals, to vary or modify any of the regulations or provisions of such ordinance relating to the use, construction or alteration of buildings or structures or the use of land, so that the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done. (1923, c. 250, s. 7; 1929, c. 94, s. 1; 1947, c. 311; 1949, c. 979, ss. 1, 2; C. S. 2776(x).)

Cross Reference.—As to power of board of adjustment to permit nonconforming use, see note to § 160-172.

Editor's Note.—The 1947 amendment, effective March 18, 1947, inserted the second, third and fourth sentences.

The 1949 amendment inserted the words "not more than" in line thirteen. It also substituted the words "alternate member or" for the words "two alternate" in line fifteen.

Purpose of Section.—The plain intent and purpose of this section is to permit, through the board of adjustment, the amelioration of the rigors of necessarily general zon-

ing regulations by eliminating the necessity for a slavish adherence to the precise letter of the regulations where, in a given case, little or no good on the one side and undue hardship on the other would result from a literal enforcement. Lee v. Board of Adjustment, 226 N. C. 107, 37 S. E. (2d) 128, 132.

Section Grants No Legislative Power.—This section and § 160-172 do not grant to board of adjustment legislative authority, and therefore, board is without power to amend an ordinance under which it functions. Lee v. Board of Adjustment, 226 N. C. 107, 37 S. E. (2d) 128.

Board Cannot Permit Nonconforming Use or Structure.—Board of adjustment cannot permit type of business or building prohibited by zoning ordinance, for to do so would be an amendment of law and not a variance of its regulations. Lee v. Board of Adjustment, 226 N. C. 107, 37 S. E. (2d) 128, 132.

But Can Merely "Vary" Regulations.—The board of adjustment cannot disregard the provisions of this article or regulations enacted in accordance with zoning law, but can merely "vary" them to prevent injustice when the strict letter of the provisions would work "unnecessary hardship." Lee v. Board of Adjustment, 226 N. C. 107, 37 S. E. (2d) 128, 132.

Who May Appeal from Order.—Any owner whose property is affected has the right to apply to the courts for review of an order of a municipal board of adjustment. Lee v. Board of Adjustment, 226 N. C. 107, 37 S. E. (2d) 128.

Optionee.—Since an optionee has no present right to erect a building on the land, the withholding of a building permit from him cannot in law impose an "undue and unnecessary hardship" upon him as a predicate for relief from an order of a municipal board of adjustment. Lee v. Board of Adjustment, 226 N. C. 107, 37 S. E. (2d) 128.

"Unnecessary hardship" as used in this section, does not mean a pecuniary loss to a single owner in being denied a building permit for a nonconforming structure pursuant to zoning regulations binding upon all alike. Lee v. Board of Adjustment, 226 N. C. 107, 37 S. E. (2d) 128.

Same—Extent to Which Reviewable.—

The decisions of the board of adjustment are final, subject to the right of the courts to review errors in law and to give relief against its orders which are arbitrary, oppressive, or attended with manifest abuse of authority. Lee v. Board of Adjustment, 226 N. C. 107, 37 S. E. (2d) 128. 131.

Review of Questions of Fact.—

In accord with original. See Lee v. Board of Adjustment, 226 N. C. 107, 37 S. E. (2d) 128, 130.

§ 160-179. Remedies.

Section Applies Only to Regulations Passed under This Article.—The equitable remedy of injunction authorized applies only to the enforcement of zoning regulations promulgated under this article. Clinton v. Ross, 226 N. C. 682, 40 S. E. (2d) 593.

An ordinance prohibiting the operation of tobacco sales warehouses in certain sections of a municipality cannot be enforced by injunction under this section as to a warehouse in operation prior to the adoption of zoning regulations by the municipality even if the ordinance be deemed a part of the later adopted zoning regulations where zoning ordinance expressly excludes from its operation nonconforming uses existing prior to its adoption. Id.

SUBCHAPTER II. MUNICIPAL CORPORATION ACT OF 1917.

Art. 17. Organization under the Subchapter.

§ 160-195. Municipal board of control; changing name of municipality.

Where the complaint contains no allegation that the Board of Municipal Control has failed to observe and follow the requirements of the statutes and no allegation that the said board has acted capriciously or in bad faith, in a civil action to restrain the execution of an order changing the name of a town, demurrer to the complaint for failure to state a cause of action was properly sustained, and there was no error in the court's dissolving a restraining order theretofore granted and dismissing the action. Hunsucker v. Winborne, 223 N. C. 650, 27 S. E. (2d) 817.

§ 160-197. Petition filed.

Upon the hearing by the Board of Municipal Control of a petition to change the name of a town, the board has power to investigate and determine whether or not the requirements of this and the following section have been complied with. Hunsucker v. Winborne, 223 N. C. 650, 27 S. E. (2d) 817.

§ 160-198. Hearing of petition and order made.

3. Election of officers provided for. The board of control shall provide for the place of holding the first election for mayor and commissioners; and shall designate how many commissioners shall serve, as set forth in subchapter I of this chapter, naming the number of commissioners, not less than three nor more than seven. The election of mayor and commissioners shall be under the same laws as now govern the election of mayor and commissioners in subchapter I of this chapter. The board of control shall appoint a registrar and two judges of election to hold the first election for mayor and commissioners and make such order as may be deemed proper and necessary for the holding of said first election and the certification of persons elected as mayor and commissioners. The list of the names of qualified voters attached to the petition shall be treated as the registration of qualified voters for said election, but the board may provide for the registration of any other qualified voters in the territory on or before the day of election.

(1949, c. 1083.)

Editor's Note.—The 1949 amendment added the last two sentences of subsection 3. As the rest of the section was not changed by the amendment only subsection 3 is set out.

See annotations under § 160-197.

Art. 18. Powers of Municipal Corporations.

Part 1. General Powers Enumerated.

§ 160-200. Corporate powers.

5. To create, provide for, construct, regulate, and maintain all things in the nature of public works, buildings, and improvements, including public libraries and equipment for the same.

25. To create and administer a special fund for the relief of indigent and helpless members of the police and fire departments who have become superannuated, disabled, or injured in such service, and receive donations and bequests in aid of such fund and provide for its permanence and increase, and to prescribe and regulate the conditions under which, and the extent to which, the same shall be used for the purpose of such relief. Also, to insure policemen, firemen, or any class of city employees against death or disability, or both, during the term of their employment under forms of insurance known as group insurance; the amount of benefit on the life of any one person not to exceed the sum of two thousand dollars, and the premiums on such insurance to be payable out of the current funds of the municipality. If and when the Congress of the United States amends the Federal Social Security Act so as to extend its provisions to include municipal employees, each municipality is hereby authorized to take such action or to appropriate such funds as are necessary to enlist their employees therein.

31. To provide for the regulation, diversion, and limitation of pedestrians and vehicular traffic upon public streets, highways, and sidewalks of the city and to regulate and limit vehicular parking on streets and highways in congested areas.

In the regulation and limitation of vehicular traffic and parking in cities and towns the govern-

ing bodies may, in their discretion, enact ordinances providing for a system of parking meters designed to promote traffic regulation and requiring a reasonable deposit (not in excess of five cents per hour) from those who park vehicles for stipulated periods of time in certain areas in which the congestion of vehicular traffic is such that public convenience and safety demand such regulation. The proceeds derived from the use of such parking meters shall be used exclusively for the purpose of making such regulation effective and for the expenses incurred by the city or town in the regulation and limitation of vehicular parking, and traffic relating to such parking, on the streets and highways of said cities and towns. Nothing contained in chapter two, section twenty-nine, of the Public Laws of one thousand nine hundred and twenty-one, or in section sixty-one of chapter four hundred and seven of the Public Laws of one thousand nine hundred and thirty-seven shall be construed as in any way affecting the validity of these parking meters or the fees required in the use thereof.

The governing authorities of all cities and towns of North Carolina shall have the power to own, establish, regulate, operate and control municipal parking lots for parking of motor vehicles within the corporate limits of cities and towns. Cities and towns are likewise hereby authorized, in their discretion, to make a charge for the use of such parking lots.

32. To regulate the emission of smoke within the city but no regulation relative to the emission of smoke shall extend to the acts of an employee or servant of a railroad company in making necessary smoke when stoking or operating a coal burning locomotive.

36a. To require that drivers and operators of taxicabs engaged in the business of transporting passengers for hire over the public streets of any city or town, make application to and receive from the governing board of any such city or town a driver's or operator's permit before operating or driving any such vehicle. The governing board may refuse to issue such permit to any person who has been convicted of: a felony; a violation of any federal or state statute relating to the use, possession, or sale of intoxicating liquors; any federal or state statute relating to prostitution; any federal or state statute relating to the use, possession, or sale of narcotic drugs; or to any person who is not a citizen of the United States; or to any person who is a habitual user of intoxicating liquors or narcotic drugs; or to a person who has been a habitual violator of traffic laws or ordinances.

The governing body may revoke any such driver's or operator's permit if the person holding such permit is convicted of: a felony; or violation of any federal or state statute relating to the possession or sale of intoxicating liquors; or violation of any federal or state statute relating to prostitution; or any federal or state statute relating to the use, possession or sale of narcotic drugs; or repeated violations of traffic laws or ordinances; or becomes a habitual user of intoxicating liquors or narcotic drugs.

The governing body may also require operators and drivers of taxicabs to prominently post and display in each taxicab, so as to be visible to the passengers therein, permit, rates and/or fares, fingerprints, photographs, and such other identification matter as deemed proper and advisable. The governing body is also authorized to establish the rates which may be charged by taxicab operators, and may grant franchises to taxicab operators on such terms as it deems advisable.

(1945, c. 564, s. 2; 1947, c. 7; 1949, cc. 103, 352; c. 594, s. 2.)

Local Modification.—Guilford: 1945, c. 251; Surry: 1947, c. 178; town of Bryson City: 1947, c. 655; city of Greensboro: 1947, c. 392; city of Roanoke Rapids: 1949, c. 3; city of Salisbury: 1947, c. 241; city of Winston-Salem: 1947, c. 392; cities and towns in Halifax, as to subsection 25: 1949, c. 1123.

Editor's Note.—The 1945 amendment added the last sentence of subsection 36a. Prior to the 1947 amendment the second paragraph of subsection 31 was not applicable to municipalities of 20,000 or less.

The first 1949 amendment added the last sentence of subsection 25. The second 1949 amendment added at the end of subsection 5 the words "including public libraries and equipment for the same." And the third 1949 amendment rewrote subsection 32. As the rest of the section was not affected by the amendments it is not set out.

Session Laws 1945, c. 176, made subsections 35, 36 and 36a of this section applicable to the Town of Rockingham in Richmond county.

For acts relating to parking meters in certain localities not affected by chapters 20 and 136 of the General Statutes, see Session Laws 1947, c. 54 (city of Shelby); c. 66 (town of Laurinburg); c. 675 (city of Statesville); c. 735 (town of Mooresville); c. 1035 (Cabarrus county). And see Session Laws 1949, c. 573, relating to the city of Statesville.

For comment on the 1943 amendment, see 21 N. C. Law Rev. 358.

For a brief comment on the 1949 amendment, see 27 N. C. Law Rev. 474.

Charter provisions are supplemented by our general statutes. Under the power thus conferred the municipal authorities are the sole judges of the necessity or expediency of exercising that right. Parsons v. Wright, 223 N. C. 520, 523, 27 S. E. (2d) 534.

Municipal corporations have no inherent police powers and can exercise only those conferred by this section and such powers as are conferred are subject to strict construction. Kass v. Hedgpeth, 226 N. C. 405, 38 S. E. (2d) 164, 165.

Licensing of Taxicab Drivers.—The legislature has deemed it to be the part of wisdom to delegate to the various municipalities of the state the power to license, regulate and control the operators and drivers of taxicabs. In the exercise of this delegated power, it is the duty of the municipal authorities, in their sound discretion, to determine what ordinances or regulations are reasonably necessary for the protection of the public or the better government of the town; and when in the exercise of such discretion an ordinance is adopted, it is presumed to be valid; and, the courts will not declare it invalid unless it is clearly shown to be so. State v. Stallings, 230 N. C. 252, 52 S. E. (2d) 901.

City May Require Drivers to Wear Distinctive Insignia.—It is not an unlawful, unreasonable or an arbitrary exercise of the police power which has been delegated to local municipal authorities by the legislature, for a city to require, as a condition incident to the privilege of operating a taxicab on its streets, that the driver of such taxicab shall wear a distinctive cap or other insignia while operating a taxicab, to show that he is a duly licensed taxicab driver. Such a requirement would seem to be reasonable and a protection to the public against unlicensed drivers or operators. State v. Stallings, 230 N. C. 252, 52 S. E. (2d) 901.

Cited in Suddreth v. Charlotte, 223 N. C. 629, 27 S. E. (2d) 650.

Part 2. Power to Acquire Property.

§ 160-204. Acquisition by purchase.

Section Confers Power of Extraterritorial Condemnation.—This and the following section expressly confer the power of extraterritorial condemnation where municipality has right to acquire property. Charlotte v. Heath, 226 N. C. 750, 40 S. E. (2d) 600, 169 A. L. R. 569.

§ 160-205. By condemnation.

Condemnation for Pipe Lines Outside of City Limits.—The city of Charlotte was authorized by its charter to ex-

tend its public services, including that of water and sewerage, to those living beyond the city limits, and to acquire the facilities used for said purposes, including pipe lines, and this right being existent, under this section city had the right to exercise its power of eminent domain to condemn lands and property rights for said purposes. Charlotte v. Heath, 226 N. C. 750, 40 S. E. (2d) 600, 169 A. L. R. 569.

§ 160-207. Order for condemnation of land; assessment districts; maps and surveys; hearing.

Cited in Parsons v. Wright, 223 N. C. 520, 27 S. E. (2d) 534.

Part 3. Streets and Sidewalks.

§ 160-222. Power to make, improve and control.

Cross Reference. — As to power of municipal governing body to close streets, etc., see note to subsection 17 of § 153-9.

§ 160-226. Maps of streets and sidewalks in subdivisions within one mile of city or town limits to be approved by such city or town.

As to control corners in real estate developments, see §§ 39-32.1 to 39-32.4.

Part 5. Protection of Public Health.

§ 160-229. Ordinances for protection of health; contracts for medical treatment and hospitalization of poor.

The provisions of this paragraph shall not apply to the municipalities of Salisbury, Spencer, East Spencer, Rocky Mount, Leaksville, Madison, Asheville, Charlotte, Gibsonville, Greensboro, Hamlet, High Point, Jamestown, Rockingham, Tarboro and Wilmington. This paragraph shall not apply to the city of High Point in Guilford county; to the city of Elizabeth City in Pasquotank county; nor to the counties of Beaufort, Camden and Lee or any city or town therein; nor to any city or town in the counties of Ashe, Avery, Columbus, Davidson, Durham, Gates, Jackson, Martin and Rockingham, save and except the city of Reidsville; nor to the counties of Ashe, Alexander, Brunswick, Clay, Cumberland, Forsyth, Haywood, Henderson, Jones, Macon, Montgomery, Moore, Pasquotank, Robeson, Transylvania, Wilkes, Catawba, Lincoln, Surry, Washington, Rowan, Warren, Vance, Johnson, Edgecombe, Halifax, Davie, Gaston, Harnett, Iredell, Pitt, Stanly, Union and Yadkin. Before this paragraph shall apply to any city or town in Catawba county it must be submitted to a vote of the people of said Catawba county. (1917, c. 136, sub-ch. 5, s. 4; 1935, c. 64; 1943, c. 215; 1947, cc. 101, 160; C. S. 2795.)

Editor's Note.—The first 1947 amendment struck out "Edenton" from the list of municipalities in the third sentence from the end of the section. The second 1947 amendment struck out "Sampson" from the list of counties in the next to last sentence. Only the last three sentences of the section are set out.

Cited in Brumley v. Baxter, 225 N. C. 691, 36 S. E. (2d) 281, 162 A. L. R. 930.

§ 160-230. Establish hospitals, pesthouses, quarantine, etc.

Editor's Note.—Chapter 1081 of Session Laws 1949, which amended §§ 160-417 to 160-421 and struck out § 160-423, reenacted all of chapter 2 of the Public Laws of 1938, as thereby amended.

Part 6. Fire Protection.

§ 160-238. Fire protection for property outside city limits; injury to employee of fire department.

Any employee of a municipal fire department, while engaged in any duty or activity in connection with the provisions of this section, or pursuant to orders or instructions from his officers or superiors, shall have the same rights under the workmen's compensation law, and shall be entitled to all such other rights, privileges, exemptions and immunities, as if such duty or activity were performed within the corporate limits of the municipality by which he was employed; and all such employees shall be entitled to all such rights, privileges, immunities and exemptions, irrespective of where such duties or activities are performed. In authorizing or permitting its fire department to answer fire calls outside the twelve-mile limit, and in answering such calls, the municipality and its employees in the fire department shall be considered as acting in a governmental capacity. (1919, c. 244; 1941, c. 188; 1947, c. 669; 1949, c. 89; C. S. 2804.)

Editor's Note.—

The 1947 amendment added the above paragraph as the second paragraph of this section, and the 1949 amendment rewrote the paragraph. As the first paragraph was not changed it is not set out.

Part 7. Sewerage.

§ 160-240. Require connections to be made.

Section Does Not Apply to Property Located Outside City.—A municipality is not authorized by this section to compel owners of improved property located outside the city, but which may be located upon or near one of its sewer lines, or a line which empties into the city's sewerage system, to connect with the sewer line. Atlantic Const. Co. v. Raleigh, 230 N. C. 365, 53 S. E. (2d) 165. See § 160-256 and note.

§ 160-249. Authority to fix sewerage charges; lien thereof.

Charges for Sewer Service Outside Corporate Limits.—A city is free to establish by contract or by ordinance such fees and charges for services rendered to residents outside its corporate limits as it may deem reasonable and proper. Atlantic Constr. Co. v. Raleigh, 230 N. C. 365, 53 S. E. (2d) 165.

Part 8. Water and Lights.

§ 160-255. Establish and maintain water and light plants.

City May Impose Conditions on Residents Outside Corporate Limits. — "Since it is optional with a city as to whether or not it will furnish water to residents outside its corporate limits and permit such residents to connect their sewer facilities with the sewerage system of the city, or with any other sewerage system which connects with the city system, it may fix the terms upon which the service may be rendered and its facilities used. G. S. 160-255; G. S. 160-256; Kennerly v. Dallas, 215 N. C. 532, 2 S. E. (2d) 538; Williamson v. High Point, 213 N. C. 96, 195 S. E. 90; George v. Asheville, 80 F. (2d) 50, 103 A. L. R. 568." Atlantic Constr. Co. v. Raleigh, 230 N. C. 365, 53 S. E. (2d) 165.

§ 160-256. Fix and enforce rates.

Cited in Atlantic Constr. Co. v. Raleigh, 230 N. C. 365, 53 S. E. (2d) 165.

Art. 19. Exercise of Powers by Governing Body.

Part 2. Ordinances.

§ 160-272. How ordinance pleaded and proved.

Where the ordinances of a city have not been published in book form, it is necessary in order to prove the existence of an ordinance, over an objection, to produce by the proper official the official records of the city or town, showing its passage and the entry on the records of the ordinance itself. Toler v. Savage, 226 N. C. 208, 37 S. E. (2d) 485, 486, citing State v. Razook, 179 N. C. 708, 103 S. E. 67.

Part 3. Officers.

§ 160-273. City clerk elected; appointment of deputy clerk; powers and duties.—The governing

body shall, by a majority vote, elect a city clerk to hold office for the term of two years and until his successor is elected and qualified. He shall have such powers and perform such duties as the governing body may from time to time prescribe in addition to such duties as may be prescribed by law. He shall keep the records of the meetings. The person holding the office of city clerk at the time when any of the plans set forth in this subchapter shall be adopted by such city shall continue to hold office for the term for which he was elected, and until his successor is elected and qualified. The governing body shall also have the authority to appoint a deputy city clerk to act during the absence or disability of the city clerk, and may assign to said deputy the same powers, authority, and duties as are assigned to the city clerk.

(1949, c. 14.)

Editor's Note.—The 1949 amendment added the last sentence of the first paragraph. As the second paragraph was not changed by the amendment it is not set out.

§ 160-277. Bonds required.—Every official, employee, or agent of any city who handles or has custody of more than one hundred dollars of such city's funds at any time shall, before assuming his duties as such, be required to enter into bond with good sureties, in an amount sufficient to protect such city, payable to such city, and conditioned upon the faithful performance of his duties and a true accounting for all funds of the city which may come into his hands, custody, or control, which bond shall be approved by the mayor and board of aldermen or other governing body and deposited with the city, except that such bond of any employee or employees may, in the discretion of the mayor and governing body, be conditioned only upon a true accounting for funds of the city. (1917, c. 136, sub-ch. 13, s. 15; 1945, c. 619; C. S. 2828.)

Editor's Note.—The 1945 amendment added the exception clause at the end of the section.

Part 4. Contracts Regulated.

§ 160-280. Separate specifications for contracts; responsible contractors; liability of separate contractors.

Each separate contractor shall be directly liable to the county or city and to the other separate contractors for the full performance of all duties and obligations due respectively under the terms of the separate contracts and in accordance with the plans and specifications, which shall specifically set forth the duties and obligations of each separate contractor. For the purpose of this section, the wording, "separate contractor" is hereby deemed and held to mean any person, firm or corporation who shall enter into a contract with any county or city for the erection, construction or alteration of any building or buildings. (1925, c. 141, s. 1; 1929, c. 339, s. 1; 1931, c. 46; 1943, c. 387; 1945, c. 852.)

Editor's Note.—

The 1945 amendment added the above paragraph at the end of the section. As the rest of the section was not affected by the amendment it is not set out.

Part 5. Control of Public Utilities, Institutions, and Charities.

§ 160-282. Power to establish and control public utilities, institutions, and charities.

Cited in Brumley v. Baxter, 225 N. C. 691, 36 S. E. (2d) 281, 162 A. L. R. 930.

§ 160-284. Ordinances to regulate management.

Rates for Sewer Service Outside Corporate Limits.—A city is free to establish by contract or by ordinance such fees and charges for services rendered to residents outside its corporate limits as it may deem reasonable and proper. Atlantic Constr. Co. v. Raleigh, 230 N. C. 365, 53 S. E. (2d) 165.

Art. 21. Adoption of New Plan of Government.

Part 2. Manner of Adoption.

§ 160-296. Petition filed.

Local Modification.—City of Fayetteville: 1945, c. 120.

Art. 22. Different Forms of Municipal Government.

Part 4. Plan "D." Mayor, City Council, and City Manager.

§ 160-346. Salaries of mayor and council.

Local Modification.—City of Fayetteville: 1947, c. 41.

§ 160-349. Power and duties of manager.

Local Modification.—City of Fayetteville: 1947, c. 41.

SUBCHAPTER III. MUNICIPAL FINANCE ACT.

Art. 28. Permanent Financing.

§ 160-378. For what purpose bonds may be issued.

No interest accruing after the year one thousand nine hundred forty-six shall be funded or refunded. (1917, c. 138, s. 16; 1919, c. 178, s. 3 (16); 1921, c. 8, s. 1; Ex. Sess. 1921, c. 106, s. 1; 1931, c. 60, s. 48; 1933, c. 259, s. 1; 1935, c. 302, s. 1; 1939, c. 231, s. 1; 1943, c. 13; 1945, c. 403; C. S. 2937.)

Local Modification.—Town of Columbus: 1949, c. 987; town of Walnut Cove: 1949, c. 987.

Editor's Note.—

The 1945 amendment substituted "forty-six" for "forty-two" in the last sentence. As the rest of the section was not affected by the amendment it is not set out.

§ 160-379. Ordinance for bond issue.

(2) If the issuance of the bonds is required by the constitution to be approved by the voters, or if the governing body, although not required to obtain the approval of the voters before issuing the bonds, deems it advisable to obtain such approval, that the ordinance shall take effect when approved by the voters of the municipality at an election as provided in this subchapter; or

(1949, c. 497, s. 3.)

Editor's Note.—The 1949 amendment rewrote subdivision (2) of clause e of subsection 2. As the rest of the section was not changed, only the said subdivision (2) is set out.

§ 160-383. Sworn statement of indebtedness.

Local Modification.—Columbus, town of Whiteville: 1947, c. 42.

§ 160-387. Elections on bond issue.

1. What Majority Required.—If a bond ordinance provides that it shall take effect when approved by the voters of the municipality, the affirmative vote of a majority of those who shall vote on the bond ordinance shall be required to make it operative.

(1949, c. 497, s. 4.)

Editor's Note.—The 1949 amendment, effective March 22, 1949, rewrote subsection 1. As the rest of the section was not affected by the amendment it is not set out. Section 7 of the amendatory act made it retroactive as to elections held subsequent to November 24, 1948. See § 153-92.1.

For a brief comment on the 1949 amendment, see 27 N. C. Law Rev. 454.

§ 160-389. Within what time bonds issued.

Notwithstanding the foregoing limitation of time which might otherwise prevent the issuance of bonds, bonds authorized by an ordinance which took effect prior to July 1st, 1948, and which have not been issued by July 1st, 1949, may be issued in accordance with all other provisions of law at any time prior to July 1st, 1951, unless such ordinance shall have been repealed, and any loans made under authority of § 160-375 of article 27 of this chapter in anticipation of the receipt of the proceeds of the sale of such bonds, or any renewals thereof, may be paid on or at any time prior to but not later than June 30th, 1951, notwithstanding the limitation of time for payment of such loans as contained in said section. (1917, c. 138, s. 24; 1919, c. 178, s. 3 (24); 1921, c. 8, s. 1; Ex. Sess. 1921, c. 106, s. 1; 1939, c. 231, s. 1; 1947, c. 510, s. 2; 1949, c. 190, s. 2; C. S. 2950.)

Editor's Note.—
The 1947 amendment added the above paragraph at the end of this section, and the 1949 amendment changed the dates therein. As the rest of the section was not affected by the amendments it is not set out.

For a brief comment on the 1947 amendment, see 25 N. C. Law Rev. 453.

Art. 29. Restrictions upon the Exercise of Municipal Powers.

§ 160-402. Limitation of tax for general purposes.—For the purpose of raising revenue for defraying the expenses incident to the proper government of the municipality, the governing body shall have the power and it is hereby authorized to levy and collect an annual ad valorem tax on all taxable property in the municipality at a rate not exceeding one dollar and fifty cents ($1.50) on the one hundred dollar ($100.00) valuation of said property, notwithstanding any other law, general or special, heretofore or hereafter enacted, except a law hereafter enacted expressly repealing or amending this section. (1917, c. 138, s. 37; 1919, c. 178, s. 3 (37); 1921, c. 8, s. 1; Ex. Sess. 1921, c. 106, s. 1; 1947, c. 506; C. S. 2963.)

Local Modification.—Town of Nashville: 1945, c. 122; town of Raeford: 1949, c. 134.

Editor's Note.—
The 1947 amendment increased the maximum rate from $1.00 to $1.50 on the one hundred dollar valuation of property, and omitted the former proviso relating to certain cities.

SUBCHAPTER IV. FISCAL CONTROL.

Art. 33. Fiscal Control.

§ 160-410. Terms in county fiscal control act made applicable to cities and towns.

Monday shall mean the first regular meeting day of the governing body of a municipality on or after the Monday mentioned in the county fiscal control act. (1931, c. 60, s. 67; 1945, c. 203.)

Editor's Note.—The 1945 amendment added the above sentence at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

Art. 34. Revenue Bond Act of 1938.

§ 160-413. Title of article.

Editor's Note.—Session Laws 1945, c. 333, extended the operation of this article as to New Hanover county and any municipality therein until March 1, 1949.

Session Laws 1949, c. 1081, which amended §§ 160-417 and 160-421 and struck out § 160-423, re-enacted this article in its entirety as so amended.

§ 160-417. Bond provisions.—Revenue bonds may be issued under this article in one or more series; may bear such date or dates, may mature at such time or times, not exceeding thirty-five years from their respective dates; may bear interest at such rate or rates, not exceeding six per centum (6%) per annum, payable at such time or times; may be payable in such medium of payment; at such place or places; may be in such denomination or denominations; may be in such form either coupon or registered; may carry such registration, conversion, and exchangeability privileges; may be subject to such terms of redemption with or without premium; may be declared or become due before the maturity date thereof; may be executed in such manner, and may contain such terms, covenants, assignments, and conditions as the resolution or resolutions authorizing the issuance of such bonds may provide. All bonds issued under this article bearing the signature of officers in office on the date of the signing thereof shall be valid and binding notwithstanding that before the delivery thereof and payment therefor, such officers whose signatures appear thereon shall have ceased to be officers of the municipality issuing the same. Pending the preparation of the definitive bonds, interim receipts, in such form and with such provisions as the governing body may determine, may be issued to the purchaser or purchasers of bonds to be issued under this article. Said bonds and coupons and said interim receipts shall be negotiable for all purposes, except as restricted by registration, and shall be and are hereby declared to be nontaxable for any and all purposes. (Ex. Sess., 1938, c. 2, s. 5; 1949, c. 1081.)

Editor's Note.—The 1949 amendment rewrote this section.

§ 160-421. Approval of state agencies and sale of bonds by local government commission. — All revenue bonds issued pursuant to this article shall be approved and sold by the local government commission in the same manner as municipal bonds are approved and sold by that commission, except that the said commission may sell any bonds issued pursuant to this article to the United States of America, or any agency thereof, at private sale and without advertisement. It shall not be necessary for any municipality proceeding under this article to obtain any other approval, consent, or authorization of any bureau, board, commission, or like instrumentality of the state for the construction of an undertaking; provided, however, that existing powers and duties of the state board of health shall continue in full force and effect. And provided further that no municipality shall construct any systems, plants, works, instrumentalities, and properties used or useful in connection with the generation, production, transmission, and distribution of gas (natural, artificial, or mixed) or electric energy for lighting, heating, and power for public and private usage without having first obtained a certificate of convenience and necessity from the North Carolina utilities commission, except that this requirement for a certificate of convenience and necessity shall not apply to any such undertaking defined in this proviso which has been authorized or the bonds for which have been authorized by any general, special, or local law enacted prior to April 21, 1949. (Ex. Sess., 1938, c. 2, s. 9; 1949, c. 1081.)

Editor's Note.—The 1949 amendment rewrote this section.

§ 160-423: Struck out by Session Laws 1949, c. 1081.

Art. 34A. Bonds to Finance Sewage Disposal System.

§ 160-424.1. Issuance of bonds by municipality. —Subject to the provisions of the Municipal Finance Act, 1921, as amended, but notwithstanding any limitation on indebtedness contained therein or in any other law, any municipality may issue its negotiable bonds for the purpose of paying the cost of acquiring, constructing, extending, enlarging or improving a system for the collection, treatment and disposal of sewage (hereinafter sometimes called the "sewage disposal system"), either within or without or partly within and partly without the municipality, and to pledge to the payment of such bonds the revenues of the sewage disposal system as hereinafter provided. (1949, c. 1213, s. 1.)

§ 160-424.2. Additional powers of municipality. —In addition to any powers which it may now have under the provisions of any law, a municipality shall have the following powers:

(a) To fix and collect rates, fees and charges for the services and facilities furnished by a sewage disposal system and to fix and collect charges for making connections with the sewer system of such municipality;

(b) To acquire in the name of the municipality, either by purchase or the exercise of the right of eminent domain, such lands and rights and interests therein, including lands under water and riparian rights, and to acquire such personal property, as it may deem necessary in connection with the construction, extension, enlargement, improvement or operation of a sewage disposal system;

(c) To construct and operate trunk, intercepting or outlet sewers, sewer mains, laterals, conduits or pipe lines in, along or under any streets, alleys, highways or other public ways;

(d) To enter into contracts with the government of the United States or any agency or instrumentality thereof, or with any other municipality, sanitary district, private corporation, co-partnership, association or individual providing for or relating to the treatment or disposal of sewage;

(e) To accept from any federal agency loans or grants for the planning, acquisition, extension, enlargement, improvement or lease of a sewer system and to enter into agreements with such agency respecting such loans and grants. (1949, c. 1213, s. 2.)

§ 160-424.3. Fixing or revising schedule of rates, etc., for services and facilities.—Before any municipality may issue bonds under the authority of this article, it shall fix the initial schedule of rates, fees and charges for the use of and for the services and facilities furnished or to be furnished by the sewage disposal system, to be paid by the owner, tenant or occupant of each lot or parcel of land which may be connected with or use the sewer system of such municipality, and revise such schedule of rates, fees and charges from time to time, so that such rates, fees and charges shall be sufficient at all times to pay the principal of and the interest on the bonds as the same shall become due and to provide reserves therefor. (1949, c. 1213, s. 3.)

§ 160-424.4. Authority to charge and collect rates, fees, etc.; basis of computation; additional charge for cause. — The municipality shall charge and collect the rates, fees and charges fixed or revised pursuant to the authority of this article, and such rates, fees and charges shall not be subject to supervision or regulation by any other commission, board, bureau or agency of the municipality or of the state or of any sanitary district or other political subdivision of the state.

Such rates, fees and charges shall be just and equitable, and may be based or computed either upon the quantity of water used or upon the number and size of sewer connections or upon the number and kind of plumbing fixtures in use in the premises connected with the sewer system or upon the number or average number of persons residing or working in or otherwise connected with such premises or upon the type or character of such premises or upon any other factor affecting the use of the facilities furnished or upon any combination of the foregoing factors.

Charges for services to premises, including services to manufacturing and industrial plants, obtaining all or a part of their water supply from sources other than the municipality's water system may be determined by gauging or metering or in any other manner approved by the municipality.

In cases where the character of the sewage from any manufacturing or industrial plant, building or premises is such that it imposes an unreasonable burden upon any sewer system, an additional charge may be made therefor, or the municipality may, if it deems it advisable, compel such manufacturing or industrial plant, building or premises to treat such sewage in such manner as shall be specified by the municipality before discharging such sewage into any sewer lines owned or maintained by the municipality. (1949, c. 1213, s. 4.)

§ 160-424.5. Inclusion of charges as part of water bill; water disconnected upon failure to pay charges. — The municipality may provide in the ordinance or resolution authorizing the issuance of bonds under the provisions of this article, that the charges for the services and facilities furnished by any sewer system or sewer improvements constructed by the municipality under the provisions of this article shall be included in bills rendered for water consumed on the premises (but such charges shall be stated separately from the water charges) and that if the amount of such charges so included shall not be paid within thirty days from the rendition of any such bills, the municipality may discontinue furnishing water to such premises and may disconnect the same from the waterworks system of the municipality. (1949, c. 1213, s. 5.)

§ 160-424.6. Revenues pledged to bond retirement.—The revenues derived from any sewer system for which bonds shall be issued under the provisions of this article shall be pledged to the payment of the principal of and the interest on such bonds and a sufficient amount to pay such principal and interest and to provide reserves therefor shall be set aside and devoted to such purposes. (1949, c. 1213, s. 6.)

§ 160-424.7. Powers herein granted are supplemental.—The powers granted by this article shall be supplemental and additional to powers con-

ferred by any other law, and shall not be regarded as in derogation of any powers now existing. (1949, c. 1213, s. 7.)

SUBCHAPTER V. CAPITAL RESERVE FUNDS.

Art. 35. Capital Reserve Funds.

§ 160-425. Short title.

For comment on this enactment, see 21 N. C. Law Rev. 357.

§ 160-428. Sources of capital reserve fund.—The capital reserve fund may consist of moneys derived from any one or more of the following sources:

(1945, c. 464, s. 1.)

Editor's Note.—The 1945 amendment struck out the words "except that no money shall be deposited in such capital reserve fund after July tenth, one thousand nine hundred and forty-five," formerly appearing after the word "sources" in line three. As only the introductory paragraph was affected by the amendment the rest of the section is not set out.

§ 160-429. How the capital reserve fund may be established; revenues derived from public utilities. If revenues derived from a utility or utilities (water system, water and sewer system, electric system, gas system) owned by the municipality are included in said ordinance, or an amendment thereto, as a source or sources, said ordinance or amendment may stipulate that the moneys of such source or sources shall not be withdrawn and expended for any purpose other than repairing, enlarging, extending or reconstructing such utility or utilities. (1943, c. 467, s. 5; 1945, c. 464, s. 1.)

Editor's Note.—The 1945 amendment added the above paragraph at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

§ 160-430. When the capital reserve fund shall be deemed established.—The capital reserve fund shall be deemed established when the ordinance passed under the provisions of § 160-429 is approved by the local government commission. After action is taken upon the provisions of said ordinance by the local government commission the secretary of said commission shall notify the clerk in writing of the approval by said commission or disapproval, if the commission declines to approve the ordinance, and the reasons therefor. Upon receipt of the notice of approval the clerk shall thereupon notify the financial officer of the municipality who shall immediately deposit in the designated depositary the moneys stated as available in said ordinance for the capital reserve fund and simultaneously report such deposit to the local government commission. (1943, c. 467, s. 6; 1945, c. 464, s. 1.)

Editor's Note.—The 1945 amendment omitted the former second paragraph.

§ 160-430.1. Increases to capital reserve fund.—No increase to a capital reserve fund shall be made except by resolution adopted by the governing body and the provisions thereof approved by the local government commission which resolution shall state the source or sources of moneys from which such increase is intended to be made and the amount of the money from each source, but each increase shall be from moneys derived from the identical source or sources as those stated in the ordinance establishing the capital reserve fund or in an amendment thereto. The clerk shall transmit a certified copy of such resolution to the local government commission. After action is taken upon the provisions of said resolution by the local government commission the secretary of said commission shall notify the clerk in writing of the approval by said commission or disapproval, if the commission declines to approve the resolution, and the reasons therefor. Upon receipt of the notice of approval the clerk shall thereupon notify the financial officer of the municipality who shall immediately deposit in the duly designated depository the moneys stated in said resolution and simultaneously report such deposit to the local government commission. Deposits required in § 160-441 shall not be construed as increases of a capital reserve fund within the meaning of this section. (1945, c. 464, s. 1.)

§ 160-433. Purposes for which capital reserve fund may be used.

(d) Investment in bonds, notes or certificates of indebtedness of the United States of America, in bonds or notes of the state of North Carolina, or in bonds of the municipality;

(1945, c. 464, s. 1.)

Editor's Note.—As the 1945 amendment affected only subsection (d), the rest of the section is not set out.

§ 160-434. Authorization for withdrawals from the capital reserve fund.—A withdrawal for any one of the purposes contained in clauses (b), (c), (d) and (e) of § 160-433 shall be authorized by resolution duly adopted by the governing body. Each such resolution shall specify the purpose of the withdrawal, the amount of such withdrawal, the sources of moneys in the capital reserve fund for such withdrawal and the amount to be withdrawn from each source. Each such resolution shall contain a request to the local government commission for its approval of the provisions thereof, shall be spread upon the minutes of the governing body and the clerk shall transmit a certified copy of such resolution to the local government commission. A resolution authorizing a withdrawal for the purpose stated in clause (b) of § 160-433 shall further specify the total appropriations contained in the annual appropriation ordinance of the fiscal year in which such withdrawal is authorized and shall state the total amount of such previous withdrawals made in such fiscal year and the date upon which the withdrawal shall be repayable to the capital reserve fund. In any case where all or any part of a capital reserve fund has been withdrawn and invested in bonds, notes or certificates of indebtedness of the United States of America which are about to mature and it is desired to continue investment of like kind, such continuance may be effected by exchange of said maturing bonds, notes or certificates of indebtedness through the treasury of the United States, or an authorized agent thereof, for bonds, notes or certificates of indebtedness of the United States of America of like principal amount and of later maturity or maturities; Provided, however, each such continuance and exchange shall first be authorized by resolution adopted by the governing body and the provisions thereof approved by the local government commission.

(1945, c. 464, s. 1.)

Editor's Note.—The 1945 amendment added the last sen-

tence to the first paragraph. As the rest of the section was not affected by the amendment it is not set out.

§ 160-439. How a withdrawal may be made.—No withdrawal from the capital reserve fund shall be made except pursuant to authority of the governing body by resolution or ordinance which has taken effect. Each withdrawal shall be for the full amount authorized, except a withdrawal for the purpose stated in clause (e) of § 160-433 which may be made for all or a part thereof from time to time according to the plan of amortization, and shall be by check drawn on the depositary by the financial officer of the municipality and payable to said financial officer, except that a check evidencing withdrawal for the purpose of investment may be made payable to the obligor or to the vendor of such bonds, notes or certificates of indebtedness in which investment has been duly authorized. Each such check shall bear a certificate on the face or reverse thereof signed by the secretary of the local government commission or by his duly designated assistant that the withdrawal evidenced thereby has been approved under the provisions of the Municipal Capital Reserve Act of One Thousand Nine Hundred and Forty-three, and such certificate shall be conclusive evidence that such withdrawal has been approved by the local government commission: Provided, however, the state of North Carolina shall not be liable for misapplication of any moneys withdrawn from the capital reserve fund by reason of such certificate. (1943, c. 467, s. 15; 1945, c. 464, s. 1.)

Editor's Note.—The 1945 amendment added the exception clause to the second sentence.

§ 160-441. Certain deposits mandatory. All deposits required in this section shall be made in the duly designated depositary of the capital reserve fund and it shall be the duty of the financial officer to simultaneously report each such deposit to the local government commission. (1943, c. 467, s. 17; 1945, c. 464, s. 1.)

Editor's Note.—The 1945 amendment added the above paragraph at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

§ 160-444. Termination of power to establish and increase capital reserve fund.—No ordinance establishing a capital reserve fund, or amendment thereto for including additional sources, shall be passed nor shall a resolution providing for increase of a capital reserve fund be adopted after July tenth, one thousand nine hundred forty-seven. (1945, c. 464, s. 1.)

Validation of Former Increase.—Session Laws 1945, c. 464, s. 3, provides: "Any increase heretofore made to a capital reserve fund with money from the same source or sources stated in the ordinance or order establishing said fund in accordance with the provisions of either the Municipal Capital Reserve Act of one thousand nine hundred forty-three or the County Capital Reserve Act of one thousand nine hundred forty-three, or stated in an amendment to said ordinance or order, is hereby validated."

SUBCHAPTER VI. EXTENSION OF CORPORATE LIMITS.

Art. 36. Extension of Corporate Limits.

§ 160-445. Procedure for adoption of ordinance extending limits; effect of adoption when no election required.—After public notice has been given by publication once a week for four successive weeks in a newspaper in the county with a general circulation in the municipality, or if there be no such paper, by posting notice in five or more public places within the municipality, describing by metes and bounds the territory to be annexed, thus notifying the owner or owners of the property located in such territory, that a session of the municipal legislative body will meet for the purpose of considering the annexation of such territory to the municipality, the governing body of any municipality is authorized and empowered to adopt an ordinance extending its corporate limits by annexing thereto any contiguous tract or tracts of land not embraced within the corporate limits of some other municipality. Then from and after the date of the adoption of such ordinance, unless an election is required as herein provided, the territory and its citizens and property shall be subject to all the debts, laws, ordinances and regulations in force in said city or town and shall be entitled to the same privileges and benefits as other parts of said city or town. The newly annexed territory shall be subject to municipal taxes levied for the fiscal year following the date of annexation. (1947, c. 725, s. 1.)

Editor's Note.—For comment on this article, see 25 N. C. Law Rev. 453.

§ 160-446. Referendum on question of extension.—If, at the meeting held for such purpose, a petition is filed and signed by at least fifteen per cent (15%) of the qualified voters resident in the area proposed to be annexed requesting a referendum on the question, the governing body shall, before passing said ordinance, annexing the territory, submit the question as to whether said territory shall be annexed to a vote of the qualified voters of the area proposed to be annexed, and the governing body may or may not cause the question to be submitted to the residents of the municipality voting separately. The governing body may, without receipt of a petition, call for a referendum on the question, provided, however, the governing body of the municipality shall be required to call for a referendum within the municipality if a petition is filed and signed by at least fifteen per cent (15%) of the qualified voters residing in the municipality, who actively participated in the last gubernatorial election. (1947, c. 725, s. 2.)

§ 160-447. Extent of participation in referendum; call of election.—Upon receipt of a sufficient petition, or if the board, on its own motion, determines that a referendum shall be held, the local governing body shall determine whether or not the election will be conducted solely in the area to be annexed or simultaneously with the qualified voters of the municipality, and shall order the board of elections of the county in which the municipality is located to call an election to determine whether or not the proposed territory shall be annexed to the city or town. Within sixty (60) days after receiving such order from the governing body, the county board of elections shall proceed to hold an election on the question. (1947, c. 725, s. 3.)

§ 160-448. Action required by county board of elections; publication of resolution as to election; costs of election.—Such election shall be called by a resolution or resolutions of said county board of elections which shall:

(a) Describe the territory proposed to be annexed to the said city or town as set out in the order of the said local governing body;

(b) Provide that the matter of annexation of such territory shall be submitted to the vote of the qualified voters of the territory proposed to be annexed, and if ordered by the local governing body, the qualified voters of said city or town voting separately;

(c) Provide for a special registration of voters in the territory proposed to be annexed for said election;

(d) Designate the precincts and voting places for such election;

(e) Name the registrars and judges of such election;

(f) And make all other necessary provisions for the holding and conducting of such election, the canvassing of the returns and the declaration of the results of such election. Said resolution shall be published in one or more newspapers of the said county once a week for thirty (30) days prior to the opening of the registration books. All cost of holding such election shall be paid by the city or town. Except as herein provided, said election shall be held under the same statutes, rules, and regulations as are applicable to elections in the municipality whose corporate limits are being enlarged. (1947, c. 725, s. 4.)

§ 160-449. Ballots; effect of majority vote for extension.—At such election those qualified voters who present themselves to the election officials at the respective voting places shall be furnished with ballots upon which shall be written or printed the words "For Extension" and "Against Extension." If at such election a majority of the votes cast from the area proposed for annexation shall be "For Extension," and, in the event an election is held in the municipality, the majority of the votes cast in the municipality shall also be "For Extension," then from and after the date of the declaration of the result of such election the territory and its citizens and property shall be subject to all the debts, laws, ordinances, and regulations in force in said city or town and shall be entitled to the same privileges and benefits as other parts of said city or town. The newly elected territory shall be subject to city taxes levied for the fiscal year following the date of annexation. (1947, c. 725, s. 5.)

§ 160-450. Maps of annexed area, copy of ordinance and election results recorded in the office of register of deeds.—Whenever the limits of any municipal corporation are enlarged, in accordance with the provisions of this article, it shall be the duty of the mayor of the city or town to cause an accurate map of such annexed territory, together with a copy of the ordinance duly certified, and the official results of the election, if conducted, to be recorded in the office of the register of deeds of the county or counties in which such territory is situated and in the office of the secretary of state. (1947, c. 725, s. 6.)

§ 160-451. Surveys of proposed new areas.—The governing bodies of the cities and towns are hereby authorized to make the surveys required to properly describe the territory proposed to be annexed. (1947, c. 725, s. 7.)

§ 160-452. Areas having less than twenty-five eligible voter-residents.—No city or town shall, by virtue of the authority granted in this article, annex any territory in which there are less than twenty-five legal residents eligible to register and vote unless the owners of all the property proposed to be annexed sign a petition requesting the governing body to annex the territory. (1947, c. 725, s. 8.)

§ 160-453. Application of article.—This article shall not apply to any city or town for which a method of changing the corporate limits has been provided by public-local or private acts. Provided, further, that this article shall not apply to any town or municipality in New Hanover county or Dare county. (1947, c. 725, s. 9.)

Chapter 161. Register of Deeds.

Sec.

§ 161-2. Four-year term for registers of deeds; counties excepted.—At the general election for the year one thousand nine hundred and thirty-six and quadrennially thereafter there shall be elected in each county of this state by the qualified voters thereof a register of deeds, who shall serve for a term of four years from the first Monday in December after his election and until his successor is elected and qualified: Provided, however, that this section shall not apply to Alexander, Ashe, Avery, Beaufort, Clay, Davidson, Halifax, Haywood, Hyde, Iredell, Jackson, Johnston, Macon, Mitchell, Orange, Rowan, Swain, Vance, Yadkin, Cherokee, Dare, Lincoln, and Moore counties. (1935, cc. 362, 392, 462; 1937, c. 271; 1939, cc. 11, 99; 1941, c. 192; 1949, cc. 756, 830.)

Editor's Note.—The 1949 amendments struck out Harnett and Bladen, respectively, from the list of excepted counties.

§ 161-6. Deputies may be appointed; assistant registers of deeds.—The registers of deeds of the several counties in this state are hereby authorized and empowered to appoint deputies, whose acts as such shall be valid and for which the registers of deeds shall officially be responsible. They shall file the certificate of the appointment of the deputy in the office of the clerk of the superior court, who shall record the same.

Each register of deeds is authorized and empowered, in his discretion, to designate an assistant register of deeds, who, in addition to his other powers and duties, shall be authorized to register and sign instruments and documents in the name and under the title of the register of deeds, by himself as assistant. Such signing shall be substantially as follows:

John Doe—Register of Deeds
By Richard Roe—Assistant

Such registering and signing when regular and sufficient in all other respects shall be valid for all purposes, and of the same force and effect as if such instrument or document had been registered and signed by the register of deeds personally. The register of deeds shall file with the clerk of the superior court of the county a certificate of the appointment of the assistant so designated and authorized to act in the name of the register of deeds, and the clerk of the superior court shall record such certificate. (1909, c. 628, s. 1; 1949, c. 261; C. S. 3547.)

Editor's Note.—The 1949 amendment added the second and third paragraphs.

For a brief comment on the 1949 amendment, see 27 N. C. Law Rev. 476.

§ 161-10. Fees of register of deeds.

Local Modification.—Beaufort: 1949, c. 368, s. 3; Cabarrus: 1945, c. 880, s. 3; Chowan: 1947, c. 490; Guilford: 1949, c. 602; Pender: 1945, c. 430; Perquimans: 1949, c. 664.

§ 161-10.1. Local variations as to fees of registers of deeds.

In Pender county the register of deeds shall be allowed the sum of fifty cents (50c) for his services in registering any crop lien. (1945, c. 432.)

In Yancey county the register of deeds shall receive the following fees:

For recording each warranty deed, mortgage deed, deed of trust, lease or contract, the sum of one dollar ($1.00) for the first three hundred words, and the sum of twenty cents (20c) for each one hundred additional words or fraction thereof; ten cents (10c) per name for indexing and cross indexing each warranty deed, mortgage deed, deed of trust, lease or contract; the sum of fifty cents (50c) for recording, indexing and cross indexing each chattel mortgage; the sum of ten cents (10c) for recording and indexing each certificate of birth, marriage or death. (1945, c. 544.)

Local Modification—Perquimans: 1949, c. 664.

§ 161-14. Registration of instruments.

Editor's Note.—

Session Laws 1945, c. 649, requires register of deeds of Pamlico county to show fees collected on recorded papers and to keep record of same.

§ 161-22.1. Index and cross-index of immediate prior owners of land.—Whenever any deed or other instrument conveying real property by a trustee, mortgagee, commissioner, or other officer appointed by the court, or by the sheriff under execution, is filed with the register of deeds for the purpose of being recorded, it shall be the duty of the register of deeds to index and cross-index as grantors the names of all persons recited in said instrument to be the persons whose interest in such real estate is being conveyed or from whom the title of such real estate was acquired by the grantor in such instrument.

For indexing and cross-indexing as grantors the names of persons described in this section, the register of deeds shall be allowed a fee of ten cents (10c). The provisions of this section shall not be construed to repeal any local act fixing a different fee for such indexing or cross-indexing. (1947, c. 211, ss. 1, 2.)

Chapter 162. Sheriff.

§ 162-6. Fees of sheriff.

Local Modification.—Nash: 1949, c. 1046; Pender: 1945, c. 431; Richmond: 1947, c. 235, s. 4.

§ 162-7. Local modifications as to fees of sheriffs.

The sheriff of Bertie county shall collect for the use of Bertie county the following fees:

Serving summons in civil actions or special proceedings and serving all civil notices and citations, one dollar ($1.00) for each defendant, or person, firm or corporation served.

Serving subpoena, fifty cents (50c) for each person. (1947, c. 755.)

Editor's Note.—

The 1947 amendment added at the end of this section the above provisions relating to Bertie county. As the rest of the section was not affected by the amendment it is not set out.

§ 162-14. Execute process; penalty for false return.

II. NEGLECT OR FAILURE TO MAKE DUE RETURN.

B. What Constitutes Failure and Defenses.

1. The Essential Elements of Failure.

Order Restraining Further Prosecution of Action in Which Execution Issued.—Execution of a judgment against defendant in summary ejectment to remove her from the land was issued and delivered to the sheriff. The sheriff failed to serve the execution because of an intervening order restraining the plaintiff from further prosecuting the summary ejectment, issued in a prior pending action to try title. Held: Motion to amerce the sheriff for failure to serve the execution was properly denied, since the sheriff had shown sufficient cause for failing to serve the execution. Massengill v. Lee, 228 N. C. 35, 44 S. E. (2d) 356.

Chapter 163. Elections and Election Laws.

SUBCHAPTER I. GENERAL ELECTIONS.

Art. 1. Political Parties.

§ 163-1. Political party defined; creation of new party.—A political party within the meaning of the election laws of this state shall be—

(1) Any group of voters which, at the last preceding general state election, polled for its candidate for governor, or for presidential electors, in the state at least ten per cent of the entire vote cast therein for governor, or for presidential electors; or

(2) Any group of voters which shall have filed with the state board of elections by twelve o'clock noon, on or before the first day of July preceding the day on which a general state election is held petitions signed by ten thousand persons who are at that time registered and qualified voters in this state, declaring their intention to organize a new state political party, the name of which party shall be stated on the petitions together with the name and address of the state chairman thereof, and also there shall be set forth on the petitions a declaration of their intention of participating in the next succeeding election and affiliating with said new state political party by voting for the nominees thereof. The signatures of the persons signing such petitions shall be proven before some officer authorized to take acknowledgments of deeds and other instruments which may be recorded and such acknowledgments certified by such officer, or the genuineness of such signatures shall be proven by the oath and examination before such officer by a person in whose presence the petitions were signed and such proof certified by such officer. Such petitions must be accompanied by certificates signed by the chairmen of the county boards of elections in the several counties in which signatures to the petitions are obtained, certifying that the signatures on the petitions have been checked against the registration books and showing the number and indicating by check marks on the petitions the names of the petitioners who are duly qualified and registered voters in such county. The group of petitioners shall pay to the chairmen of the county boards of elections who check the signatures on the petitions a fee of five cents for each name checked on the petitions.

No such group of petitioners shall assume a name or designation which shall be so similar, in the opinion of the state board of elections, to that of an existing political party as to confuse or mislead the voters at an election, and which name or designation shall not contain the same word that appears in the name or designation of any existing state political party. When any new political party has qualified for participation in an election as herein required, and has furnished to the state board of elections by the first day of August prior to the election the names of such of its nominees named in a convention of such party, for state, congressional and national offices as is desired to be printed on the official ballots, it shall be the duty of the state board of elections to cause to be printed on the official ballots furnished by it to the counties the names of such nominees. No names of any candidates of any new party shall be printed on the county ballots in any county for the first election held after the filing of such petitions. When any political party fails to cast ten per cent of the total vote cast at any election for governor or for presidential electors, it shall cease to be a political party within the meaning of this chapter. Provided, that notwithstanding any other provision of this section, any group of voters which at the 1948 general election polled for its candidates for presidential electors in the state at least three per cent of the total vote cast therein for presidential electors shall be deemed to be a political party within the meaning of the election and primary laws of this state until the regular general election of 1952 is held. (1949, c. 671, s. 1.)

Editor's Note.—The 1949 amendment rewrote this section. Among other changes, the 1949 amendment to this section wrote into it a number of administrative regulations adopted by the state board of elections in 1948, some of which were found in States' Rights Democratic Party v. State Board of Elections, 229 N. C. 179, 49 S. E. (2d) 379, to be repugnant to the intention of the law as then written. 27 N. C. L. Rev. 455.

This section confers upon any qualified voter the legal right to sign a petition for the creation of a new political party irrespective of whether such voter has participated in the primary election of an existing political party during the year in which the petition is signed, and regulations of the state board of elections are invalid if they undertake to establish and enforce the rule that a qualified

voter is ineligible to join in a petition for the creation of a new political party during a year in which he has voted in the primary election of an existing political party. States' Rights Democratic Party v. State Board of Elections, 229 N. C. 179, 49 S. E. (2d) 379.

The primary laws have no application to new political parties created by petition under this section. By express legislative declaration, such laws apply only to existing political parties "which, at the last preceding general election, polled at least three (now ten) per cent of the total vote cast therein for" governor, or for presidential electors. The law permits a new political party created by statutory petition to select its candidates in its own way. States' Rights Democratic Party v. State Board of Elections, 229 N. C. 179, 49 S. E. (2d) 379.

Duty of State Board of Elections.—Upon the filing of a petition under this section for the creation of a new political party, it is the duty of the state board of elections, in the first instance, to determine whether the petition is in accordance with the statutory requirements. States' Rights Democratic Party v. State Board of Elections, 229 N. C. 179, 49 S. E. (2d) 379. Note effect of 1949 amendment.

As § 163-151 specifies that ballots for use in general elections shall be printed and delivered to the county boards of elections "at least thirty days previous to the date of elections," the indisputable purpose of the provision of this section as it stood prior to the 1949 amendment concerning the time for filing a petition for the creation of a new political party was to afford the state board of elections approximately sixty days as the time in which to determine the sufficiency of the petition and to print ballots for use in the general election bearing the names of the nominees of the new political party in the event the petition for its creation was found to conform to the statute. States' Rights Democratic Party v. State Board of Elections, 229 N. C. 179, 49 S. E. (2d) 379.

Notice and Hearing Required before Rejection of Petition.—Manifestly the statutes creating the state board of elections and defining its duties contemplate that the board shall give petitioners for the creation of a new political party under this section notice and an opportunity to be heard in support of their petition before rejecting it or adjudging it insufficient. Indeed, notice and hearing in such case are necessary to meet the constitutional requirement of due process of law. States' Rights Democratic Party v. State Board of Elections, 229 N. C. 179, 49 S. E. (2d) 379.

Art. 2. Time of Elections.

§ 163-6. Special election for members of general assembly.

Nominations of candidates for a special election to fill a vacancy in the state house of representatives may be made by the several political party executive committees for each party respectively in the county in which such vacancy occurs. Nominations of candidates for a special election to fill a vacancy in the state senate in a senatorial district composed of only one county may be made by the several political party executive committees for each party respectively of such county in which said vacancy occurs. Nominations of candidates for a special election for the state senate in a senatorial district composed of more than one county where there is no party agreement for rotation of counties in the district in furnishing the candidate or candidates, may be made by the senatorial party executive committees for each party respectively of the district. Nominations of candidates for a special election for the state senate in a senatorial district composed of more than one county operating under a party rotation agreement under which one or more counties are permitted to nominate the candidate or candidates for the state senate in such district, may be made by the county political party executive committee or committees for the county or counties which, under the party rotation agreement, are entitled to select the candidates. It shall be the duty of the chairman and secretary of the political party executive committees making such a nomination for state senator in a special election to certify the name and party affiliation of the nominee to the chairman of each county board of elections in said district in which the special election is to be held before the special election ballots are printed. (Rev., s. 4298; 1901, c. 89, s. 74; 1947, c. 505, s. 1; C. S. 5919.)

Editor's Note.—The 1947 amendment added the above paragraph at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

Art. 3. State Board of Elections.

§ 163-10. Duties of the state board of elections. 16. The state board of elections may, under such rules and regulations as it may prescribe, when it deems it necessary and advisable, authorize the chairman of any county board of elections to delegate the authority to any other member of such county board of elections to receive applications for and to issue absentee ballots in any primary or general election; provided the chairman of any county board of elections may in his discretion decline to delegate any other member of said board to receive applications for and to issue absentee ballots.

(1945, c. 982.)

Editor's Note.—The 1945 amendment inserted subsection 16. As the rest of the section was not affected by the amendment it is not set out.

The title of the amendatory act purports to amend this section but there is no reference to the section in the body of the act.

Board May Make Rules and Regulations Not in Conflict with Law.—The general assembly has conferred upon the state board of elections power to make reasonable rules and regulations for carrying into effect the law it was created to administer, but has annexed to the grant of this power the express limitation that such rules and regulations must not conflict with any provisions of such law. It seems clear that this specific restriction would have been inseparably wedded to the authority granted even if the statutes had been silent with respect to it. This is true because the constitution forbids the legislature to delegate the power to make law to any other body. States' Rights Democratic Party v. State Board of Elections, 229 N. C. 179, 49 S. E. (2d) 379.

Art. 4. County Board of Elections.

§ 163-11. County boards of elections; appointments; term of office and qualifications.—There shall be in every county in the state a county board of elections to consist of three persons of good moral character, who are electors in the county in which they are to act, who shall be appointed by the state board of elections on the tenth Saturday preceding each primary election, and whose terms of office shall continue for two years from the time of their appointment and until their successors are appointed and qualified. Not more than two members of the county board of elections shall belong to the same political party, and the state chairman of each political party shall have the right to recommend three electors in each county for such offices, and it shall be the duty of the state board of elections to appoint said county board from the names thus recommended: Provided, that said chairman shall recommend such persons at least fifteen days before the tenth Saturday before the primary election is to be held.

No person shall serve as a member of the county board of elections who holds any elective public office or who is a candidate for any office in the primary or election.

No person, while acting as a member of a

county board of elections, shall serve as a county campaign manager of any candidate in a primary or election. (Rev., s. 4303; 1901, c. 89, s. 6; 1933, c. 165, s. 2; 1945, c. 758, s. 1; 1949, c. 672, s. 1; C. S. 5924.)

Editor's Note.—
The 1945 amendment rewrote the proviso at the end of the first paragraph.
The 1949 amendment added the last paragraph.

§ 163-12. Meetings of county elections boards; vacancies; pay.

The members of the county board of elections shall receive in full compensation for their services five dollars per day for the time they are actually engaged in the discharge of their duties, together with such other expenses as are necessary and incidental to the discharge of their duties. Provided, that the chairman of a county board of elections shall receive for his services, when actually engaged in the discharge of his duties, the sum of seven dollars ($7.00) per day. (Rev., s. 4304; 1901, c. 89, s. 11; 1923, c. 111, s. 1; 1933, c. 165, s. 2; 1941, c. 305, s. 1; 1945, c. 758, s. 2; C. S. 5925.)

Editor's Note.—
The 1945 amendment increased the compensation first mentioned in the last paragraph from three to five dollars per day, and increased the compensation of the chairman from five to seven dollars per day. As the first two paragraphs were not affected by the amendment they are not set out.

Art. 5. Precinct Election Officers and Election Precincts.

§ 163-15. Appointment of registrars and judges of elections; qualifications.—The county boards of elections, at the first meeting herein provided to be held on the seventh Saturday before each primary election, shall select one person of good repute who shall act as registrar and two other persons of good repute who shall act as judges of election for each election precinct in the respective counties for both the ensuing primary and general election, whose terms of office shall continue for two years from the time of their appointment, or until their successors are appointed and qualified, and who shall conduct the primaries and elections within their respective precincts. Each registrar and judge of election so appointed shall be able to read and write and they shall be residents of the precincts for which they are appointed. The chairman of each political party in each county shall have the right to recommend from three to five electors in each precinct, who are residents of the precinct, and who shall be of good moral character and able to read and write, for appointment as registrar and for judges of election in each precinct, and such appointments may be made from such names so recommended: Provided, such recommendations are made by the seventh Saturday before each primary election: Provided, further, that in any primary, when only one political party participates in such primary then all of the precinct officials selected for holding such primary shall be chosen only from such political party so participating. In a primary, where more than one political party participates, and in the general election, not more than one judge of election in each precinct shall be of the same political party with that of the registrar. The county boards of elections shall also have the right to appoint assistants for such precincts where there are more than three hundred registered voters when deemed advisable. No person holding any office or place of trust or profit under the government of the United States, or of the state of North Carolina or any political subdivision thereof, shall be eligible to appointment as an election official: Provided that nothing herein contained shall extend to officers in the militia, notaries public, justices of the peace, commissioners of public charities, or commissioners for special purposes. No person who is a candidate shall be eligible to serve as a registrar or judge or assistant.

The registrars, judges and assistants shall, before entering upon their duties, have the oath of office administered to them by some officer authorized to administer oaths. (Rev., s. 4307; 1901, c. 89, s. 8; 1933, c. 165, s. 3; 1947, c. 505, s. 2; C. S. 5928.)

The 1947 amendment rewrote the next to the last sentence of the first paragraph.

§ 163-19. Compensation for certain duties relating to elections.

Editor's Note.—Session Laws 1947, c. 496 made the compensation provided by this section applicable in Ashe county.

§ 163-20. Compensation of precinct officers.—Judges of elections and assistants shall each receive for their services on the day of a primary or election the sum of five dollars. The registrar shall receive the sum of six dollars per day for his services on the day of a primary or election, and shall also receive the sum of six dollars per day for each Saturday during the period of registration that he attends at the polling place for the purpose of registering voters. Any person sworn in to act as registrar or judge of election shall receive the same compensation as the registrar and judge: Provided, that markers appointed for assisting voters in marking their ballots shall not receive any compensation therefor. Provided, further, that the registrars and judges of elections shall receive the same compensation for attending any meeting called by the chairman of the county board of elections relating to their duties in any primary or election; provided, further, that the board of commissioners of any county may provide for additional compensation for such precinct election officials. (Rev., s. 4311; 1901, c. 89, s. 42; 1927, c. 260, s. 2; 1931, c. 254, s. 16; 1933, c. 165, s. 3; 1935, c. 421, s. 1; 1939, c. 264, s. 1; 1941, c. 304, s. 1; 1945, c. 758, s. 3; 1947, c. 505, s. 11; C. S. 5932.)

Local Modification.—Session Laws 1945, c. 263 struck out "Alleghany" from the list of counties appearing in Public Laws 1939, c. 264. Session Laws 1947, c. 496 made the compensation provided by this section applicable in Ashe county.

Editor's Note.—
The 1945 amendment substituted "five" for "four" in line three, and "six" for "five" in lines four and six. It also added the last proviso.

The 1947 amendment struck out the words "and said registrar shall receive no other compensation whatsoever" formerly appearing at the end of the second sentence. It also struck out from the end of the last proviso the words "in precincts where the duties of those election officials require services for a substantial period of time after the closing of the polls."

§ 163-21. Duties of registrars and judges of election.

2. The enforcement of peace and good order in and about the place of registration and voting.

They shall especially keep the place of access of the electors to the polling place open and unobstructed, prevent and stop improper practices or attempts to obstruct, intimidate or interfere with any elector in registering or voting. They shall protect challengers and witnesses against molestation and violence in the performance of their duties, and may eject from the polling place any such challenger or witness for violation of any provisions of the election laws. They shall prevent riots, violence, tumult or disorder. In the discharge of these duties they may call upon the sheriff, police, or other peace officers to aid them in enforcing the law. They may order the arrest of any person violating any provision of the election law, but such arrest shall not prevent such person from registering or voting if he is entitled so to do. The sheriff, all constables, police officers and other officers of the peace, shall immediately obey and aid in the enforcement of any lawful order made by the precinct election officials in the enforcement of the election laws. The registrar and judges of election of any precinct, or any two of such election officials, shall have the authority to deputize any person or persons as police officers to aid in maintaining order at a voting precinct.

(1947, c. 505, s. 3.)

The 1947 amendment added the last sentence of subsection 2. As the rest of the section was not affected by the amendment it is not set out.

Art. 6. Qualification of Voters.

§ 163-25. Qualifications of electors; residence defined.—Subject to the exceptions contained in the preceding section, every person born in the United States and every person who has been naturalized, and who shall have resided in the state of North Carolina for one year and in the precinct, ward, or other election district in which he offers to vote, four months next preceding the election shall, if otherwise qualified as prescribed in this chapter, be a qualified elector in the precinct, or ward or township in which he resides; Provided, that removal from one precinct, ward, or other election district to another in the same county shall not operate to deprive any person of the right to vote in the precinct, ward or other election district from which he has removed until four months after such removal.

(1945, c. 758, s. 7.)

Editor's Note.—

The 1945 amendment inserted in lines two and three of the first paragraph the words "every person born in the United States and." As the rest of the section was not affected by the amendment it is not set out.

Meaning of "Residence" Is Judicial Question.—The meaning of the term "residence" for voting purposes, as used in Art. VI, § 2, of the Constitution of North Carolina, is a judicial question. It cannot be made a matter of legislative construction. This is true because the legislature cannot prescribe any qualifications for voters different from those found in the organic law. State v. Chaplin, 228 N. C. 705, 47 S. E. (2d) 12.

"Residence" Is Synonymous with Domicile.—Residence as a prerequisite to the right to vote in this state, within the purview of N. C. Constitution, Art. VI, § 2, is synonymous with domicile, which denotes a permanent dwelling place to which a person, when absent, intends to return. State v. Chaplin, 228 N. C. 705, 47 S. E. (2d) 12.

Evidence Insufficient to Show Loss of Domicile.—Uncontroverted testimony which discloses that electors whose votes were challenged on the ground of nonresidence left their homes and moved to another state or to another county in this state for temporary purposes, but that at no time did they intend making the other state or the other county in this state a permanent home, is insufficient to support a finding that they had lost their domicile in the county for the purpose of voting. State v. Chaplin, 228 N. C. 705, 47 S. E. (2d) 12.

The indefiniteness of an elector's intention to return to the county of his domicile is insufficient to establish loss of voting residence—no other having been acquired or intended. State v. Chaplin, 229 N. C. 797, 48 S. E. (2d) 37.

Art. 7. Registration of Voters.

§ 163-31. Time when registration books shall be opened and closed; oath and duty of registrar; new registration when books destroyed or mutilated.

In the event that the registration books for any township, ward or precinct shall, prior to thirty days preceding any primary, general, or special election, be destroyed from fire or other cause or shall become mutilated to the extent that such books can no longer be used, new registration books shall be provided for the registration of voters in such township, ward or precinct and such new registration books shall be opened for the registration of voters at the times and places and in the manner prescribed by this section. Such new registration books may thereafter be used in such township, ward or precinct for all general, primary or special elections, including municipal elections. Notice of such new registration shall be given by advertisement in a newspaper published in the municipality or county in which such township, ward or precinct is located at least ten days before the opening of the new registration books and such notice shall also state the location of the polling place and the name of the registrar for such township, ward or precinct. When a special registration is held under this law the Saturday for challenge day may be combined with the last Saturday for registration, so that voters may be registered on challenge day when time does not permit an extra Saturday for challenge day prior to any primary or election. (Rev., s. 4323; 1901, c. 89, s. 18; 1923, c. 111, s. 3; 1933, c. 165, s. 5; 1947 c. 475; C. S. 5947.)

Editor's Note.—The 1947 amendment added the above paragraph at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

Art. 9. New State-Wide Registration of Voters.

§ 163-43. State-wide revision of registration books and relisting of voters in one general registration book.—Prior to the next state-wide primary election of 1950 there shall be a revision made of the registration books and a relisting of the registered voters into one new general registration book for each and every precinct in the state in the manner hereinafter provided. The state board of elections shall, as soon as possible after April 13, 1949, meet and adopt a new form of a general registration book to be substituted for the separate party primary registration books and the general election registration book now used in each voting precinct in this state, which new general registration book shall be the only kind of registration book to be used hereafter in each precinct in all primaries and general elections held in this state: Provided, the state board of elections may authorize any county board of elections, at the request of any county board and at such county's expense, to use a modern loose-leaf registration book system in the larger precincts instead of the new registration book to be

furnished by the state. The new general registration book shall be so prepared as to contain all of the information pertaining to a registered voter now required by law, except the new registration book shall also contain a column or space to enter the party affiliation of each registered voter. The new registration book shall also have printed on each page thereof a column index giving the first two letters of the surnames and the pages where such voters are registered so that a registrar can turn immediately to the page where a voter is registered and find the name.

The state board of elections shall, through the state department of purchase and contract, order the printing or purchase of a sufficient number of the said new general registration books to furnish one for each voting precinct in the state, the cost of which shall be paid for by the state out of the contingency and emergency fund. (1939, c. 263, s. 1; 1949, c. 916, s. 1.)

Editor's Note.—The 1949 act repealed the former section and substituted therefor the present section.

§ 163-44. State board of elections to distribute new registration books and instruct county election officials.—As soon as the new general registration books have been printed the state board of elections shall furnish to the chairman of each county board of elections in this state a sufficient number of the new registration books to supply one for each voting precinct in each county. These books shall be distributed to the county election chairman in time for the names from the old primary and general election registration books to be transcribed to the new book prior to the 1950 registration period. The state board of elections shall also furnish written instructions to each county election chairman and to the various registrars as to their duties with respect to the use of the new general registration book system. (1949, c. 916, s. 2.)

Editor's Note.—The 1949 act repealed the former section and substituted therefor the present section.

§ 163-45. County election board chairman to deliver new registration books to registrars and instruct them on their use.—After the receipt of the new registration books by a chairman of a county election board from the state board of elections, the chairman shall call a meeting of all of the registrars in his county for the purpose of delivering said new books to his registrars and instructing the registrars as to their duties relative thereto. Each registrar shall be entitled to be paid compensation and travel expense by the county for attending this meeting. (1949, c. 916, s. 3.)

Editor's Note.—The 1949 act repealed the former section and substituted therefor the present section.

§ 163-46. How new general registration book is to be used by registrar.—It shall be the duty of each registrar, after receiving his new general registration book from the chairman, to transcribe to the new general registration book in alphabetical order the names of all persons who are registered in the present party primary and general election registration books and shall indicate opposite the name of each registrant, in the column showing party affiliation, the political party affiliation of each such registrant as shown on the present party primary registration book, in which such person is now registered. In those cases where a person is now registered in the general election registration book and is not registered in a party primary registration book, no party affiliation will be placed opposite the name of such person when transcribed on the new book, but such person will not be permitted to vote in any party primary held thereafter unless or until such person declares his party affiliation to the registrar on the day of a party primary or registration period, and then only in the primary of such political party with which such person so declares his or her party affiliation and requests the registrar to record that party affiliation opposite his or her name on the new registration book.

It shall likewise be the duty of a registrar, when any person applies for new registration during the regular registration periods held hereafter prior to any primary or general election, to request the applicant to state his or her political party affiliation and record that party affiliation on the new book opposite the name. If such applicant refuses to declare his or her party affiliation upon request, then the registrar shall register such applicant's name, if found qualified to register, on the new registration book without indicating any party affiliation opposite the name, but the registrar shall then advise such person that he or she cannot vote in any party primary election but only in a general election held thereafter. If such applicant for registration states to the registrar that he or she is an independent, indicating affiliation with no political party, the registrar shall register such applicant as an independent, if found qualified to register, and shall likewise advise such person that he or she cannot vote in any party primary election held thereafter as he or she does not affiliate with any political party.

In transcribing the names of registrants from the old books to the new general registration book, the registrar shall not transcribe the names of any persons known to the registrar to be dead, or who have moved their permanent residence to another precinct, county or state; however, if any person whose name has been so removed from the books because of removal of residence should appear at the same polling place on election day and satisfy the registrar that he or she is entitled under the law to vote in that precinct, the registrar shall put such person's name back on the new book on election day and be permitted to vote there.

In lieu of a registrar transcribing the names of registrants from the old to the new general registration book, the county board of elections, in its discretion, may employ such clerks or assistants as it may desire to do the work.

Each registrar, or other persons, who transcribes the names of registrants from the old books to the new registration book shall be paid such compensation for same as the county board of commissioners may fix as proper. (1949, c. 916, s. 4.)

Editor's Note.—The 1949 act repealed the former section and substituted therefor the present section.

§ 163-47. New registration in discretion of county board of elections.—In lieu of the procedure prescribed in this article for the transcription of registrants from the present registration books to the new general registration book, any county board of elections may, in its discretion,

order a new registration of the voters in any county or precincts, but in any new registration only the new general registration book shall be used in each precinct, and the party affiliation of the new registrants indicated thereon. (1939, c. 263, s. 2½; 1949, c. 916, s. 5.)

Editor's Note.—The 1949 act repealed the former section and substituted therefor the present section.

§ 163-48. Registration and poll books to be returned to chairman of county election board.—On the day of the county canvass of votes after a primary or an election, each registrar shall return the registration book and the poll book for his precinct to the chairman of the county board of elections. The registrars shall be responsible for the safekeeping of the registration and poll books while in their custody. (1939, c. 263, s. 3½; 1949, c. 916, s. 6.)

Editor's Note.—The 1949 act repealed the former section and substituted therefor the present section.

§ 163-49. Chairman of county board of elections to keep registration books.—When not in use for a primary or an election, all of the registration books and poll books shall be in the custody and safekeeping of the chairman of the county board of elections. It shall be his duty to keep these books in a safe and secure place where they may not be tampered with, stolen or destroyed, and, if possible, they shall be kept in a fireproof vault. The chairman may, in his discretion, permit these books while in his custody to be inspected or copied, but only under his supervision. (1949, c. 916, s. 7.)

Editor's Note.—The 1949 act repealed the former section and substituted therefor the present section.

§ 163-50. Change of party affiliation.—No registered elector shall be permitted to change his party affiliation for a primary or second primary after the close of the registration period. Any elector who desires to change his party affiliation for a primary from the registration book on which registered to that of another party shall, during the registration period only, go to the registrar of his precinct and request that such change be made on the general registration books. Before being permitted to change his party affiliation, for the purpose of participating in a primary election, however, such elector shall be required by the registrar to take the oath of party loyalty to the party to which he wishes to now affiliate, and the registrar shall thereupon administer to the said elector the following oath:

I, ..., do solemnly swear (or affirm) that I desire in good faith to change my party affiliation from the ..... party to the ..... party, and that such change of affiliation be made on the party registration books, and I further solemnly swear (or affirm) that I will support the nominees of the party to which I am now changing my affiliation in the next election and the said party nominees thereafter until I shall, in good faith, change my party affiliation in the manner provided by law, so help me God.

If at any time the chairman of the board of elections or the registrar of any precinct shall be satisfied that an error has been made in designating the party affiliation of any voter on the general registration book then and in all such events the chairman of the county board of elections or the registrar, having the custody of the registration book may make the necessary correction upon the voter taking the oath of party loyalty in substance of the form set forth in this section. (1939, c. 263, s. 6; 1949, c. 916, s. 8.)

Editor's Note.—The 1949 amendment substituted the words "general registration books" for the words "party primary books" at the end of the second sentence. It also substituted "general registration book" for "primary registration books" in lines four and five of the last paragraph.

§ 163-51. Willful violations made misdemeanor.—Any chairman of a county board of elections or any registrar who willfully and knowingly refuses or fails to comply with the provisions of this article with respect to his duties as herein specified shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine, imprisonment, or both, in the discretion of the court. (1939, c. 263, s. 7; 1949, c. 916, s. 9.)

Editor's Note.—The 1949 amendment inserted in line two the words "or any registrar" and struck out all of the former second paragraph relating to violations by registrars.

Art. 10. Absent Voters.

§ 163-54. Absentee voting in general elections.

Effect of Mistake or Misconduct of Election Officials.—Persons in all respects qualified to cast absentee ballots will not be disfranchised for the mistake or even willful misconduct of election officials in performing their duties when the mistake or misconduct does not amount to coercion, fraud or imposition and it appears that the ballots expressed only the free choices of the electors themselves. State v. Chaplin, 228 N. C. 705, 47 S. E. (2d) 12.

§ 163-55. Written application for official ballot.

Cross Reference.—See notes to §§ 163-54, 163-56, 163-58.
Applied in State v. Chaplin, 228 N. C. 705, 47 S. E. (2d) 12.

§ 163-56. Issuance of official ballot.

As to delegation of authority of chairman to other members of board, see § 163-56, subsection 16.

Delivery of Ballot to Voter.—The fact that the chairman of the county board of elections, in company with candidates in the election, personally delivers absentee ballots to absentee voters at their temporary residence in another state or county is insufficient, of itself, to vitiate their votes, there being no evidence remotely suggesting coercion, fraud or imposition. State v. Chaplin, 228 N. C. 705, 47 S. E. (2d) 12.

§ 163-57. Container envelopes provided for absentee ballots; affidavit of absent voter.

Cross Reference.—See notes to §§ 163-54, 164-56, 163-58.
Applied in State v. Chaplin, 228 N. C. 705, 47 S. E. (2d) 12.

§ 163-58. Instructions for voting absentee ballots.

Provided, that in the case of voters who are members of the armed or auxiliary forces of the United States, the signature of any commissioned or noncommissioned officer of the rank of sergeant in the army, or chief petty officer in the navy, or the equivalent thereof, as a witness to the execution of any certificate required by this or any other section of this article to be under oath shall have the force and effect of the jurat of an officer with a seal fully authorized to take and administer oaths in connection with the absentee ballots. (1939, c. 159, s. 5; 1941, c. 248; 1943, c. 736; 1945, c. 758, s. 5.)

Editor's Note.—

The 1945 amendment rewrote the proviso at the end of the section. As the rest of the section was not affected by the amendment it is not set out.

Delivery of Ballots. — The fact that the chairman of a county board of elections delivers absentee ballots in person to the voters at their temporary residences outside the boundaries of the state, and that the voters deliver the votes in the sealed containers to him in person instead of

mailing them, is not sufficient, standing alone, to vitiate the votes. State v. Chaplin, 228 N. C. 705, 47 S. E. (2d) 12.

Voters Must Be Sworn.—Where the evidence supports the findings that certain absentee voters were not sworn, the rejection of their ballots is proper. State v. Chaplin, 228 N. C. 705, 47 S. E. (2d) 12.

Oaths Need Not Be Taken upon the Bible.—The fact that the oaths of absentee voters were not taken by them upon the Bible, but were taken with uplifted hands, does not invalidate their votes. State v. Chaplin, 228 N. C. 705, 47 S. E. (2d) 12.

The interest of the clerk of the superior court in his own re-election, standing alone, does not disqualify him from administering oaths to absentee voters, administering the oaths being ministerial and not judicial. State v. Chaplin, 228 N. C. 705, 47 S. E. (2d) 12.

§ 163-59. List of applications made in triplicate; certificate of correctness.

Applied in State v. Chaplin, 228 N. C. 705, 47 S. E. (2d) 12.

§ 163-60. Delivery of absentee ballots and list thereof to registrars; list to be posted.

Applied in State v. Chaplin, 228 N. C. 705, 47 S. E. (2d) 12.

§ 163-61. Ballots deemed voted upon delivery to precinct officials; opening, depositing and recording; rejected ballots; challenges.

Applied in State v. Chaplin, 228 N. C. 705, 47 S. E. (2d) 12.

§ 163-62. Challenged voter granted right of hearing before county board.—The absent voter, whose ballot has been challenged, shall, upon notice, have the right to appear before the county board of electors on canvass day and be given the opportunity to sustain the validity, and if its validity is sustained, his ballot shall be counted and added to the returns from the proper precincts; provided, that in case the voter is absent from the county or is physically unable to attend, such voter may act through any duly appointed representative. (1939, c. 159, s. 9; 1945, c. 758, s. 8.)

Editor's Note.—The 1945 amendment added the proviso.

Art. 11. Absentee Voting in Primaries by Voters in Military and Naval Service.

§ 163-70. Voting by persons in armed forces.—Any qualified voter entitled to vote in the primary of any political party, who, on the date of such primary, is in the military, naval or other armed forces of the United States may vote in the primary of the party of his affiliation in the manner as hereinafter provided. (1941, c. 346, ss. 1, 1a; 1945, c. 758, s. 4.)

Editor's Note.—
The 1945 amendment struck out the former provision that the act shall be null and void on or after the repeal of the Selective Service Act.

Art. 11A. Absentee Registration and Voting in General Elections by Persons in Military or Naval Service.

§ 163-77.9. Provisions applicable to absentee registration and voting in primaries.—The provisions of this article shall be applicable to registration and voting in primary elections, as well as in general elections. The state board of elections is hereby authorized and empowered to adopt and promulgate whatever rules and regulations it may deem necessary to conform the provisions hereof to the primary election law. (1943, c. 503, s. 9; 1945, c. 758, s. 6.)

Editor's Note.—The 1945 amendment rewrote this section.

§ 163-77.10. Printing and distribution of absentee ballots and supplies.—In order to fully carry out the purposes and intentions of this article, the state board of elections and the various county boards of elections, as the case may be, are authorized, empowered and directed to have printed, and in the hands of the proper election officials, all necessary ballots, together with the container return envelope, not later than the first day of September immediately preceding the ensuing general election, and in the event this article is made applicable to primary elections, not later than ten days after the time has expired for the filing for candidacy by county officers. (1943, c. 503, s. 10; 1949, c. 672, s. 3.)

Editor's Note.—The 1949 amendment substituted "September" for "August."

Art. 14. Counting of Ballots; Precinct Returns; Canvass of Votes and Preparation of Abstracts; Certification of Results by County Board of Elections.

§ 163-92. Chairman of county board of elections to furnish county officers certificate of election.—The chairman of the county board of elections of each county shall furnish, within ten days, the member or members elected to the house of representatives and the county officers, a certificate of election under his hand and seal. He shall also immediately notify all persons elected to the county offices to meet at the courthouse on the first Monday in the ensuing December to be qualified. The chairman of the county board of elections shall also issue a certificate of election to each township officer elected to office within the county. (1933, c. 165, s. 8; 1947, c. 505, s. 4.)

The 1947 amendment added the last sentence.

Art. 16. State Officers, Senators and Congressmen.

§ 163-105. Special election for congressmen.—If at any time after the expiration of any congress and before another election, or if at any time after an election, there shall be a vacancy in the representation in congress, the governor shall issue a writ of election, and by proclamation shall require the voters to meet in the different townships in their respective counties at such times as may be appointed therein, and at the places established by law, then and there to vote for a representative in congress to fill the vacancy; and the election shall be conducted in like manner as regular elections.

In the event such vacancy occurs within eight months preceding the next succeeding general election, nominations of candidates in a special election for representative in congress to fill a vacancy may be made by the several political party congressional executive committees in the district in which such vacancy occurs, for each political party respectively. It shall be the duty of the chairman and secretary of each political party congressional executive committee making such a nomination of a candidate in a special election to immediately certify to the state board of elections the name and party affiliation of the nominee so selected prior to the printing of the special election ballots.

In the event such vacancy occurs more than eight months prior to the next succeeding general election, then a special primary election shall be called by the governor. Such special primary election shall be conducted in accordance with the laws governing general primaries, except that

the closing date for filing notices of authority with the state board of elections shall be fixed by the governor in his call for the primary, and shall be for the purpose of nominating candidates, to be voted upon thereafter in a special election to be called by the governor as hereinbefore provided in the first paragraph of this section. The candidate elected in this special election shall fill such vacancy in the representation in congress. (Rev., s. 4369; 1901, c. 89, s. 60; 1947, c. 505, s. 5; C. S. 6007.)

The 1947 amendment added the second and third paragraphs.

Art. 17. Election of Presidential Electors.

§ 163-108. Arrangement of names of presidential electors.—The names of candidates for electors of president and vice-president of any political party or group of petitioners, who have qualified under the provisions of § 163-1 of the General Statutes of North Carolina as a political party shall not be placed on the ballot, but shall after nomination be filed with the secretary of state. In place of their names there shall be printed first on the ballot the names of the candidates for president and vice-president, respectively, of each party or group of petitioners who have qualified under the provisions of § 163-1 of the General Statutes of North Carolina as a political party and they shall be arranged under the title of the office. A vote for such candidates shall be a vote for the electors of the party by which such candidates were named and whose names have been filed with the secretary of state. (Rev., s. 4372; 1901, c. 89, s. 78; 1933, c. 165, s. 11; 1949, c. 672, s. 2; C. S. 6010.)

Editor's Note.—The 1949 amendment inserted the clauses as to having qualified as a political party under § 163-1.

Art. 18. Miscellaneous Provisions as to General Elections.

§ 163-113. Agreements for rotation of candidates in senatorial districts of more than one county.—When any senatorial district consists of two or more counties, in one or more of which the manner of nominating candidates for legislative offices is regulated by statute, and the privilege of selecting the candidate for senator, or any one of the candidates for senator, of any political party (as the words "political party" are defined in the first section of this subchapter) in the senatorial district, is, by agreement of the several executive committees representing that political party in the counties constituting the district, conceded to one county therein, such candidate may be selected in the same manner as the party's candidates for county officers in the county, whether in pursuance of statute or under the plan of organization of such party. All nominations of party candidates for the office of senator, made as hereinbefore provided, shall be certified by the chairman of the county board of elections of the county in which the nomination is made, to each chairman of the county board of elections in all of the counties constituting the senatorial district, and it shall be the duty of each chairman of the other counties to which the nominations are certified to print the name or names of the nominee or nominees on the official county ballot for the general election. (1911, c. 192; 1947, c. 505, s. 6; C. S. 6014.)

The 1947 amendment rewrote the second sentence.

SUBCHAPTER II. PRIMARY ELECTIONS.

Art. 19. Primary Elections.

§ 163-117. Date for holding primaries.

Local Modification.—Session Laws 1945, c. 894, repealed this article in so far as its provisions apply to the nomination of democratic candidates for the general assembly and county offices in Mitchell county.

The manifest purposes of the primary system set up by our laws is to secure to the members of an existing political party freedom of choice of candidates, and to confine the right of qualified electors to vote in party primaries to the primary of the existing political party of which they are members at the time of the holding of such primary. States' Rights Democratic Party v. State Board of Elections, 229 N. C. 179, 49 S. E. (2d) 379.

The primary laws have no application to new political parties created by petition under § 163-1. States' Rights Democratic Party v. State Board of Elections, 229 N. C. 179, 49 S. E. (2d) 379.

§ 163-119. Notices and pledges of candidates; with whom filed.—Every candidate for selection as the nominee of any political party for the offices of governor and all state officers, justices of the supreme court, the judges of the superior court, United States senators, members of congress, and solicitors to be voted for in any primary election shall file with and place in the possession of the state board of elections, by 12:00 o'clock noon on or before the tenth Saturday before such primary election is to be held, a notice and pledge in the following form, the blanks being properly filled in and the same signed by the candidate:

"I hereby file my notice as a candidate for the nomination as ..... in the primary election to be held on ..... I affiliate with the ..... party, and I hereby pledge myself to abide by the results of said primary, and to support in the next general election all candidates nominated by the ..... party."

Every candidate for selection as the nominee of any political party for the office of state senator in a primary election, member of the house of representatives, and all county and township offices shall file with and place in the possession of the county board of elections of the county in which they reside by six o'clock p. m. on or before the sixth Saturday before such primary is to be held a like notice and pledge.

The notice of candidacy required by this section to be filed by a candidate in the primary must be signed personally by the candidate himself or herself, and such signature of the candidate must be signed in the presence of the chairman or secretary of the board of elections with whom such candidate is filing, or a candidate must have his or her signature on the notice of candidacy acknowledged and certified to by any officer authorized to administer an oath. Any notice of candidacy of any candidate signed by an agent in behalf of a candidate shall not be valid. (1915, c. 101, s. 6; 1917, c. 218; 1923, c. 111, s. 13; 1927, c. 260, s. 19; 1929, c. 26, s. 1; 1933, c. 165, s. 12; 1937, c. 364; 1947, c. 505, s. 7; 1949, c. 672, s. 4; C. S. 6022.)

Editor's Note.—The 1947 amendment added the last paragraph, and the 1949 amendment substituted in the first paragraph "12:00 o'clock noon" for "6:00 o'clock P. M."

Obligation Imposed upon Candidate. — This section attempts to place upon a candidate who seeks nomination to public office in the primary election of an existing political party an obligation to adhere to such existing political party for at least a limited time in the future. States' Rights Democratic Party v. State Board of Elections, 229 N. C. 179, 49 S. E. (2d) 379.

§ 163-123. Registration of voters.

Cross Reference.—As to effect of voting in primary on future conduct of voter, see notes to § 163-126.

§ 163-126. How primary conducted; voter's rights; polling books; information given; observation allowed.

This section secures to the member of an existing political party freedom of choice of candidates by providing that he may vote for candidates for all or any of the officers printed on the ballots of the political party with which he affiliates "as he shall elect and that he shall disclose the name of the political party printed thereon and no more." States' Rights Democratic Party v. State Board of Elections, 229 N. C. 179, 49 S. E. (2d) 379.

Voter Need Not Support Candidates of Party in Whose Primary He Voted.—This section and § 163-123 confine the right of a qualified elector to vote in party primaries to the primary of the existing political party with which he affiliates at the time of the holding of the primary. But they do not undertake to deprive the voter of complete liberty of conscience or conduct in the future in the event he rightly or wrongly comes to the conclusion subsequent to the primary that it is no longer desirable for him to support the candidates of the party in whose primary he has voted. States' Rights Democratic Party v. State Board of Elections, 229 N. C. 179, 49 S. E. (2d) 379. See § 163-126.

He May Sign Petition to Establish New Party under § 163-1.—Thus regulations of the state board of elections conflict with this and other pertinent sections of this subchapter if they attempt to set up and establish a rule that voting in the primary election of an existing political party disables qualified electors to sign a petition for the creation of a new political party under § 163-1 during the year in which such primary election is held. States' Rights Democratic Party v. State Board of Elections, 229 N. C. 179, 49 S. E. (2d) 379.

§ 163-128. Names of candidates successful at primaries printed on official ballot; where only one candidate.

Cited in Ingle v. State Board of Elections, 226 N. C. 454, 38 S. E. (2d) 566.

§ 163-129. Primaries for county offices; candidates to comply with requirements.

Local Modification.—Stanly: 1945, c. 958.

Editor's Note.—Session Laws 1945, c. 823 repealed Session Laws 1943, c. 349 so as to make this article applicable to Macon county.

§ 163-144. Political party defined for primary elections.—A political party within the meaning of the primary law shall mean any political group of voters which, at the last preceding general election, polled at least ten per cent of the total vote cast therein for such offices as are described in § 163-1. (1915, c. 101, s. 31; 1917, c. 218; 1933, c. 165, s. 17; 1949, c. 671, s. 2; C. S. 6052.)

Editor's Note.—The 1949 amendment substituted "ten" for "three" in line four.

The primary laws have no application to new political parties created by petition under § 163-1. By express legislative declaration, such laws apply only to existing political parties "which, at the last preceding general election, polled at least three (now ten) per cent of the total vote cast therein for" governor, or for presidential electors. The law permits a new political party created by statutory petition to select its candidates in its own way. States' Rights Democratic Party v. State Board of Elections, 229 N. C. 179, 49 S. E. (2d) 379.

§ 163-147. Notice of candidacy to indicate vacancy; votes only effective for vacancy indicated.—In any primary when there are two or more vacancies for chief justice and associate justices of the supreme court of North Carolina or two vacancies in the United States senate from North Carolina to be filled by nominations all candidates shall file with the state board of elections at the time of filing notice of candidacy a notice designating to which of said vacancies the respective candidate is asking the nomination. All votes cast for any candidate shall be effective only for the vacancy for which he has given notice of candidacy, as provided herein. (1921, c. 217; 1949, c. 932; C. S. 6055(a).)

Editor's Note.—The 1949 amendment made this section applicable to two vacancies for United States senator.

Section Is Constitutional.—This section does not contravene art. IV, § 21, of the state constitution requiring justices to be elected in the same manner as members of the general assembly, since the method of selection of nominees does not reach into and control the general election. Ingle v. State Board of Elections, 226 N. C. 454, 38 S. E. (2d) 566.

Effect of Failure to Indicate Vacancy.—Where there are two vacancies for the office of associate justice of the supreme court to be filled at the general election, a notice of candidacy for the nomination of a party which does not specify to which of the vacancies the candidate is asking the nomination is fatally defective. Ingle v. State Board of Elections, 226 N. C. 454, 38 S. E. (2d) 566.

SUBCHAPTER III. GENERAL ELECTION LAWS.

Art. 20. Election Laws of 1929.

§ 163-151. Ballots, provisions as to; names of candidates and issue.

Provided, that in printing the names of candidates on all primary or general election ballots, only the name of the candidate shall appear and no appendage such as doctor, reverend, judge, et cetera, may be used either before or following the name of any candidate. (1929, c. 164, s. 5; 1945, c. 972.)

Editor's Note.—The 1945 amendment added the above proviso at the end of this section. As the rest of the section was not affected by the amendment it is not set out.

Cited in States' Rights Democratic Party v. State Board of Elections, 229 N. C. 179, 49 S. E. (2d) 379.

§ 163-153. Becoming candidate after the official ballots have been printed; provision as to the ballots.—If any candidate dies or resigns, or otherwise become disqualified after his name has been printed on an official election ballot, and if any person is nominated, as authorized by law, to fill such vacancy, then the name of the candidate so nominated to fill said vacancy shall not be printed upon said ballots, but the name of such candidate so nominated shall be certified by the party executive committee making the nomination to the chairman of the board of elections charged with the duty of printing such ballots, and a vote cast by a voter for the name of the candidate printed on the ballot who has either died or resigned, shall be counted as a vote for the candidate nominated to fill such vacancy and whose name is on file with said board of elections. After the official ballots have been printed by the proper election board the death or resignation of a candidate whose name is printed on the official ballot, shall not cause the said board of elections to reprint the official ballots. Provided that the board of elections having jurisdiction over the printing and distribution of the ballots concerned may cause said ballots to be reprinted and be substituted in all respects for the first printed ballots if, in its judgment, such substitution is feasible and advisable. (1929, c. 164, s. 7; 1931, c. 254, s. 1; 1947, c. 505, s. 8.)

The 1947 amendment rewrote this section.

§ 163-155. Number of ballots; what ballots shall contain; arrangement.

(a) On the official presidential ballot, the names of candidates for electors of president and

vice-president of the United States of any political party or group of petitioners, who have qualified under the provisions of § 163-1 of the General Statutes of North Carolina as a political party shall not be placed on the ballot, but shall after nomination, be filed with the secretary of state. In place of their names, there shall be printed first on the ballot the names, of the candidates for president and vice-president of the United States respectively, of each such political party or group of petitioners, who have qualified under the provisions of § 163-1 of the General Statutes of North Carolina as a political party and they shall be arranged under the title of the offices. The party columns shall be separated by black ink lines. At the head of each party column shall be printed the party name in large type and below this a circle one-half inch in diameter, below this the names of the candidates for president and vice-president in the order prescribed. Each party circle shall be surrounded by the following instructions plainly printed: "For a straight ticket, mark within this circle."

(e) On the official ballot on constitutional amendments or other propositions submitted shall be printed each amendment or proposition submitted in the form laid down by the legislature, county commission, convention, or other body submitting such amendment or proposition. Each amendment or proposition shall be printed in a separate section and the section shall be numbered consecutively, if there be more than one. The form of the constitutional amendment or referendum ballot shall be prepared by the state board of elections and approved by the attorney general of North Carolina.

(1947, c. 505, s. 9; 1949, c. 672, s. 2.)

Editor's Note.—The 1947 amendment rewrote the latter part of subsection (e), and the 1949 amendment inserted in the first paragraph of subsection (a) the clause as to having qualified as a political party under § 163-1. As the rest of the section was not affected by the amendments only subsection (e) and the first paragraph of subsection (a) are set out.

§ 163-175. Method of marking ballots; improperly marked ballots not counted; when.

2. If the elector desires to vote a mixed ticket, or in other words for candidates of different parties, he shall, either,

(a) Omit making a cross mark in the party circle above the name of any party and make a cross mark in the voting square opposite the name of each candidate for whom he desires to vote on whatever ticket he may be; or

(b) Make a cross mark in the party circle above the name of the party for some of whose candidates he desires to vote, and then make a cross mark in the voting square opposite the name of any candidates of any other party for whom he may desire to vote, in which case, the cross mark in the party circle above the name of a party will cast the elector's vote for every candidate on the ticket of such party, except for those candidates whose names are opposite the specially marked opposing candidates and the cross mark before the names of such opposing candidates will cast the elector's vote for them; provided that where there are group candidates for similar offices the elector may select and specially mark all of such candidates for whom he wishes to vote.

3. If the elector desires to vote for a person whose name does not appear on the ticket, he can substitute the name by writing it in with a pencil or ink in the proper place, and making a cross (x) mark in the blank space at the left of the name so written in. When a name is written in on the official ballot, the new name so written in is to be treated like any other name on the ballot. No sticker is to be used. Any name written in on an official ballot by any election official, or by any person other than the voter or a person rendering assistance to a voter pursuant to §§ 163-172, 163-173 or 163-174, shall be invalid, and the name or names so written in shall not be counted.

(1947, c. 505, s. 10.)

Editor's Note.—

The 1947 amendment rewrote the latter part of paragraph (b) of subsection 2, and added the last sentence of subsection 3. As the rest of the section was not changed only these subsections are set out.

§ 163-183. Supervision over primaries and elections; regulations.

State Board of Elections May Make Regulations Not in Conflict with Law.—The general assembly has conferred upon the state board of elections power to make reasonable rules and regulations for carrying into effect the law it was created to administer, but has annexed to the grant of this power the express limitation that such rules and regulations must not conflict with any provisions of such law. It seems clear that this specific restriction would have been inseparably wedded to the authority granted even if the statutes had been silent with respect to it. This is true because the constitution forbids the legislature to delegate the power to make law to any other body. States' Rights Democratic Party v. State Board of Elections, 229 N. C. 179, 49 S. E. (2d) 379.

§ 163-187.1. Automatic voting machines.—Any county or city of the state may, at the expense of such county or city, adopt and purchase, upon an installment basis or otherwise, or lease, with or without option to purchase, voting machines for use at all primaries and elections held within such county or city, or within any one or more precincts thereof, in such manner and upon such terms as are deemed to be in the best interest of such county or city. The use of any voting machines approved by the state board of elections in any primary or election held in any county or city shall be as valid as the use of paper ballots by the voters. (1949, c. 301.)

Art. 21. Corrupt Practices Act of 1931.

§ 163-196. Certain acts declared misdemeanors.

Applied in State v. Pritchard, 227 N. C. 168, 41 S. E. (2d) 287 (paragraph 11).

Art. 22. Other Offenses against the Elective Franchise.

§ 163-207. Convicted officials; removal from office.—Any public official who shall be convicted of any violation of any of the provisions of article 21 or article 22 of this chapter, in addition to the punishment provided by law for such violation, may be removed from office by the judge presiding at the trial and shall be ineligible to hold any other public office until his citizenship is restored as provided by law in case of conviction of a felony, and for a period of two years in case of conviction of a misdemeanor. (1949, c. 504.)

Chapter 164. Concerning the General Statutes of North Carolina.

Sec.

Art. 1. The General Statutes.

164-10. Supplements to the General Statutes; rearrangement of laws and correction of errors.
164-11. Supplements prima facie statement of laws; method of citation.
164-11.1. 1945 and 1947 Cumulative Supplements prima facie evidence of laws.

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164-12. Creation; name.
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164-15. Meetings; quorum.
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164-17. Committees; rules.
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164-19. Compensation.

Art. 1. The General Statutes.

§ 164-1. Title of revision.

Editor's Note.—Acts 1945, c. 157 inserted the heading of this article.

§ 164-10. Supplements to the General Statutes; rearrangement of laws, and correction of errors.—The division of legislative drafting and codification of statutes of the department of justice, under the direction and supervision of the attorney general, shall have the following duties and powers with regard to the supplements to the General Statutes:

(a) Within six months after the adjournment of each general assembly, or as soon thereafter as possible, the division shall cause to be published under its supervision, cumulative pocket supplements to the four volumes of the General Statutes, which shall contain an accurate transcription of all laws of a general and permanent nature enacted by the general assembly, the material contained in the next preceding pocket and interim supplements, complete and accurate annotations to the statutes appendix and other material accumulated since the publication of the next preceding pocket and interim supplements, and a cumulative index of said material.

(b) Periodically, every six months after the publication and issuance of a cumulative pocket supplement following a session of the general assembly, or as soon thereafter as possible, except when the publication of the cumulative pocket supplement makes it unnecessary, the division shall cause to be published an interim supplement containing all pertinent annotations and other material found by the division to be necessary and proper, accumulating since the publication of the said cumulative pocket supplement or the last interim supplement.

(c) In the preparation of the general and permanent laws enacted by the general assembly for inclusion in the cumulative pocket supplements, the division is hereby authorized:

(1) To rearrange the order of chapters, subchapters, articles, sections and other divisions or subdivisions;

(2) To provide titles for any such divisions or subdivisions and section titles or catchlines when they are not provided by such laws;

(3) To adopt a uniform system of lettering or numbering sections and the various subdivisions thereof and to reletter or renumber sections and section subdivisions in accordance with such uniform system;

(4) To rearrange definitions in alphabetical order;

(5) To rearrange lists of counties in alphabetical order; and

(6) To make such other changes in arrangement and form that do not change the law as may be found by the division necessary for an accurate, clear and orderly codification of such general and permanent laws. (1945, c. 863; 1947, c. 150.)

Editor's Note.—The 1947 amendment rewrote subsection (c). For a brief comment on the 1947 amendment, see 25 N. C. Law Rev. 460.

§ 164-11. Supplements prima facie statement of laws; method of citation.—(a) The supplements to the General Statutes of North Carolina, when printed under the supervision of the division of legislative drafting and codification of statutes of the department of justice, shall establish prima facie the general and permanent laws of North Carolina contained in said supplements.

(b) The cumulative pocket supplement may be cited as "G. S., Supp. 19...." and the interim supplement may be cited as "....G. S. In. Supp. 19...," the blank in front of "G. S." to be filled in with the number of the interim supplement for that year. (1945, c. 863.)

Cross Reference.—For subsequent law, see § 164-11.1.

§ 164-11.1. 1945 and 1947 Cumulative Supplements prima facie evidence of laws.—The 1945 and the 1947 Cumulative Supplements to the General Statutes of North Carolina of 1943, as compiled and published by the Michie Company, under the supervision of the department of justice of the state of North Carolina, are hereby constituted and declared to be prima facie evidence of the laws of North Carolina contained in said supplements. (1949, c. 45.)

Editor's Note.—For a brief comment on this section, see 27 N. C. Law Rev. 478.

See § 164-11.

Art. 2. The General Statutes Commission.

§ 164-12. Creation; name.—There is hereby created and established a commission to be known as "The General Statutes Commission." (1945, c. 157.)

§ 164-13. Duties.—It shall be the duty of the commission—

(a) To advise and cooperate with the division of legislative drafting and codification of statutes of the department of justice in the work of continuous statute research and correction for which the division is made responsible by § 114-9 (c).

(b) To advise and cooperate with the division of legislative drafting and codification of statutes in the preparation and issuance by the division of supplements to the General Statutes pursuant to § 114-9 (b).

(c) To make a continuing study of all matters involved in the preparation and publication of modern codes of law. (1945, c. 157.)

Cross Reference.—As to subsequent statute relating to

duties of revisor of statutes in regard to § 114-9(c), see § 114-9.1.

§ 164-14. Membership; appointments; terms; vacancies.—(a) The commission shall consist of nine members, who shall be appointed as follows: (1) one member, by the president of the North Carolina state bar; (2) one member, by the president of the North Carolina bar association; (3) one member, by the dean of the school of law of the University of North Carolina; (4) one member, by the dean of the school of law of Duke University; (5) one member, by the dean of the school of law of Wake Forest College; (6) one member, by the speaker of the house of representatives of each general assembly from the membership of the house; (7) one member, by the president of the senate of each general assembly from the membership of the senate; (8) two members, by the governor.

(b) Appointments of original members of the commission made by the president of the North Carolina state bar, the president of the North Carolina bar association, and the deans of the schools of law of Duke University, the University of North Carolina, and Wake Forest College shall be for one year. Appointments of original members of the commission made by the speaker of the house of representatives, the president of the senate, and the governor shall be for two years.

(c) After the appointment of the original members of the commission, appointments by the president of the North Carolina state bar, the president of the North Carolina bar association, and the deans of the schools of law of Duke University, the University of North Carolina, and Wake Forest College shall be made in the even numbered years, and appointments made by the speaker of the house of representatives, the president of the senate, and the governor shall be made in the odd numbered years. Such appointments shall be made for two-year terms beginning June first of the year when such appointments are to become effective and expiring May thirty-first two years thereafter. All such appointments shall be made not later than May thirty-first of the year when such appointments are to become effective.

(d) If any appointment provided for by this section is not made prior to June first of the year when it should become effective, a vacancy shall exist with respect thereto, and the vacancy shall then be filled by appointment by the governor. If any member of the commission dies or resigns during the term for which he was appointed, his successor for the unexpired term shall be appointed by the person who made the original appointment, as provided in § 164-14, or by the successor of such person; and if such vacancy is not filled within thirty days after the vacancy occurs, it shall then be filled by appointment by the governor.

(e) All appointments shall be reported to the secretary of the commission. (1945, cc. 157, 635; 1947, c. 114, s. 3.)

The 1947 amendment struck out the words "with the approval of the council thereof" formerly appearing after the word "bar" in line four of subsection (a).

For comment on the 1947 amendment, see 25 N. C. Law Rev. 459.

§ 164-15. Meetings; quorum.—The commission shall hold not less than two regular meetings each year, of which one shall be held in June and one in November, at such times during those months as may be fixed therefor by the commission itself. The commission may hold such other regular meetings as it may provide for by its rules. Special meetings may be called by the chairman, or by any two members of the commission, upon such notice and in such manner as may be fixed therefor by the rules of the commission. The regular June and November meetings of the commission shall be held in Raleigh, but the commission may provide for the holding of other meetings from time to time at any other place or places in the state. The first meeting of the commission shall be held in June one thousand nine hundred and forty-five upon the call of the attorney general at such time and upon such notice as he may designate. A majority of the members of the board shall constitute a quorum. (1945, c. 157.)

§ 164-16. Officers.—At its regular June meeting in the odd numbered years the commission shall elect a chairman and a vice chairman for a term of two years and until their successors are elected and assume the duties of their positions. The revisor of statutes shall be ex-officio secretary of the commission. (1945, c. 157; 1947, c. 114, s. 2.)

Editor's Note.—The 1947 amendment substituted "revisor of statutes" for "director of the division of legislative drafting and codification of statutes" in the last sentence.

For comment on the 1947 amendment, see 25 N. C. Law Rev. 459.

§ 164-17. Committees; rules.—The commission may elect, or may authorize its chairman to appoint, such committees of the commission as it may deem proper. The commission may adopt such rules not inconsistent with this article as it may deem proper with respect to any and all matters relating to the discharge of its duties under this article. (1945, c. 157.)

§ 164-18. Reports.—The commission shall submit to each regular session of the general assembly a report of its work during the preceding two years, together with such recommendations as it may deem proper. (1945, c. 157.)

§ 164-19. Compensation.—Members of the commission shall be paid ten dollars a day for attendance upon meetings of the commission, or upon attendance of meetings of committees of the commission, together with such subsistence and travel allowance as may be provided by law. (1945, c. 157.)

Chapter 165. Veterans.

Art. 1. North Carolina Veterans Commission.

§ 165-1. Short title.—This article may be cited as "The North Carolina Veterans Commission Act." (1945, c. 723, s. 1.)

§ 165-2. Definition of terms.—Wherever used in this article, unless the context otherwise requires, the terms defined in this section shall have the following meaning:

(a) "Commission" means the North Carolina veterans commission.

(b) "Director" means the director of the North Carolina veterans commission.

(c) "Veteran" means any person who has served at any time in the armed forces of the United States during any war in which the United States was a belligerent, or any person who is entitled to any benefits or rights under the laws of the United States, particularly the servicemen's readjustment act of one thousand nine hundred and forty-four, or any rules, regulations or directives issued pursuant thereto, by reason of service in the armed forces of the United States during any war in which the United States has engaged.

(d) "Veterans organization" means a nationally recognized veterans organization whose membership is composed of veterans as defined in this section and which has been chartered by an act of the United States Congress. (1945, c. 723, s. 1; 1949, c. 430, s. 1.)

Editor's Note.—The 1949 amendment added subsection (d).

§ 165-3. Purpose of article.—The purpose of this article is to create a commission whose functions, purpose and duty it shall be to coordinate, harmonize, and perform the services now being rendered veterans by various state departments, agencies, and instrumentalities to the end that such state services may be more effectively and economically administered; and that such coordinated state services may give to all veterans, through this commission, a definite and practical means of availing themselves of all such rights and benefits as they may be entitled to as veterans, without unnecessary inconvenience or delay. In no sense is this commission intended to supersede or duplicate the work of federal, private, or civic agencies rendering service to veterans, it being the function of this commission to furnish a means of contact and coordination between veterans and all governmental, private, or civic service facilities in order to make more fully and readily available to all veterans, all rights and benefits to which they may be entitled. (1945, c. 723, s. 1.)

§ 165-4. Creation; name.—There is hereby created a commission to be known as the North Carolina veterans commission. (1945, c. 723, s. 1.)

§ 165-5. Membership; vacancies; chairman; meetings; compensation.—(1) The membership of the commission shall consist of five persons appointed by the governor, who shall be veterans as defined in § 165-2 of this article. Both major political parties in the state shall be represented on the commission. The department commander or official head of each recognized veterans organization in this state shall be an ex officio member of the commission but shall have no vote nor re-

ceive compensation, per diem or other expense for services rendered as a member of said commission.

(2) For the initial term of the members of the commission, one shall be appointed for a term of one year, one for a term of two years, one for a term of three years, one for a term of four years, and one for a term of five years; thereafter the successors of each shall be appointed for terms of five years and until their successors are appointed and qualify.

(3) Vacancies in the commission shall be filled by the governor for the unexpired term.

(4) The commission shall select one of its members to act as chairman.

(5) The commission shall meet quarterly in January, April, June, and October, and at such other times as may be fixed by the chairman. The commission may be convoked at such other times as the governor or chairman may deem necessary.

(6) Members of the commission shall receive a per diem of seven dollars ($7.00) while attending meetings of the commission and, in addition thereto, shall be allowed reasonable travel and subsistence expenses in accordance with the applicable schedules and procedure of the budget bureau. (1945, c. 723, s. 1; c. 1087; 1949, c. 430, s. 2.)

Editor's Note.—The 1949 amendment added the last sentence of subsection (1).

§ 165-6. Powers and duties of the commission; limitation.—(a) The commission shall have the following powers and duties:

(1) To acquaint itself, the director, and such other assistants and employees as may be employed for carrying out the purposes of this article, with the laws, rules, and regulations, federal, state, and local, enacted for the benefit of veterans, their families, and dependents.

(2) To collect data and information as to the facilities and services available to veterans, their families, and dependents and to cooperate with agencies furnishing information or services throughout the state in order to inform such agencies regarding the availability of (a) education, training and retraining facilities, (b) health, medical, rehabilitation, and housing services and facilities, (c) employment and reemployment services, (d) provisions of federal, state, and local laws, rules, and regulations affording rights, privileges, and benefits to veterans, their families, and dependents, and in respect to such other matters of similar, related, or appropriate nature not herein set out.

(3) To assist veterans, their families, and dependents in the presentation, processing, proof, and establishment of such claims, privileges, rights, and benefits as they may be entitled to under federal, state, or local laws, rules, and regulations.

(4) To cooperate with the national, state, and local governmental, private, and civic agencies and instrumentalities securing services or any benefits to veterans, their families, and dependents.

(5) To accept any property, funds, service, or facilities from any source, public or private, granted in aid or furtherance of the administration of the provisions of this article: Provided, that no financial obligation shall be thereby incurred without the authorization and approval of the director of the budget.

(6) Subject to the approval of the director of the budget to establish in any county, city, or town of the state such branch or district offices as the commission may find necessary for the proper administration of this article.

(7) Subject to the approval of the director of the budget, to enter into any contract or agreement with any person, firm, or corporation, or governmental agency or instrumentality in furtherance of the purposes of this article, and to make all rules and regulations necessary for the proper and effective administration of its duties.

(b) Any county, city, or town may employ one or more persons to serve in such county, city, or town, under the supervision of the commission and to perform such duties as the commission may direct in carrying out the provisions and purposes of this article; and such county, city, or town is hereby authorized to pay the salaries of such persons so employed, together with such other expense for quarters, equipment, supplies, and incidentals as may be necessary to give proper effect to this article: Provided, that the commission is hereby authorized and empowered in its discretion to contribute to the salaries and expenses of such persons as are employed by counties, cities, or towns, in order to provide for joint maintenance of the service rendered by them.

(c) There is hereby appropriated to the North Carolina veterans commission out of the general fund of the state the sum of fifty thousand dollars for the fiscal year beginning July 1, 1949, and ending June 30, 1950, and a like sum for the fiscal year beginning July 1, 1951, to be expended as set out below.

There may be paid by North Carolina veterans commission, in its discretion, to any county of the state, in quarterly installments, for each fiscal year of the next biennium a sum equal to such amount as the board of county commissioners of such county appropriates for the employment during such fiscal year of a county veterans service officer, not exceeding one thousand dollars ($1000) to any one county, such money to be expended by the recipient county in supplementing its own appropriation for payment of the salary and other necessary expenses of a county veterans service officer.

The board of county commissioners of each county of the state is hereby authorized to appropriate such amount as it may deem necessary to pay the salary of a county veterans service officer, and to secure supplementary funds from the state, and the payment of such salary is hereby declared to be for a public purpose. (1945, c. 723, s. 1; 1949, c. 1292.)

Editor's Note.—The 1949 amendment added subsection (c).

§ 165-7. Director and employees.—The commission shall elect, with the approval of the governor, a director who shall be a veteran of competency and ability. He shall serve for such time as his services are satisfactory to the commission at a salary to be fixed by the commission and approved by the director of the budget.

The director may, with the approval of the commission, employ such assistants as may be necessary effectively to administer the provisions

of this article and with the approval of the commission may establish at such veterans administration facilities as are now or may hereafter be established, necessary personnel for the processing and presentation of all claims and benefits under federal or state laws, rules, and regulations; and to fix the salaries of such personnel subject to the approval of the director of the budget. In employing such persons, preference shall be given to veterans. (1945, c. 723, s. 1.)

§ 165-8. Biennial report.—The commission shall biennially prepare and submit to the governor and the general assembly a report of its activities during the preceding two years. (1945, c. 723, s. 1.)

§ 165-9. Quarters.—The board of public buildings and grounds shall provide in the city of Raleigh, adequate quarters for the central office of the commission. The division of purchase and contract shall arrange for leasing or shall otherwise provide such necessary quarters as the commission may require for the transaction of its business in other sections of the state. (1945, c. 723, s. 1.)

§ 165-10. Appropriation.—The governor, with the approval of the council of state, is hereby authorized and empowered to allocate from time to time from the contingency and emergency fund, such funds as may be necessary to carry out the intent and purposes of this article. (1945, c. 723, s. 1.)

§ 165-11. Transfer of veterans activities.—As promptly as he may deem practicable after the appointment of the commission, the governor shall transfer to the commission such facilities, properties, and activities now being held or administered by the state for the benefit of veterans, their families, and dependents as he may deem proper.

(a) The governor may transfer to the commission all such funds or appropriations now available for any veterans service, including appropriations and allocations for the impending biennium.

(b) The provisions of subsection (a) of this section shall not apply to the war veterans loan administration, this agency being in the process of liquidation.

(c) The provisions of subsection (a) of this section shall not apply to the activities of the North Carolina unemployment compensation commission in respect to veterans. (1945, c. 723, s. 1.)

Art. 2. Minor Veterans.

§ 165-12. Short title.—This article may be cited as "The Minor Veterans Enabling Act." (1945, c. 770.)

For discussion of this article, see 23 N. C. Law Rev. 359.

§ 165-13. Definition.—In this article, unless the context or subject matter otherwise requires, the term, "servicemen's readjustment act" means the servicemen's readjustment act of one thousand nine hundred and forty-four as enacted by the congress of the United States (58 Statutes at Large 284, 38 U. S. Code 693 and following), together with any amendments thereof or related legislation supplemental or in addition thereto, and any rules, regulations, or directives issued pursuant thereto. (1945, c. 770.)

§ 165-14. Application of article.—This article applies to every person, either male or female, eighteen years of age or over, but under twenty-one years of age, who is, or who may become, entitled to any rights or benefits under the servicemen's readjustment act. (1945, c. 770.)

§ 165-15. Purpose of article.—The purpose of this article is to remove the disqualification of age which would otherwise prevent persons to whom this article applies from taking advantage of any right or benefit to which they may be or may become entitled under the servicemen's readjustment act, and to assure those dealing with such minor persons that the acts of such minors shall not be invalid or voidable by reason of the age of such minors, but shall in all respects be as fully binding as if said minors had attained their majority; and this article shall be liberally construed to accomplish that purpose. (1945, c. 770.)

§ 165-16. Rights conferred; limitation.—(a) Every person to whom this article applies is hereby authorized and empowered, in his or her own name without order of court or the intervention of any guardian or trustee—

(1) To purchase or lease any property, either real or personal, or both, which such person may deem it desirable to purchase or lease in order to avail himself or herself of any of the benefits of the servicemen's readjustment act, and to take title to such property in his or her own name or in the name of himself or herself and spouse.

(2) To execute any note or similar instrument for any part or all of the purchase price of any property purchased pursuant to paragraph (1) of this section and to secure the payment thereof by retained title contract, mortgage, deed of trust or other similar or appropriate instrument.

(3) To execute any other contract or instrument which such person may deem necessary in order to enable such person to secure the benefits of the servicemen's readjustment act.

(4) To execute any contract or instrument which such person may deem necessary or proper in order to enable such person to make full use of any property purchased pursuant to the provisions of the servicemen's readjustment act, including the right to dispose of such property, such contracts to include but not to be limited to the following:

(A) With respect to a home: Contracts for insurance, repairs, and services such as gas, water, and lights, and contracts for furniture and other equipment.

(B) With respect to a farm: Contracts such as are included in paragraph (A) of this subparagraph (4) above, together with contracts for live stock, seeds, fertilizer and farm equipment and machinery, and contracts for farm labor and other farm services.

(C) With respect to a business: Contracts such as are included in paragraph (A) of this subparagraph (4), together with such other contracts as such person may deem necessary or proper for the maintenance and operation of such business.

(b) Every person to whom this article applies may execute such contracts as are hereby authorized in his own name without any order from any court, and without the intervention of a guardian or trustee, and no note, mortgage, conveyance,

deed of trust, contract, or other instrument, conveyance or action within the purview of this article shall be invalid, voidable or defective by reason of the fact that the person executing or performing the same was at the time a minor.

(c) In respect to any action at law or special proceeding in relation to any transaction within the purview of this article, every minor person to whom this article applies shall appear and plead in his or her own name and right without the intervention of any guardian or trustee, and every such minor person shall be considered a legal party to any such action at law or special proceeding in all respects as if such person had attained the age of twenty-one years. No such minor shall hereafter interpose the defense of lack of legal capacity by reason of age in connection with any transaction within the purview of this article, nor disavow any such transaction upon coming of age.

(d) All such authority and power as are conferred by this article are subject to all applicable provisions of the servicemen's readjustment act. (1945, c. 770.)

Art. 3. Minor Spouses of Veterans.

§ 165-17. Definition.—For the purposes of this article, the term "veteran" means any person who is entitled to any benefits or rights under the laws of the United States or any rules, regulations or directives issued pursuant thereto by reason of service in the armed forces of the United States during any war in which the United States has engaged. (1945, c. 771.)

§ 165-18. Rights conferred.—(a) Any person under the age of twenty-one years who is the husband or wife of a veteran, is hereby authorized and empowered in his or her own name, and without any order of court or the intervention of a guardian or trustee, to execute any and all contracts, conveyances, and instruments, to take title to property, to defend any action at law, and to do all other acts necessary to make fully available to such veteran, his or her family or dependents, all rights and benefits under the servicemen's readjustment act of one thousand nine hundred and forty-four, or other statutes enacted in the interest of veterans, their families or dependents, and all laws, rules and regulations amendatory or supplemental thereto, in as full and ample manner as if such minor husband or wife of such veteran had attained the age of twenty-one years.

(b) Any person under the age of 21 years, who is the husband or wife of a veteran, is hereby authorized and empowered in his or her own name, and without any order of court or the intervention of a guardian or trustee, to join in the execution of any contract, deed, conveyance or other instrument which may be deemed necessary to enable his or her veteran spouse to make full use of any property purchased pursuant to the provisions of the foregoing section, including the right to dispose of such property.

(c) With respect to any action at law or special proceeding in relation to any transaction within the purview of this article, every minor person to whom this article applies shall appear and plead in his or her own name and right without the intervention of any guardian or trustee; and every such minor person shall be considered a legal party to any such action at law or special proceeding in all respects as if such person had attained the age of twenty-one years. No such minor shall hereafter interpose the defense of lack of legal capacity by reason of age in connection with any transaction within the purview of this article, nor disavow any such transaction upon coming of age. (1945, c. 771; 1947, c. 905. ss. 1, 2.)

Editor's Note.—The 1947 amendment inserted present subsection (b) and designated former subsection (b) as (c).

Art. 4. Copies of Records Concerning Veterans.

§ 165-19. Definitions.—For the purpose of this article the term veteran shall be given the meaning set forth in § 165-2. (1945, c. 1064.)

§ 165-20. Copies to be furnished by bureau of vital statistics.—Upon application to the bureau of vital statistics by a representative of the North Carolina veterans commission, it shall be the duty of the bureau of vital statistics to furnish forthwith to such applicant without charge or fee certified copies of all such vital statistical records or other records, including but not limited to birth certificates and death certificates, concerning any veteran which, in the judgment of such representative of the North Carolina veterans commission may be necessary or desirable in order to secure for such veteran, his or her family or dependents, any right or benefit under any federal, state, or local law, rule or regulation relating to veterans: Provided, that the provisions of this section shall be subject to those provisions of chapter forty-eight of the General Statutes which relate to the records in adoption proceedings. (1945, c. 1064.)

As to furnishing statistical records to officers of veterans' organizations, see § 130-103.

§ 165-21. Copies to be furnished by registers of deeds.—Upon application to the register of deeds of any county by a representative of the North Carolina veterans commission, it shall be the duty of such register of deeds to furnish forthwith to such applicant, without charge or fee, certified copies of any such marriage certificate or any other such official record or document concerning any veteran as in the judgment of such representative of the North Carolina veterans commission may be necessary or desirable in order to secure for such veteran, his or her family or dependents any right or benefit under any federal, state or local law, rule or regulation relating to veterans. (1945, c. 1064.)

§ 165-22. Officials relieved of liability for fees.—No official chargeable with the collection of any fee or charge under the laws of the state of North Carolina in connection with his official duties shall be held accountable on his official bond or otherwise for any fee or charge remitted pursuant to the provisions of this article. (1945, c. 1064.)

Article 5. Veterans' Recreation Authorities.

§ 165-23. Short title.—This article may be referred to as the "Veterans' Recreation Authorities Law." (1945, c. 460, s. 1.)

This article is valid, as it is for a public purpose and in the public interest. Brumley v. Baxter, 225 N. C. 691, 36 S. E. (2d) 281, 162 A. L. R. 930.

Article Does Not Authorize City to Make Absolute Grant.—The act under which the veterans' recreational center was created does not authorize city to make an absolute grant

of its property upon such terms that in the event the grantee determines the public purpose has failed, or the recreational facilities placed thereon for veterans are not being sufficiently used, the grantee may dispose of the property in its discretion and apply the proceeds to such charity as it may elect. Brumley v. Baxter, 225 N. C. 691, 36 S. E. (2d) 281, 287, 162 A. L. R. 930.

§ 165-24. Finding and declaration of necessity.—It is hereby declared that conditions resulting from the concentration in various cities and towns of the state having a population of more than one hundred thousand inhabitants of persons serving in the armed forces in connection with the present war, or who after having served in the armed services during the present war, or previously have been honorably discharged, require the construction, maintenance and operation of adequate recreation facilities for the use of such persons; that it is in the public interest that adequate recreation facilities be provided in such concentrated centers; and the necessity, in the public interest, for the provisions hereinafter enacted is hereby declared as a matter of legislative determination. (1945, c. 460, s. 2.)

§ 165-25. Definitions.—The following terms, wherever used or referred to in this article, shall have the following respective meanings, unless a different meaning clearly appears from the context:

(1) "Authority" or "Recreation Authority" shall mean a public body and a body corporate and politic organized in accordance with the provisions of this article for the purposes, with the powers and subject to the restrictions hereinafter set forth.

(2) "City" shall mean the city or town having a population of more than one hundred thousand inhabitants (according to the last federal census) which is, or is about to be, included in the territorial boundaries of an authority when created hereunder.

(3) "Council" shall mean the legislative body, council, board of commissioners, board of trustees, or other body charged with governing the city.

(4) "City clerk" and "mayor" shall mean the clerk and mayor, respectively, of the city or the officers thereof charged with the duties customarily imposed on the clerk and mayor, respectively.

(5) "Commissioner" shall mean one of the members of an authority appointed in accordance with the provisions of this article.

(6) "State" shall mean the state of North Carolina.

(7) "Government" shall include the state and federal governments and any subdivision, agency or instrumentality, corporate or otherwise, of any of them.

(8) "Federal government" shall include the United States of America, the federal emergency administration of public works or any agency, instrumentality, corporate or otherwise, of the United States of America.

(9) "Veterans' recreation project" shall include all real and personal property, buildings and improvements, offices and facilities acquired or constructed, or to be acquired or constructed, pursuant to a single plan or undertaking to provide recreation facilities for veterans in concentrated centers of population. The term "veterans' recreation project" may also be applied to the planning of the buildings and improvements, the acquisition of property, the construction, reconstruction, alteration and repair of the improvements, and all other work in connection therewith.

(10) "Real property" shall include lands, lands under water, structures, and any and all easements, franchises and incorporeal hereditaments and every estate and right therein, legal and equitable, including terms for years and liens by way of judgment, mortgage or otherwise.

(11) "Veteran" shall include every person who has enlisted or who has been inducted, warranted or commissioned, and who served honorably in active duty in the military or naval service of the United States at any time, and who is honorably separated or discharged from such service, or who, at the time of making use of the facilities, is still in active service, or has been retired, or who has been furloughed to a reserve. This definition shall be liberally construed, with a view completely to effectuate the purpose and intent of this article. (1945, c. 460, s. 3.)

§ 165-26. Creation of authority.—If the council of any city in the state having a population of more than one hundred thousand, according to the last federal census, shall, upon such investigation as it deems necessary, determine:

(1) That there is a lack of adequate veterans' recreation facilities and accommodations from the operations of public or private enterprises in the city and surrounding area; and/or

(2) That the public interest requires the construction, maintenance or operation of a veterans' recreation project for the veterans thereof, the council shall adopt a resolution so finding (which need not go into any detail other than the mere finding), and shall cause notice of such determination to be given to the mayor, who shall thereupon appoint, as hereinafter provided, five commissioners to act as an authority. Said commission shall be a public body and a body corporate and politic upon the completion of the taking of the following proceedings:

The commissioners shall present to the secretary of state an application signed by them, which shall set forth (without any detail other than the mere recital): (1) that the council has made the aforesaid determination after such investigation, and that the mayor has appointed them as commissioners; (2) the name and official residence of each of the commissioners, together with a certified copy of the appointment evidencing their right to office, the date and place of induction into and taking oath of office, and that they desire the recreation authority to become a public body and a body corporate and politic under this article; (3) the term of office of each of the commissioners; (4) the name which is proposed for the corporation; and (5) the location and the principal office of the proposed corporation. The application shall be subscribed and sworn to by each of the said commissioners before an officer authorized by the laws of the state to take and certify oaths, who shall certify upon the application that he personally knows the commissioners and knows them to be the officers as asserted in the application, and

that each subscribed and swore thereto in the officer's presence. The secretary of state shall examine the application, and if he finds that the name proposed for the corporation is not identical with that of a person or of any other corporation of this state or so nearly similar as to lead to confusion and uncertainty, he shall receive and file it and shall record it in an appropriate book of record in his office.

When the application has been made, filed and recorded, as herein provided, the authority shall constitute a public body and a body corporate and politic under the name proposed in the application; the secretary of state shall make and issue to the said commissioners a certificate of incorporation pursuant to this article, under the seal of the state, and shall record the same with the application.

The boundaries of such authority shall include said city and the area within ten miles from the territorial boundaries of said city, but in no event shall it include the whole or a part of any other city nor any area included within the boundaries of another authority. In case an area lies within ten miles of the boundaries of more than one city, such area shall be deemed to be within the boundaries of the authority embracing such area which was first established, all priorities to be determined on the basis of the time of the issuance of the aforesaid certificates by the secretary of state. After the creation of an authority, the subsequent existence within its territorial boundaries of more than one city shall in no way affect the territorial boundaries of such authority.

In any suit, action or proceeding involving the validity or enforcement of or relating to any contract of the authority, the authority shall be conclusively deemed to have been established in accordance with the provisions of this article upon proof of the issuance of the aforesaid certificate by the secretary of state. A copy of such certificate, duly certified by the secretary of state, shall be admissible evidence in any such suit, action or proceeding, and shall be conclusive proof of the filing and contents thereof. (1945, c. 460, s. 4.)

§ 165-27. Appointment, qualifications and tenure of commissioners.—An authority shall consist of five commissioners appointed by the mayor, and he shall designate the first chairman.

Of the commissioners who are first appointed, two shall serve for a term of one year, two for a term of three years, and one for a term of five years, and thereafter, the terms of office for all commissioners shall be five years. A commissioner shall hold office until his successor has been appointed and qualified. Vacancies shall be filled for the unexpired term. Vacancies occurring by expiration of office or otherwise shall be filled in the following manner: The mayor and the remaining commissioners shall have a joint session and shall unanimously select the person to fill the vacancy; but if they are unable to do so, then such fact shall be certified to the resident judge of the superior court of the county in which the authority is located, and he shall fill the vacancy. The mayor shall file with the city clerk a certificate of the appointment or reappointment of any commission, and such certificate shall be conclusive evidence of the due and proper appointment of such commission. A commissioner shall receive no compensation for his services, but he shall be entitled to the necessary expenses, including traveling expenses, incurred in the discharge of his duties.

When the office of the first chairman of the authority becomes vacant, the authority shall select a chairman from among its members. An authority shall select from among its members a vice chairman, and it may employ a secretary, technical experts and such other officers, agents and employees, permanent and temporary, as it may require, and shall determine their qualifications, duties, and compensation. An authority may employ its own counsel and legal staff. An authority may delegate to one or more of its agents or employees such powers or duties as it may deem proper. (1945, c. 460, s. 5.)

§ 165-28. Duty of the authority and commissioners of the authority.—The authority and its commissioners shall be under a statutory duty to comply or to cause compliance strictly with all provisions of this article and the laws of the state, and in addition thereto, with each and every term, provision and covenant in any contract of the authority on its part to be kept or performed.

The commissioners shall provide separate recreational centers for persons of the colored and white races, and they may, in the exercise of their discretion, limit the use of recreational centers under their control in whole or in part to veterans of one sex. They shall have the authority to make rules and regulations regarding the use of the recreational centers and other matters and things coming within their jurisdiction.

They shall have the authority to appoint one or more advisory committees consisting of representatives of various veterans' organizations and others and may delegate to such committee or committees authority to execute the policies and programs of activity adopted by the commissioners. (1945, c. 460, s. 6.)

§ 165-29. Interested commissioners or employees.—No commissioner or employee of any authority shall acquire any interest, direct or indirect, in any veterans' recreation project or in any property included or planned to be included in any project, nor shall he have any interest, direct or indirect, in any contract or proposed contract for materials or services to be furnished or used in connection with any such project. If any commissioner or employee of an authority owns or controls an interest, direct or indirect, in any property included or planned to be included in any veteran's recreation project, he shall immediately disclose the same in writing to the authority and such disclosure shall be entered upon the minutes of the authority. Failure so to disclose such interest shall constitute misconduct in office. (1945, c. 460, s. 7.)

§ 165-30. Removal of commissioners.—The mayor may remove a commissioner for inefficiency or neglect of duty or misconduct in office, but only after the commissioner shall have been given a copy of the charges against him (which may be made by the mayor) at least ten days prior to the hearing thereon and had an opportunity to be heard in person or by counsel.

If, after due and diligent search, a commissioner to whom charges are required to be delivered hereunder cannot be found within the county where the authority is located, such charges shall be deemed served upon such commissioner if mailed to him at his last known address as same appears upon the records of the authority.

In the event of the removal of any commissioner, the mayor shall file in the office of the city clerk a record of the proceedings, together with the charges made against the commissioner removed, and the findings thereon. (1945, c. 460, s. 8.)

§ 165-31. Powers of authority.—An authority shall constitute a public body and a body corporate and politic, exercising public powers, and having all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this article, including the following powers in addition to others herein granted:

To sue and be sued in any court; to make, use and alter a common seal; to purchase, acquire by devise or bequest, hold and convey real and personal property; to elect and appoint, in such manner as it determines to be proper, all necessary officers and agents, fix their compensation and define their duties and obligations; to make by-laws and regulations consistent with the laws of the state, for its own government and for the due and orderly conduct of its affairs and management of its property; without limiting the generality of the foregoing, to do any and every thing that may be useful and necessary in order to provide recreation for veterans. (1945, c. 460, s. 9.)

§ 165-32. Zoning and building laws.—All recreation projects of an authority shall be subject to the planning, zoning, sanitary and building laws, ordinances and regulations applicable to the locality in which the recreation project is situated. (1945, c. 460, s. 10.)

§ 165-33. Tax exemptions.—The authority shall be exempt from the payment of any taxes or fees to the state or any subdivisions thereof, or to any officer or employee of the state or any subdivision thereof. The property of an authority shall be exempt from all local, municipal and county taxes, and for the purpose of such tax exemption, it is hereby declared as a matter of legislative determination that an authority is and shall be deemed to be a municipal corporation. (1945, c. 460, s. 11.)

§ 165-34. Reports.—The authority shall, at least once a year, file with the mayor of the city an audit report by a certified public accountant of its activities for the preceding year, and shall make any recommendations with reference to any additional legislation or other action that may be necessary in order to carry out the purposes of this article. (1945, c. 460, s. 12.)

§ 165-35. Exemption from local government and county fiscal control acts.—The authority shall be exempt from the operation and provisions of chapter sixty of the public laws of North Carolina of one thousand nine hundred and thirty-one, known as the "local government act," and the amendments thereto, and from chapter one hundred and forty-six of the public laws of North Carolina of one thousand nine hundred and twenty-seven, known as the "county fiscal control act" and the amendments thereto. (1945, c. 460, s. 13.)

§ 165-36. Conveyance, lease or transfer of property by a city or county to an authority.—Any city or county, in order to provide for the construction, reconstruction, improvement, repair or management of any veterans' recreation project, or in order to accomplish any of the purposes of this article, may, with or without consideration or for a nominal consideration, lease, sell, convey or otherwise transfer to an authority within the territorial boundaries of which such city or county it is wholly or partly located, any real, personal or mixed property, and in connection with any such transaction, the authority involved may accept such lease, transfer, assignment and conveyance, and bind itself to the performance and observation of any agreements and conditions attached thereto. Any city or county may purchase real property and convey or cause same to be conveyed to an authority. (1945, c. 460, s. 14.)

§ 165-37. Contracts, etc., with federal government.—In addition to the powers conferred upon the authority by other provisions of this article, the authority is empowered to borrow money and/or accept grants from the federal government for or in aid of the construction of any veterans' recreation project which such authority is authorized by this article to undertake, to take over any land acquired by the federal government for the construction of such a project, to take over, lease or manage any recreation project constructed or owned by the federal government, and to these ends, to enter into such contracts, mortgages, trust indentures, leases and other agreements which the federal government shall have the right to require. It is the purpose and intent of this article to authorize every authority to do any and all things necessary to secure the financial aid and the cooperation of the federal government in the construction, maintenance and operation of any veterans' recreation project which the authority is empowered by this article to undertake. (1945, c. 460, s. 15.)

§ 165-38. Article controlling.—In so far as the provisions of this article are inconsistent with the provisions of any other law, the provisions of this article shall be controlling, provided that nothing in this article shall prevent any city or municipality from establishing, equipping and operating a veterans' recreation project, or extending recreation facilities under the provisions of its charter or any general law other than this article. (1945, c. 460, s. 17.)

Art. 6. Powers of Attorney.

§ 165-39. Validity of acts of agent performed after death of principal.—No agency created by a power of attorney in writing given by a principal who is at the time of execution, or who, after executing such power of attorney, becomes, either (a) a member of the armed forces of the United States, or (b) a person serving as a merchant seaman outside the limits of the United States, included within the forty-eight states and the

District of Columbia; or (c) a person outside said limits by permission, assignment or direction of any department or official of the United States government, in connection with any activity pertaining to or connected with the prosecution of any war in which the United States is then engaged, shall be revoked or terminated by the death of the principal, as to the agent or other person who, without actual knowledge or actual notice of the death of the principal, shall have acted or shall act, in good faith, under or in reliance upon such power of attorney or agency, and any action so taken, unless otherwise invalid or unenforceable, shall be binding on the heirs, devisees, legatees, or personal representatives of the principal. (1945, c. 980, s. 1.)

§ 165-40. Affidavit of agent as to possessing no knowledge of death of principal.—An affidavit, executed by the attorney in fact or agent, setting forth that he has not or had not, at the time of doing any act pursuant to the power of attorney, received actual knowledge or actual notice of the revocation or termination of the power of attorney, by death or otherwise, or notice of any facts indicating the same, shall, in the absence of fraud, be conclusive proof of the nonrevocation or nontermination of the power at such time. If the exercise of the power requires execution and delivery of any instrument which is recordable under the laws of this state, such affidavit (when authenticated for record in the manner prescribed by law) shall likewise be recordable. (1945, c. 980, s. 2.)

§ 165-41. Report of "missing" not to constitute revocation.—No report or listing, either official or otherwise, of "missing" or "missing in action," as such words are used in military parlance, shall constitute or be interpreted as constituting actual knowledge or actual notice of the death of such principal or notice of any facts indicating the same, or shall operate to revoke the agency. (1945, c. 980, s. 3.)

§ 165-42. Article not to affect provisions for revocation.—This article shall not be construed so as to alter or affect any provision for revocation or termination contained in such power of attorney. (1945, c. 980, s. 4.)

Art. 7. Miscellaneous Provisions.

As to guardians of children of service men, see § 33-67. As to veterans' guardianship act, see chapter 34. As to federal records and reports that person dead, missing, captured, etc., see §§ 8-37.1 to 8-37.3. As to conservators of estates of persons reported missing, captured or interned, see §§ 33-63 to 33-66. As to absentee voting by members of armed forces, see §§ 163-58, 163-70, 163-77.9. As to registration of official discharges from military and naval forces, see §§ 47-109, 47-110, 47-113, 47-114. As to validation of instruments proved before officers of certain ranks, see § 47-2.1. As to salary increments for experience to teachers, etc., serving in armed forces, see § 115-359.1. As to exemption of veterans' pensions from taxation, see § 105-344. As to exemption of veterans from peddlers' license tax, see § 105-53. As to educational advantages for children of veterans, see §§ 116-145, 116-147, 116-148. As to furnishing statistical records to veterans' organizations, see § 130-103. As to exemption of property of veterans' organizations from taxation, see §§ 105-296, 105-297. As to exemption of veterans' organizations from tax on billiard and pool tables, see § 105-64. As to pensions for Confederate veterans, widows and servants, see § 112-18.

§ 165-43. Protecting status of state employees in armed forces, etc.—Any employee of the state of North Carolina, who has been granted a leave of absence for service in either (1) the armed forces of the United States; or (2) the merchant marine of the United States; or (3) outside the Continental United States with the Red Cross, shall, upon return to state employment, if reemployed in the same position and if within the time limits set forth in the leave of absence, receive an annual salary of at least (1) the annual salary the employee was receiving at the time such leave was granted; plus (2) an amount obtained by multiplying the step increment applicable to the employee's classification as provided in the classification and salary plan for state employees by the number of years of such service, counting a fraction of a year as a year; provided that no such employee shall receive a salary in excess of the top of the salary range applicable to the classification to which such employee is assigned upon return. (1945, c. 220.)

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

November 30, 1949

I, Harry McMullan, Attorney General of North Carolina, do hereby certify that the foregoing 1949 Cumulative Supplement to the General Statutes of North Carolina was prepared and published under the supervision of the Division of Legislative Drafting and Codification of Statutes of the Department of Justice of the State of North Carolina.

HARRY MCMULLAN,
Attorney General of North Carolina

THE GENERAL STATUTES OF NORTH CAROLINA OF 1943

1949 CUMULATIVE SUPPLEMENT

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

UNDER THE DIRECTION OF
A. HEWSON MICHIE, GEORGE P. SMITH, JR.
AND BEIRNE STEDMAN

Volume IV

Place in Pocket of Corresponding Volume of Main Set

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North Carolina Reports volumes 223-230 (p. 576).

Federal Reporter 2nd Series volumes 134 (p. 417)-174.

Federal Supplement volumes 49 (p. 225)-83.

United States Reports volumes 318-337.

Supreme Court Reporter volumes 63 (p. 862)-69.

North Carolina Law Review volumes 22 (p. 280)-27.

The General Statutes of North Carolina 1943
1949 Cumulative Supplement

Volume IV

I. Rules of Practice in the Supreme Court and Superior Courts of North Carolina

(1) RULES OF PRACTICE IN THE SUPREME COURT OF NORTH CAROLINA.

5. Appeals—When Heard.

Rules Mandatory.—
When case is not docketed within time prescribed by this rule and no application for writ of certiorari is made, appeal will be dismissed, the rules of practice in the supreme court being mandatory and not directory. State v. Presnell, 226 N. C. 160, 36 S. E. (2d) 927.

Applied in State v. Harrell, 226 N. C. 743, 40 S. E. (2d) 205.

10. Submission on Printed Arguments.

Applied in Shaw University v. Durham Life Ins. Co., 230 N. C. 526, 53 S. E. (2d) 656.

17. Appeal Dismissed for Failure to Docket in Time.

Right of Appellee.—
In accord with 3rd paragraph in original. See State v. Buchanan, 224 N. C. 626, 31 S. E. (2d) 774; State v. Brooks, 224 N. C. 627, 31 S. E. (2d) 754; State v. Alexander, 224 N. C. 478, 31 S. E. (2d) 357; State v. Taylor, 224 N. C. 479, 31 S. E. (2d) 367.

Certiorari to Preserve Right of Appeal.—Where appellant fails to file his case on appeal fourteen days before the call of the district to which it belongs, he may apply for certiorari to preserve his right of appeal and appellees' motion filed thereafter to docket and dismiss under this rule will be denied. State v. Jones, 225 N. C. 363, 34 S. E. (2d) 202.

When Motion Allowed in Capital Case.—In a capital case, where the time for bringing up the case on appeal has expired, in the absence of any apparent error in the record before the court, the motion of the attorney-general to docket and dismiss, under this rule, is allowed. State v. Poole, 223 N. C. 394, 26 S. E. (2d) 858.

Where defendant fails to file statement of case on appeal or apply for writ of certiorari within the time allowed, the appeal will be dismissed on motion of the attorney-general, but where defendant has been convicted of a capital felony this will be done only after an inspection of the record proper fails to show error. State v. Garner, 230 N. C. 66, 51 S. E. (2d) 895; State v. Lewis, 230 N. C. 539, 53 S. E. (2d) 528.

Where a defendant convicted of a capital felony fails to file case on appeal in the superior court, the motion of the attorney-general to docket and dismiss, made after expiration of time agreed for perfecting the appeal and any extension of time which may have been granted, will be allowed after a careful inspection of the record proper fails to disclose error. State v. Nelson, 226 N. C. 529, 39 S. E. (2d) 391.

(1) Appeal Docketed by Appellee When Frivolous and Taken for Purposes of Delay.

When Statement of Case Contains No Assignments of Error.—Where the agreed statement of case on appeal contains no exceptions or assignments of error, making it apparent that the appeal was taken solely for the purpose of delay, appellee's motion to docket and dismiss under this rule, will be allowed. Stephenson v. Watson, 226 N. C. 742, 40 S. E. (2d) 351.

19. Transcripts.

(1) What to Contain and How Arranged.

Applied in Ericson v. Ericson, 226 N. C. 474, 38 S. E. (2d) 517.

(2) Two Appeals.

Where indictments relating to one offense against several defendants are properly consolidated for trial, only one record should be filed on the appeals of defendants. State v. Jackson, 226 N. C. 760, 40 S. E. (2d) 417.

Cited in Hoke v. Atlantic Greyhound Corp., 227 N. C. 412, 42 S. E. (2d) 593.

(3) Exceptions Grouped.

Appeal from Death Sentence.—In State v. Thompson, 224 N. C. 661, 665, 32 S. E. (2d) 24, although the assignments of error appearing on the record were not brought forward and grouped in accordance with the requirements of this rule, since defendants had been sentenced to death, the supreme court considered the appeal on its merits.

Exceptions to Rulings Granting New Trial, etc.—
In Watkins v. Grier, 224 N. C. 334, 338, 30 S. E. (2d) 219, it was held that any confusion there was in the transcript of the case on appeal to the Supreme Court, arose upon the merging of the proceedings in the trial in the municipal court with the proceedings had on appeal to Superior Court, without separate grouping of exceptions presented on such appeal. See also, Watkins v. Grier, 224 N. C. 339, 30 S. E. (2d) 223.

Not Sufficient to Show Exceptions in Record.—See State v. Biggerstaff, 226 N. C. 603, 605, 39 S. E. (2d) 619.

Exceptions Not Set Out Deemed Abandoned.—This rule provides that all exceptions shall be grouped and separately numbered immediately before or after the signature to the case on appeal, and exceptions not thus set out are deemed abandoned. State v. Biggerstaff, 226 N. C. 603, 604, 39 S. E. (2d) 619.

In Capital Case.—Where defendant's exceptions are not brought forward and grouped as required by this rule, the appeal will be dismissed, but where defendant has been convicted of a capital crime this will be done only after an inspection of the record proper and the exceptions fail to disclose prejudicial error. State v. West, 229 N. C. 416, 50 S. E. (2d) 3.

Cited in Curlee v. Scales, 223 N. C. 788, 28 S. E. (2d) 576.

20. Pleadings.

(1) When Deemed Frivolous.

Applied in Ericson v. Ericson, 226 N. C. 474, 38 S. E. (2d) 517.

(2) When Containing More than One Cause of Action.

Effect of Noncompliance.—Demurrer to answer will not be sustained if sufficient facts can be gathered from pleadings to entitle defendant to some relief, notwithstanding answer fails to state separately cause or causes relied on for affirmative relief and the matters relied on as defenses, as required by this rule and § 1-138. Pearce v. Pearce, 226 N. C. 307, 37 S. E. (2d) 904.

Cited in King v. Coley, 229 N. C. 258, 49 S. E. (2d) 648.

21. Exceptions. (See also, Rule 19(3).)

I. EXCEPTIONS.

Agreement of Counsel.—Where the record shows that the solicitor agreed that the statement of case on appeal, containing an exception to his argument to the jury and an assignment of error based thereon, should constitute the

case on appeal, this is sufficient as an exceptive assignment of error even though defendant made no objection and took no exception at the time. State v. Hawley, 229 N. C. 167, 48 S. E. (2d) 35.

Exception Not Considered.—

The failure of the court to restrict the admission of testimony competent for the purpose of corroboration is not error where defendant neither objects to the admission of the testimony nor requests that its admission be restricted. State v. Perry, 226 N. C. 530, 39 S. E. (2d) 460.

Assignments Not Based on Exceptions Considered in Capital Case.—Assignments of error should be based upon exceptions briefly and clearly stated and numbered in the record, but in a capital case, wherein the life of defendant is at stake, assignments of error not so based nevertheless will be considered. State v. Herring, 226 N. C. 213, 37 S. E. (2d) 319.

Applied in State v. Ham, 224 N. C. 128, 29 S. E. (2d) 449; State v. McKnight, 226 N. C. 766, 40 S. E. (2d) 419; State v. Gentry, 228 N. C. 643, 46 S. E. (2d) 863; State v. Harris, 229 N. C. 413, 50 S. E. (2d) 1.

Cited in Curlee v. Scales, 223 N. C. 788, 28 S. E. (2d) 576; State v. Scoggins, 225 N. C. 71, 73, 33 S. E. (2d) 473.

II. CORROBORATIVE AND CONTRADICTORY EVIDENCE.

When Evidence Competent for Some Purposes, etc.—

Where evidence, admissible only for the purpose of attacking the credibility of a witness, is admitted generally without objection, there is no error in the court's failure to so restrict its use. State v. McKinnon, 223 N. C. 160, 25 S. E. (2d) 606.

Where the evidence to which exceptions relate is competent for purpose of corroboration, and the record fails to show that appellant asked, at the time, that its purpose be restricted, the admission of the statements will not be ground for exception. Humphries v. Queen City Coach Co., 228 N. C. 399, 45 S. E. (2d) 546.

Where evidence competent for the purpose of corroboration is admitted generally, and defendant fails at the time of its admission to request that its purpose be restricted, his exception to the admission of the testimony cannot be sustained. State v. Walker, 226 N. C. 458, 38 S. E. (2d) 531.

Where blouse introduced had certain tears about the shoulder, and prosecutrix and another witness testified that on night of alleged assault blouse prosecutrix had on was torn about the shoulder, the admission of the blouse in evidence was competent to corroborate witnesses, and, in absence of request to limit it to corroboration, it was competent for general purposes. State v. Petry, 226 N. C. 78, 80, 36 S. E. (2d) 653.

Evidence Competent When Introduced.—Where plaintiff sued for divorce on ground of adultery and defendant in cross-action alleged adultery on the part of plaintiff but at close of evidence withdrew her cross action, it was held that since evidence of adultery on the part of plaintiff was competent at the time of its introduction and there was no motion to strike when defendant withdrew cross-action, plaintiff was not unduly prejudiced by its admission. Ziglar v. Ziglar, 226 N. C. 102, 36 S. E. (2d) 657.

25. Mimeographed Records and Briefs.

Editor's Note.—By amendment, effective February 1, 1947, this rule was changed so as to authorize the clerk to charge not in excess of $1.25 per page for mimeographing records and briefs. See 227 N. C. Adv. Sh. III, p. vi.

27½. Statement of the Questions Involved.

Quoted in Steelman v. Benfield, 228 N. C. 651, 46 S. E. (2d) 829.

28. Appellant's Brief.

Failure to File Brief.—

Where appellant does not file a brief his appeal will be dismissed. Wilson v. Ervin, 227 N. C. 396, 42 S. E. (2d) 468.

Exceptions Not Discussed Deemed Abandoned.—

In accord with 5th paragraph in original. See State v. Hill, 225 N. C. 74, 33 S. E. (2d) 470; State v. Britt, 225 N. C. 364, 34 S. E. (2d) 408; Troitino v. Goodman, 225 N. C. 406, 35 S. E. (2d) 277; Clark v. Cagle, 226 N. C. 230, 37 S. E. (2d) 672; State v. Frye, 229 N. C. 581, 50 S. E. (2d) 895; State v. Muse, 230 N. C. 495, 53 S. E. (2d) 529.

Exceptions not set out in the brief and in support of which no argument is given, are deemed abandoned. State v. Randolph, 228 N. C. 228, 45 S. E. (2d) 132.

Where an exception is not argued in the brief it is taken as abandoned. Randle v. Grady, 228 N. C. 159, 45 S. E. (2d) 35.

Exceptions not set out in defendants' brief are considered abandoned. State v. Thompson, 224 N. C. 661, 664, 32 S. E. (2d) 24. See State v. Stone, 226 N. C. 97, 36 S. E. (2d) 704; State v. Malpass, 226 N. C. 403, 38 S. E. (2d) 156.

Exceptions not argued or referred to in appellant's brief are deemed abandoned. State v. Smith, 223 N. C. 457, 27 S. E. (2d) 114; State v. Epps, 223 N. C. 740, 28 S. E. (2d) 219; State v. Hart, 226 N. C. 200, 37 S. E. (2d) 487.

Exceptions not discussed in appellant's brief are deemed abandoned. Gillis v. Great Atlantic, etc., Tea Co., 223 N. C. 470, 27 S. E. (2d) 283; Merchant v. Lassiter, 224 N. C. 343, 30 S. E. (2d) 217; State v. Reid, 230 N. C. 561, 53 S. E. (2d) 849.

Assignments of error, without reason, argument, or authority in the brief to support them, will not be considered on appeal. Hopkins v. Colonial Stores, 224 N. C. 137, 29 S. E. (2d) 455; State v. Hightower, 226 N. C. 62, 36 S. E. (2d) 649.

Assignments of error not brought forward and discussed in appellant's brief are deemed abandoned. State v. Jones, 227 N. C. 94, 40 S. E. (2d) 700. See Bell v. Brown, 227 N. C. 319, 42 S. E. (2d) 92; State v. Carroll, 226 N. C. 237, 37 S. E. (2d) 688; State v. Cogdale, 227 N. C. 59, 40 S. E. (2d) 467; State v. Fairley, 227 N. C. 134, 41 S. E. (2d) 88.

Exceptions set out in the record, and not preserved as required by this rule, are to be considered as abandoned. Higgins v. Higgins, 223 N. C. 453, 455, 27 S. E. (2d) 128.

Exceptions referred to in defendants' brief as "formal exceptions" and as to which no argument is made and no authority cited are deemed abandoned. State v. Hunt, 223 N. C. 173, 25 S. E. (2d) 598.

Where an exception is carried forward in appellants' brief, but no reason or argument is stated or authority cited in support thereof, as required by this rule, the exception is taken as abandoned. Wingler v. Miller, 223 N. C. 15, 19, 25 S. E. (2d) 160; Penny v. Stone, 228 N. C. 295, 45 S. E. (2d) 362.

Exceptions to the refusal of the court below to sustain the defendant's motion for judgment as of nonsuit have not been brought forward in his brief and argued, as required by Rule 28 of the rules of practice in the supreme court, and will therefore be considered as abandoned. State v. Stallings, 230 N. C. 252, 52 S. E. (2d) 901.

Exception Too General.—An exception simply to the general failure of the judge to state in a plain and correct manner the evidence and declare and explain the law arising thereon is too general and cannot be sustained. Ellis v. Wellons, 224 N. C. 269, 272, 29 S. E. (2d) 884.

Applied in State v. McMahan, 224 N. C. 476, 31 S. E. (2d) 357; Bailey v. Inman, 224 N. C. 571, 31 S. E. (2d) 769; Whitehurst v. FCX Fruit, etc., Service, 224 N. C. 628, 32 S. E. (2d) 34; State v. Biggs, 224 N. C. 722, 728, 32 S. E. (2d) 352; State v. Harrell, 226 N. C. 743, 40 S. E. (2d) 205; State v. McKnight, 226 N. C. 766, 40 S. E. (2d) 419; State v. Anderson, 228 N. C. 720, 47 S. E. (2d) 1.

Cited in Curlee v. Scales, 223 N. C. 788, 28 S. E. (2d) 576; State v. Friddle, 225 N. C. 240, 34 S. E. (2d) 5; State v. Murdock, 225 N. C. 224, 34 S. E. (2d) 69; State v. Gordon, 225 N. C. 241, 34 S. E. (2d) 414; State v. Reid, 230 N. C. 561, 53 S. E. (2d) 849.

32. Agreements of Counsel.

Applied in Russos v. Bailey, 228 N. C. 783, 47 S. E. (2d) 22.

44. Petition to Rehear.

(6) When Petition Docketed for Rehearing.

When Petitions Will Be Dismissed.—Petitions to rehear will be dismissed where the grounds of error assigned are substantially the same as on the former hearing, and no new facts appear, no new authorities cited, and no new positions assumed. Montgomery v. Blades, 223 N. C. 331, 26 S. E. (2d) 567.

VII. Rules Governing Admission to Practice of Law

4. Applications.

(a) Applicants for the March examination to be given during the years 1947, 1948, 1949, 1950 and 1951 shall file their applications with the Secretary on or before January 15 of the year in which the applicant applies to take the examination.

Editor's Note.—The above paragraph was added to Rule 4 by amendment duly adopted at a regular meeting of the Council of the North Carolina State Bar on October 23, 1947. As the rest of the rule is not affected it is not set out.

17. Comity.

In addition to all other fees required by these rules, each applicant for admission under this rule shall deposit with the Secretary the sum of $75.50 to be used as the Board may direct for investigation or otherwise.

Editor's Note.—The deposit required by the second sentence of the second paragraph of this rule has been increased from $50.00 to $75.50. As the rest of the rule has not been amended only the changed sentence is set out.

VIII. Comparative Tables

(1) TABLE OF COMPARATIVE SECTIONS.

(On page 70 of original, top of second column, the reference to "217(7) . . . 84-21" should read "215(7) . . . 84-21."

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